

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D9/2006

**CATCHWORDS**

Swimming pool – cause of damage – reasonable cost of rectification

<b>APPLICANTS</b>	John Parisi, Kylie Parisi
<b>RESPONDENT</b>	Compass Pools (Vic) Pty Ltd (ACN 005 779 635)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C. Aird
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	28 & 27 February and 1 & 5 March 2007
<b>DATE OF ORDER</b>	22 March 2007
<b>CITATION</b>	Parisi v Compass Pools (Domestic Building) [2007] VCAT 425

**ORDER**

- 1 The Respondent shall pay the Applicants the sum of \$55,627.00.
- 2 Costs reserved – liberty to apply. I direct the principal registrar to list any application for costs before Deputy President Aird for half a day.

**DEPUTY PRESIDENT C. AIRD**

**APPEARANCES:**

For Applicants	Mr J. Brett of Counsel
For Respondent	Mr A. Fraatz of Counsel

## REASONS

- 1 The Respondent ('Compass') installed a fibreglass pool for the previous owners of the subject property in October 1999. The pool has a 20 Year Structural Guarantee dated 21 October 1999. The Applicants ('the owners') purchased the property by contract dated 18 November 2000 with settlement in March 2001, although they moved in prior to settlement. Subsequently, they discovered ripples on the floor of the pool for which Compass denies liability. In January 2006 the owners made application to the Tribunal seeking payment of the sum of \$50,570.00 plus GST for rectification costs. They rely on a quotation from Greenhouse Landscapes Pty Ltd.
- 2 The owners have subsequently filed Points of Claim dated 9 May 2006 and Amended Points of Claim dated 27 July 2006. The Amended Points of Claim include a claim against AHL Insurance Brokers (Aust) Pty Ltd. However, there has been no application to join the insurer as a party to the proceeding and on the first day of the hearing, Mr Brett of Counsel, who appeared on behalf of the owners, confirmed they were not proceeding against the insurer.
- 3 At the commencement of the hearing, Mr Fraatz of Counsel, who appeared on behalf of Compass, made application that the allegations in paragraphs 12-19 and 20-25 of the Amended Points of Claim, which can conveniently be described as the 'misrepresentation and repudiation' claims, be struck out as failing to disclose a cause of action by the owners against Compass. Being mindful of the Tribunal's obligations under ss97 and 98 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act'), I declined to consider the application, it having been made without notice to the owners, and some 6 months after the filing of Points of Defence and further noting that the matter has been before the Tribunal on two occasions since then. During final submissions, Mr Brett advised these claims were withdrawn.
- 4 At the commencement of the hearing, Compass made an 'open offer', without any admission of liability, in the following terms:
  - i The owners' claim would be treated as a 'warranty claim' and the pool would be repaired in accordance with the terms of the warranty, with the repairs to be warranted;
  - ii The 'offered works' were that the tie beam be cut away, removal, repair and reinstallation of the pool shell after removal and replacement of the scoria under the pool shell, and the tie beam coping replaced. The offer insofar as it related to consequential damage was to be confirmed.
- 5 During final submissions, Mr Fraatz indicated that the open offer had been revised to include the installation of an automatic submersible pump under the pool and consequential damage to the pavers. This 'revised offer' was

not conveyed to the Tribunal until final submissions and accordingly I am not persuaded it can be properly regarded as an 'open offer'.

- 6 The open offer was rejected by the owners primarily, as I understood it at the time, because they had lost confidence in Compass for reasons which will be discussed later in these Reasons, that they did not consider the proposed works adequate because they did not address the underlying site issues, and also because they no longer believed that the pool could be repaired. However, during final submissions, Mr Brett confirmed that the only quotation before me was for the rectification of the pool and that the owners accepted the pool could be repaired if the shell was removed, and necessary site works carried out.

### **Background**

- 7 The owners were given the handover notes and operating instructions that the previous owners had been given by Compass when the pool was installed. Mr Parisi said that in mid-March 2001 he arranged for Greenhouse Pools and Spa to attend to carry out routine annual maintenance. Matt Barton, a technician with Greenhouse attended, and explained the operation of the pool and equipment to him. He said that during the service Mr Barton had found that one corner of the pool had sagged. On inspecting the stand pipe he found the water level was high and showed Mr Parisi how to use a slurpy to pump out the water. Mr Barton left the slurpy with him because he was concerned about the level of the water, and later when Greenhouse asked for it to be returned, Mr Parisi purchased a slurpy.
- 8 Mr Parisi said that Mr Barton told him he should report this to Compass immediately and that he would also tell them. He said that John and Adam Martin from Compass attended the property a few weeks later, were there for a very short time and 'told him off' for wasting their time (this is denied by Compass).
- 9 Subsequently, rippling on the floor of the pool became apparent, and it got worse over time. Mr Parisi contacted Compass a number of times, and although he left messages there was little or no response from Compass. He said that during this time the staff at Greenhouse, who continued to service the pool and from whom he purchased his pool supplies, kept asking him how he was getting on with Compass. There seems to have been no response from Compass until they wrote to him on 11 December 2003. It is helpful to set out the ensuing correspondence, it being illustrative of Compass' attitude and lack of responsiveness to this issue:

I refer to the warranty of your swimming pool, honoured by Compass Pools (Vic) Pty Ltd (CPV) and advise as follows:

1. CPV has been made aware of your concern with the floor of the pool having noticeable ridges;
2. at this stage, further investigations are required in the matter;

3. it is anticipated that the investigations will be undertaken in the New Year, indeed given the unprecedented workload currently affecting the company, CPV cannot commit to completing these investigations before February 2004;
4. this response time is probably a great disappointment to you and for this the company apologises;
5. the bottom line is that CPV will undertake all investigations and certainly honour all warranties associated with the pool installation – (ie, the 20 year workmanship) and for that matter, all warranties associated with the pool, to your complete satisfaction;
6. In the meantime, you are invited to contact myself in respect of technical advise. (sic)

- 10 On 10 May 2004, having heard nothing further, the owners wrote to Compass Pools advising:

As per your letter dated 11<sup>th</sup> December 2003 you wrote to say that an investigation regarding the pool floor will not commence before February 2004 as you had an unprecedented workload till this time. It is now May 2004 and still awaiting your call to investigate pool floor further, as time is continuing on I take no responsibility as to the deterioration of the pool floor. I await your urgent advice.

- 11 The owners heard nothing further until they received a letter from Compass dated 3 September 2004 – four months later and only after their solicitor wrote to Compass – advising:

I refer to your swimming pool which was installed by Compass Pools (Vic) Pty Ltd (CPV) and is currently in the warranty period and advise as follows:

1. CPV is in receipt of a letter from V.M. Roccisano-Barrister and Solicitor dated 31 August 2004 and thanks you for this.
2. CPV apologises that it has been unable to attend site in order to carry out further investigation of the issue currently affecting your swimming pool (as indicated in its letter dated 11 December 2003);
3. as indicated in the telephone conversation at approximately 12.00pm today between John Parisi and Greg Murphy, Jeff Hazzledine (one of CPV's installation Team) has been forwarded all relevant information and requested to attend site on Saturday 4 September 2004 in order to go for a dive and assess the severity of the "ridges" on the floor of the pool; CPV will be requesting that Jeff Hazzledine provide a written report (together with digital photographs) indicating the position and nature of these "ridges";
4. quite clearly, CPV has not met your expectations in relation to dealing with this issue and for that it sincerely apologises;
5. CPV remains, however, committed to determining the cause of the "ridges" in the floor of the pool and establishing a suitable process to rectify the issue at the earliest possible time.

- 12 On 11 November 2004, again after receiving a letter from the owners' solicitors - Compass wrote to the owners (rather than to their solicitors) advising:

I refer to your swimming pool which was installed by Compass Pools (Vic) Pty Ltd (CPV) and is currently in the warranty period and advise as follows:

1. CPV is in receipt of a letter from V.M. Rocciasno-Barrister and Solicitor dated 20 October 2004, thanks you for this, and apologises for the delay in responding;
2. CPV can confirm that Jeff Hazzledine (one of CPV's Installation Team) attended site on 4 September 2004 and carried out an underwater inspection on the floor of the swimming pool;
3. as the next step in investigating the most suitable method of rectifying the issue currently affecting your pool CPV has requested the services of Compass Manufacturing Pty Ltd (CM) (Namely Mr Martin Kennedy (Warranty Services Manager); Martin is expected to be in Victoria in the week of 22 November 2004 (to be confirmed) and he has been briefed on the condition of the floor of the pool;
4. following the inspection by Martin, CPV will present you with a "Method Statement" regarding the rectification work on site;
5. quite clearly, CPV has not met your expectations in relation to dealing with the issue and for that it sincerely apologises;
6. CPV remains, however, committed to determining the cause of the "ridges" in the floor of the pool and establishing a suitable process to rectify the issue at the earliest possible time.

- 13 Jeff Hazeldine attended site on 4 September 2004, as arranged, and reported to Compass, by email addressed to Greg Murphy on 5 September 2004, wherein he advised, with reference to the corner of the pool to the left of the skimmer box, *'looks like pool is dropping'*. He also took photographs and mapped the ridges. Inexplicably the photographs were not discovered by Compass. Copies were made available on the first day of the hearing. Having received this report, Compass apparently made no attempt to contact the owners.

- 14 On 23 November 2004, once again after receiving a letter from the owners' solicitors, Compass wrote to the owners advising:

I refer to your swimming pool which was installed by Compass Pools (Vic) Pty Ltd (CPV) and is currently in the warranty period and advise as follows:

1. CPV is in receipt of a letter from V.M. Rocciasno-Barrister and Solicitor dated 20 October 2004, thanks you for this;
2. CPV can confirm that Mr Martin Kennedy has been inadvertently delayed with respect to him being able to attend site in the week beginning 22 November 2004 to carry out an underwater inspection

on the floor of the swimming pool; Martin has, however, indicated that he will return to Victoria in the week commencing 29 November 2004 and will be attending site during this week.

- 15 However, despite these assurances, Mr Kennedy did not attend the site, and the owners had to 'chase up' Compass. Once again, although receiving correspondence from the owners' solicitors, Compass wrote to the owners direct on 21 March 2005 – four months after their last communication and nearly two years after, if I accept Compass' evidence, the owners first contacted them in relation to their concerns, or nearly three years after the owners say they first contacted Compass:

I refer to your swimming pool which was installed by Compass Pools (Vic) Pty Ltd (CPV) and is currently in the warranty period and advise as follows:

1. CPV is in receipt of a letter from V.M. Roccisano-Barrister and Solicitor dated 15 March 2005, thanks you for this;
2. CPV would like to confirm that it has requested that an independent assessor, Anderson & Associate – Assessors Pty Ltd (AAA), attend site in order to conduct a fully independent report on the current status of the swimming pool and would request that you consent to the attendance of AAA on site; a representative from AAA will be contacting you to arrange a mutually convenient time to attend site;...

- 16 During 2005, Ted Martin, director of Compass, attended the site. Mr Parisi said that he apologised on behalf of his son for the lack of responsiveness (while he had been away ill), and that he gave Mr Parisi his word that he would fix the problems with the pool. Mr Martin denies this, and says that he would have said *'if there's a problem we'll fix'*

- 17 On 6 September 2005, Compass responded directly to the owners' solicitors, for the first time, advising:

I refer to the swimming pool which was installed by Compass Pools (Vic) Pty Ltd (CPV) for Mr J and Mrs K Parisi of 20 Castlwellen Boulevard, Hiilside VIC and advise as follows:

1. CPV is in receipt of your letter dated 19 August 2005 and thanks you for this;
2. CPV confirms that the issue currently affecting the swimming pool at the abovementioned property is due to inadequate site drainage; the issue is in no way connected to the installation of the swimming pool by CPV.

### **The Applicants' expert evidence**

- 18 The owners rely on an expert report from Mr Henry Herzog, a materials engineer, who asserts that the damage is consistent with expansion of the reactive clay soils surrounding the pool, probably caused by poor drainage

under and around the pool, which he says should have been installed at the time of installation of the pool.

- 19 Mr Herzog makes the following observation in his first report dated 31 July 2006 which is pertinent:

...But as stated, with the pool full of water, ground water should not be a problem unless it causes expansion of the clay, which then will push against the outside of the pool.

and in his second report:

...However, as stated in our report and as, we understand, acknowledged by Compass, there is poor drainage around the pool which it appears was not properly addressed when the pool was installed. That is, it is likely that insufficient provisions were made to allow for adequate drainage so that the clay in the soil does not expand around the pool which has probably caused the rippling in the floor of same.

- 20 Although Mr Herzog has little familiarity with the relevant Australian Standards – AS 1838 and AS 1839 having, on his own evidence, not read them until a few days prior to the hearing, I am satisfied that he has the necessary expertise to advise on the impact of expanding reactive clay soils on a fibreglass pool shell.

### **The Respondent's expert evidence**

- 21 Since 6 September 2005, Compass has consistently maintained that the damage was caused by poor site drainage for which it denied any liability, as the sub-surface drainage around the pool was the responsibility of the original owner, exacerbated by the failure of the owners to properly use the so-called 'smart water system', and that because of this the damage had been caused by hydrostatic pressure. However, its position changed significantly during the course of the hearing. Compass seems to have resiled from its position that poor site drainage is the problem. Compass conceded that the principal users of the smart water system would be those servicing the pool, and that it is not a maintenance tool.
- 22 A site survey completed a few days prior to the hearing confirms that the pool is 110-140 mm above ground level, Compass alleged that the only reasonable explanation for the rippling is that at some time the owners have allowed the water level in the pool to drop below the recommended operating level.
- 23 Compass relies on the expert evidence of Mr Anderson, Loss Assessor and Mr Rickard of RHM Consulting Engineers Pty Ltd. At the conclusion of Compass' case, Mr Fraatz confirmed that Mr Merlo would not be called to give evidence because, as I understood it, his report had been prepared on the basis of inaccurate instructions. This was notwithstanding that Compass had filed two reports from Mr Merlo – the first dated 25 August 2006 which was filed on 29 August 2006, and the second, which was effectively a

'reply report' to Mr Herzog's report, dated 6 November 2006 which was filed on 5 December 2006. A further copy of the second report was filed on 8 February 2007. Further copies of both reports were filed, as I understand it, in an abundance of caution, together with the other reports on which Compass was relying, on 26 February 2007, the day before the hearing commenced. Colour copies of the photographs attached to the first report were provided to me on the second day of the hearing. In the circumstances, particularly as it is apparent that Compass placed significant reliance on Mr Merlo's reports in its defence of this claim, I have no alternative other than to draw the negative inference that his evidence would not have assisted Compass (*Jones v Dunkel* (1959) 101 CLR 29). The first report was subsequently tendered by the owners which was entirely appropriate. I will consider the evidence of each of the Respondent's expert witnesses:

#### Mr Anderson

- 24 Although not filed, Mr Anderson's report dated 5 September 2005 was tendered. It is simply a report of his inspection, testing and monitoring by Mr Parisi and does not proffer any explanation as to the cause of the damage.
- 25 Mr Anderson gave sworn evidence and said he had been asked by Compass to attend the site and report on whether the pool was dropping in one corner as alleged, and it was not until he was carrying out the inspection that Mr Parisi mentioned to him that the owners got a 'floating feeling' when swimming. He said this caused him to have a closer look at the internal surfaces of the pool. He said he found that the shell was severely distorted below the step ledge, a hump in the floor was clearly visible and that he advised Mr Parisi this was of more concern than the alleged dropping of the pool corner.
- 26 Mr Anderson said he thought the cause was water pooling under the pool caused by failure of the hydrostatic relief valve or a broken pipe (pool pipe or elsewhere). He said he started to empty the cavity and noticed that the walls were starting to change shape and the floor was starting to show ridges rather than a hump. The walls rather than simply bulging changed shape so that it appeared as if there were little hills – some areas were bulging and others 'flat'. He was unable to locate any evidence of leaking pipes. He formed the view that the pool had floated at some time and asked Mr Parisi to monitor the water levels and report to him, which he did. There were no appreciable changes in the water level in the pool, and the levels in the stand pipe were not significant until there was rain. Mr Parisi denied under oath that there had ever been or that he had told Mr Anderson there had been '*a substantial water leak in the water main supply to the house over a period of time which had been repaired by his plumber*' (as reported by Mr Anderson).

- 27 Mr Anderson said that he is familiar with damage to fibreglass pools caused by expansive reactive clay soils, having seen two and repaired one. He said that where the soil is the cause of the problem he would expect the floor to remain flat and the buckles in the wall to be significant. In his opinion, it was unlikely that a pool would float where the damage was caused by expansion of the reactive clay soil.
- 28 Initially he thought he had inspected the pool on or about 2 December 2004, but later he conceded he may not have attended until early 2005. The documents in his file were, to say the least, sparse. He had a copy of his report, a letter relating to a conference with Counsel, and his qualifications. Although he said that he was not provided with any background information by Compass, and that he had been asked to inspect as ‘an independent set of eyes’ a copy of a facsimile dated 21 March 2005 (together with a successful transmission report) appears on the Compass electronic file. This was not discovered, but hard copies of what Compass says is its electronic file, was produced during the hearing, wherein Compass advises:
- Dear Peter,
- Please find enclosed information in relation to the location and issue currently affecting this Compass swimming pool.
- The customer details are as follows:
- ...
- The pool was installed in 1999 and the floor is suffering from a number of “ridges” and “depressions”.
- CPV believes the problem with the floor of the pool may have developed due to poor site drainage.
- CPV requested that you contact the customer to arrange a mutually convenient time to attend site...and provide it with a detailed report as to the cause of the irregularities in the pool floor...
- 29 This is clearly inconsistent with Mr Anderson’s evidence that he had been requested to carry out an independent inspection of the ‘dropped corner’. There is no mention of this in this facsimile (although it is referred to as the primary reason for his inspection in the first paragraph of his report). Where the instructions to an expert include a suggestion as to the cause of the problem it, unfortunately, taints the independence of the expert’s evidence.
- 30 Surprisingly, Mr Anderson did not have any field notes as one may have expected. He said he did not appear to have invoiced Compass independently for his inspection and report. He did not have any documents with him and gave his evidence ‘from memory’. He did, however, say that he would not recommend that owners use the so-called ‘smart water system’, and that *‘it’s for service people who know how to use them’*.

- 31 He confirmed that he was unable to proffer any explanation as to the cause of the damage other than speculating that the pool level had dropped below ground level, maybe on more than one occasion, resulting in damage caused by hydrostatic pressure.

Mr Rickard

- 32 Compass also relies on the evidence of Mr Rickard of RHM Consulting Engineers – his report dated 19 December 2006 was filed on 8 February 2007. There can be no question that Mr Rickard has significant expertise and is well qualified to give expert evidence to the Tribunal. He is technical secretary for FRP Swimming Pool Code Committee for AS1838 and AS1839 and, was in fact, responsible for drafting some of the clauses in the standards. Surprisingly, he did not disclose, until asked about it in cross examination, that he designed the pool shell, the subject of this dispute. Further, I note that Mr Rickards did not carry out a close and careful inspection of the pool – rather he viewed it ‘from over the fence’ from where I doubt he could actually see the nature and extent of the ‘rippling’. There is no evidence before me that access was denied by the owners, who I note have apparently been very co-operative when inspections were arranged. Surprisingly, he was not provided with a copy of the map of the damage prepared by Mr Hazeldine in September 2005.
- 33 Mr Rickard has concluded that the damage to this pool is entirely due to hydrostatic pressure and that the owners must have allowed the pool to fall well below the recommended operating level, this, in his view, being the only realistic explanation for the damage. He does not consider site drainage to be an issue. In his opinion the damage could not have been caused by the expansion of reactive clay although he conceded that he has never seen a pool where this was the primary cause of the damage. Mr Rickard gave a very helpful explanation as to when and how damage caused by hydrostatic pressure will occur accompanied by clear illustrations on a whiteboard. He said the following three things had to occur simultaneously:
- i a noticeable drop in the water level inside the pool; and
  - ii a high level of ground water; and
  - iii inadequate operation of the hydrostatic pressure valve which he recommended in his written report be tested once the pool is emptied.
- 34 Further, for the condition of the pool to deteriorate, there would have to be a number of instances where these three things happened simultaneously. If there was one isolated incident further and continuing deterioration of the pool surface would not be expected. He suggests in his report:
- 15 ....The cause can only logically be a totally unforeseen ground condition such a hidden stream or an accidental reduction in internal water level over a period of time which led to a external

pressure build up in excess even though that level was not very high up the pool wall. It is a clear condition of all fibreglass and concrete pool builders that pools are only emptied by qualified experienced operators, because of the possible consequences which can occur. Alternatively if it is a natural phenomenon such as a spring we should monitor water level on a weekly basis over Christmas by means of the standpipe to assess for abnormal water. (sic)

16. All pools are fitted with a hydrostatic relief valve which is supposed to open when such a pressure differential occurs. These valves have been known to stick and this one should indeed be checked for serviceability.

35 He then recommends in his conclusions:

2.7 Inspection is required to confirm the adequacy of pool wall deformation and be within contract tolerance (sic).

2.8 The pool shall be drained and the operational ability of the hydrostatic pressure value checked (sic)

2.9 The cause of failure is either an unforeseen ground condition such as a spring (for which we recommend water level monitoring over Christmas) or an accident which led to water imbalance at some stage over the pool floor. (sic)

36 Having engaged Mr Rickard to provide an expert report, Compass did not arrange for him to have access to the site so that he could carry out a thorough inspection and have inexplicably failed to follow any of his recommendations. If there is an unforeseen ground condition, such as a spring, it may well be that there was evidence of water during excavation for the pool which should have caused alarm bells to ring. However, I have no evidence before me about what was or was not apparent during installation.

### **Other witnesses called by the Respondent**

37 I have not considered the evidence of the other witnesses who gave evidence on behalf of Compass, as they do not assist in determining the cause of the deformation to the pool other than to note that Compass did not call Greg Murphy, Operations Manager. Mr Murphy is the signatory on most of the correspondence referred to above, and appears to have been the main contact person for the owners. There was no explanation proffered for the failure to call him. In the circumstances I have no alternative other than to apply the rule in *Jones v Dunkel* and infer that his evidence would not have assisted Compass.

38 I have not had any regard to the evidence of Mr Bedagia, Compass' solicitor concerning the copy of the AAMI 'file' which was subpoenaed and tendered through him. Compass sought to rely on file notes of a complaint from the owners wherein it is recorded:

Our swimming pool floor ridges have turned into lumps. Over the past two years the condition is worsening. The water level keeps dropping. We are currently in litigation with Compass Pools as they give a twenty five guarentte for their pools. They accepted liability for a per centage of the damage but don't want to be fully responsible. We had had many meeting with them and now we are taking them to VCAT to try and hold them accountable (sic) (emphasis added)

- 39 The person who made these notes was not called to give evidence. There is no evidence when the complaint was made. This report appears on the second page of the 'file', the next page carrying the notation "Report Only" and the date 05052006, and appears to be a record of a telephone conversation. The last three lines on that page record:

Adament for AAMI to call lawyer so at least we are aware that this this has occurred and if down the track the soil moves as a result of water escaping we are aware of it (sic)

On the fifth page there is a further notation dated 28.02.07 (the same day AAMI was notified that its file would be subpoenaed):

Changed report into claim

- 40 In my view this does not assist Compass at all. It simply confirms that the owners have reported the situation to their insurers as they are, no doubt, obliged to do under the terms of the policy. Although the Tribunal is not bound by the rules of evidence it is bound to act fairly and according to the substantial merits of the case (s97) and by the rules of natural justice (s98). I cannot be satisfied as to the accuracy of the record of the report and do not consider it determinative of any of the issues before me.

## Discussion

- 41 Both parties were poorly prepared for this hearing. Discovery was a major issue, where, although they had both filed Amended Lists of Documents, further documents came to light during the course of the hearing. The deficiencies in Compass' discovery were significant. Inexplicably, it had failed to discover its electronic file, apparently not considering it relevant to the issues in dispute, notwithstanding that it included details of contact and communications with the owners and its experts (other than Mr Rickard). Its existence only became apparent during cross-examination of Ms Allen (a handover technician employed by Compass) late on the second day of the hearing, when she gave evidence that she had documented her first telephone contact with Mr Parisi on the 'computer file'.
- 42 There were material changes in both parties' cases – the owners abandoned the misrepresentation and repudiation claims during final submissions, and during the hearing, Compass moved away from its earlier position that the primary cause of the damage was the failure by the previous owner to install adequate drainage. Compass, having failed to respond to the owners' complaint in a timely and reasonable manner, whilst undertaking to identify the cause of the problem, now denies liability on the basis of speculation as

to what the cause of the deformation in the pool floor might be. As noted above, Compass initially maintained that the damage was caused by hydrostatic pressure resulting from poor site drainage which, it said, was not part of its contract with the original owner. It has since resiled from that position whilst maintaining that the only explanation is that the damage is caused by hydrostatic pressure. Mr Rickard's recommendations that additional testing be carried, including testing to ensure that the hydrostatic valve is operating correctly, have seemingly been ignored by Compass.

- 43 On his own evidence, Mr Rickard has never seen a pool which has been damaged by the expansion of reactive clay soils. Mr Anderson has seen two, and repaired one. Mr Herzog acknowledged under cross-examination the damage may have been caused by a combination of the effects of the expansion of the reactive clay and hydrostatic pressure.
- 44 Although Mr Merlo was not called to give evidence, his report was tendered by the owners and I can therefore have regard to it. Interestingly, he concluded on page 4 of the first report:

Additionally, due to the poor drainage situation and having regard to the highly reactive soil with the excavation suffering from continually excessive high water levels, expansion of the highly reactive clay soil forming the pool excavation would have occurred. This in turn is believed to have forced the stabilised sand backfill inwards thereby buckling the floor and distorting the sides of the composite pool shell.  
(emphasis added)

and in the caption to photograph 13:

- (a) Testing of the floor confirmed that it was buckled in several areas and that the sides of the pool had bulged.
- (b) This is believed to have been caused partly by excessive ground water pressure acting on the pool shell dominating the internal water pressure and resulting in permanent deformation...  
Additionally, with the earth pool excavation continually exposed to saturation from sustained excessively high water levels as a result of the poor drainage situation, the highly reactive soil is believed to have swollen and pushed the stabilised sand backfill inwards also contributing to buckling of the floor of the pool shell/distortion of the pool walls...(emphasis added)

- 45 Although it is suggested, by Compass, that Mr Merlo is misguided or misinformed in his assumption that stabilised sand back fill has been used which is apparently not the case, I am not persuaded this means that his conclusions should be completely ignored. I am reinforced in this view by the failure of Compass to call Mr Merlo to give evidence, in circumstances where it is clear that he agrees, at least in part, with Mr Herzog's conclusions that the damage is consistent with expansion of the reactive clay soil.

- 46 I am not persuaded that the sole or primary cause of the damage is hydrostatic pressure. As noted above, a site survey carried out on 21 February 2007, confirms that the pool has been installed at 110-140 mm above natural ground level by reference to the nearest fence, and therefore if the pool level is maintained, damage from hydrostatic pressure, which requires the water level outside the pool to be higher than the level inside the pool, would be unlikely. As I understand it, the damage would not be expected to worsen over time unless there were repeated instances of falling water levels. Even if the water level was allowed to fall (and I am not persuaded it was) the hydrostatic pressure valve is intended to protect the pool from damage. There is no evidence as to whether the hydrostatic pressure valve is fully operational and I note that despite Mr Rickard's recommendation that it be tested once the pool was emptied, this has not occurred.
- 47 Although passionate about his claim, Mr Parisi struck me as a truthful and credible witness understandably frustrated by the lack of responsiveness from Compass. I accept his evidence that he is not aware of any instances of the pool level falling below the recommended level and note that all photographs before me show the level of the pool to be consistent. Compass, for whatever reason, appeared reluctant to accept responsibility for the damage, although its 'revised offer' which includes an automatic submersible pump under the pool, seems to be an acknowledgement, albeit without any admission of liability, that drainage under and around the pool needs to be addressed, no doubt to address the issues Mr Herzog has raised and to avoid further damage caused by the expansion of the reactive clay soil.

### **Section 8 of the *Domestic Building Contracts Act 1995***

- 48 It seems to me that Compass may not fully appreciate its obligations under s8 of the *Domestic Building Contracts Act 1995* which provides:

The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract—

- (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
- (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Act;

(d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;

...

(f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

49 It is expected that when installing swimming pools Compass will have regard to and comply with the provisions of the relevant Australian Standards – in this case AS 1838 and AS 1839. AS 1838 sets out the requirements for the design of fibreglass swimming pools. Although Compass did not design or manufacture the pool, it supplied and installed it and had an obligation to ensure that the selected pool was appropriate for the prevailing site conditions. Clause 5.2.2(d) provides:

The design of the pool shall take into account the following:

...

(c) Hydrostatic pressure.

(d) Special loadings peculiar to the particular locality of the installation, including loads from reactive clay.

50 Further, Appendix B – Design Guidance (Informative) suggests:

**B1 GENERAL** ...Sites with particular complications should be examined on an individual basis.

...

**B2 DESIGN PRESSURES** The soil pressure generated against the pool wall relates to the type of soil, the topography of the surrounding areas, and the landscaping around the pool. General building practice, which involves the cutting of a hole into which the pool is placed with backfill around, results in a release of 'at rest' pressures. Special requirements may be required for certain clays, particularly if the penetration of the pool into the clay varies around its perimeter.

...

Should the pool be founded on varying ground strata, or where even bearing may not be relied upon, or where ground heave may occur, the pool design should be specifically assessed and modified as necessary by the engineer. In a location where long-term differential settlement may occur, suitable measures should be taken to ensure that no damage is caused to the pool structure. (emphasis added)

51 Whilst it is common ground that this property is in an area where the soils are known to be highly reactive clay, as far as I am aware, Compass did not

obtain a soil test before installing the pool. In the absence of a soil test I am not sure how Compass could have satisfied itself that the pool was suitable for the prevailing site conditions. Further, it is clear that ‘penetration of the pool into the clay varies around its perimeter’ – as between the shallow and deep ends of the pool – and there is no evidence of any special requirements having been implemented by Compass to accommodate this. Although it did not design the pool, Compass had an obligation to ensure that the pool was suitable for installation on the subject property. I am satisfied Compass is responsible for the failure of the pool to perform and is therefore in breach of the s8 warranties.

### **What is the reasonable cost of rectification?**

- 52 Having determined the question of liability in favour of the owners, I turn now to a consideration of the damages to be awarded. I am satisfied it was entirely appropriate for the owners to reject the builder’s open offer made at the commencement of the hearing. Not only did it fail to address the site issues, it is not surprising that the owners were reluctant to have Compass return to site given its general lack of responsiveness in dealing with their complaint. I am therefore satisfied that the owners are entitled to an award of damages to enable them to arrange for the works to be carried out by a third person.
- 53 As noted above the owners rely on one quotation only – from Greenhouse Landscapes Pty Ltd for rectification and landscaping works for \$50,570.00 plus GST. They have also filed a quotation for landscaping works only, from Outdoor Effects Landscapes, for \$28,500.00 plus GST. This was filed under cover of a letter dated 13 October 2006 wherein the owners’ solicitors indicated they were waiting for a second quotation from Cool Pools which would be available the following Monday. A quotation from Cool Pools has not been filed.
- 54 At the commencement of the hearing, Mr Brett indicated leave may be sought, during the course of the hearing, to amend the owners’ claim. No such application was made – whether because the owners were unable to obtain alternative quotations or for some other reason is unclear to me. Mr Brett also said that the owners would not be calling Mr Bazley, formerly of Greenhouse Landscapes, to give evidence, as they had been unable to locate him. I am not sure what steps they had taken to do so, but nevertheless I have had the benefit of his evidence as he was subpoenaed by Compass.
- 55 The Greenhouse quotation is simply a lump sum quotation. Whilst it sets out a scope of works there are no details as to the material and labour costs relative to each item. Mr Bazley was unable to clarify the basis for the quoted price. He said that at the time he was asked to provide the quotation he was in the process of selling the business, with settlement due within a matter of days. He was not really interested in carrying out the work but had provided the quotation because he was asked to do so. He said he had ‘priced’ all the items except the repair works to the pool. If he had been

carrying out the works he would have arranged for these to have been carried out by a contractor. He said he had obtained a price, at the time, for those works of \$15,000.00. There was no evidence as to what, if any, margin he would have added to this price for his overheads and profit.

- 56 Where a party is unable to provide itemised particulars to support their claim, this does not mean the claim is doomed to fail. It is clear that rectification works are necessary and appropriate, and that these should be paid for by Compass. Compass has provided its own calculations and suggests that the works could be carried out for a total cost of \$5,860.00 plus GST. As I understand it, this is the cost to Compass of carrying out the works. Compass has not provided any evidence as to what it says is the reasonable cost for an alternative swimming pool contractor to carry out the works. Further, this estimate is predicated on the works being carried out *in situ*. I am satisfied that it will be necessary for the pool to be removed, for the rectification works to be carried out (including repairs to the pool and any site works that become evident once the pool is removed) and the pool reinstalled. I accept that in carrying out these works there will be significant consequential damage, necessitating rectification of the concrete coping, tiling and landscaping, for which there appears to be no allowance in the Compass estimate. I do not have any evidence before me as to what Compass considers to be the reasonable cost of carrying out its 'open offer' or its 'revised offer'.
- 57 Having considered the quotation from Greenhouse Landscapes, Mr Bazley's evidence that he had obtained a quotation for the rectification works to the pool for \$15,000.00, and that he had 'priced out' all the other items, and the quotation from Outdoor Effects for '*rectification work of pool paving and surrounding garden beds*' which, I note, does not include any allowance for the installation of a submersible pump which is included in the Greenhouse quotation and the 'revised offer', and having regard to ss97 and 98 of the *VCAT Act*, I am satisfied that the quotation from Greenhouse Landscapes is fair and reasonable.
- 58 I will therefore order that Compass pay the owners the sum of \$50,570.00 plus GST – a total of \$55,627.00.

**DEPUTY PRESIDENT C. AIRD**