

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D347/2008

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – swimming pool – no height datum agreed – representation as to finished appearance given by means of photograph shown to owners during pre-contract negotiations - pool constructed too high – insufficient evidence of quantum of actual damage – general damages awarded – damages set off against unpaid balance under contract - s.53 Domestic Building Contracts Act 1995

FIRST APPLICANT	Zac Ahmeti
SECOND APPLICANT	Madeline Jorgensen
RESPONDENT	Leisure Pools and Spas Manufacturing Pty Ltd
WHERE HELD	Melbourne on 8 August 2008; On site – 7 Clendon Court Templestowe on 10 September 2008
BEFORE	Senior Member R Walker
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	8 August 2008 and 10 September 2008
DATE OF ORDER	16 October 2008
CITATION	Ahmeti v Leisure Pools and Spas Manufacturing Pty Ltd (Domestic Building) [2008] VCAT 2270

ORDER

Order the Respondent pay to the Applicants the sum claimed of \$7,923.00, such sum to be set off against the like amount claimed by the Respondent from the Applicants.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr Ahmeti in person
For the Respondent	Mr S. Smith and Mr D. Bloom

REASONS

Background

- 1 The Applicants (“the Owners”) are the owners of the dwelling house (“the House”) at 7 Clendon Court Templestowe. The Respondent (“the Builder”) carries on business designing and constructing domestic swimming pools.
- 2 By a written form of contract dated 11 May 2007 (“the Contract”) the Builder contracted to excavate and construct an “Elegance 7” sapphire blue swimming pool at the rear of the House for a price of \$34,450.00.
- 3 The Contract provided an allowance of \$600.00 for excavation and \$600.00 for cartage. Excavation and cartage in excess of those allowances were to be charged to the Owners at an agreed rate.
- 4 The Contract identifies the design and colour of the pool and the various fittings to be supplied. The finished installation was to include a brushed concrete bond beam to engineer’s specifications around the perimeter of the pool.
- 5 The pool has been installed but the Owners complain that it is installed 150mm too high. As a result, when they paved the area between the House and the pool they were left with a substantial fall in the concrete paving from the pool down to the House. Some attempt has been made by the paviour to direct water runoff into a stormwater drain but I agree with the views the two experts expressed on site that it is quite inadequate. The Builder denies that the pool was installed too high and this is the primary issue that I had to decide.

The hearing

- 6 The matter came before me for a hearing as a small claim on 8 August 2008 and was then adjourned part heard to an on-site hearing on 12 September 2008.
- 7 At the hearing on 8 August 2008 Mr Ahmeti appeared on behalf of the Owners and Mr Smith, a director, and Mr Bloom, a sales representative, appeared on behalf of the Builder. At the on-site hearing I also heard evidence from Mr Ahmeti’s father and from a Mr Colalancia on behalf of the Owners and from a Mr Donovan on behalf of the Builder. Mr Smith and Mr Bloom were also there but Mr Ahmeti did not attend.

The evidence

- 8 After the pool was installed and the bond beam constructed, the Builder left the site. The Owners engaged a landscaping contractor to quote on paving the area between the House and the pool and were then advised that the pool was too high. Eventually they engaged another contractor who concreted around the pool and up to the House and this concreted area was subsequently tiled. As stated above, an attempt was made to provide

drainage near the house but it is the opinion also of both Mr Colalancia and Mr Donovan, the expert witnesses who were on site, that it is inadequate.

- 9 Mr Colalancia said that the pool was installed too high. He said that the relevant datum height that should have been adopted was the bottom sill of the rear door, that is, the entrance to the House from the area where the pool was to be installed. That is obviously correct. Mr Colalancia said that the finished height of the pool was approximately 150mm above that height. Mr own observation confirms that it is at least that high. Mr Colalancia's evidence was that the paving should have fallen away from the House 10mm for every metre. Instead, the paving goes uphill from the House to the edge of the pool. If the paving were to have a fall from the doorway towards the pool of the required gradient, the pool ought to have been at least 200mm lower. I accept that evidence of Mr Colalancia. It is notorious that paving laid next to a house is to be graded so as to fall away from the House. Of course, it was the Owners who laid the paving not the Builder. The question is whether the pool itself was installed too high.

The Contract

- 10 General condition 1.9 of the Contract defines "Datum Point" as the fixed point agreed in writing between the Owner and the Builder and stated in item 1 of the Contract specification or as specified in writing between the parties at the time the swimming pool was being installed. Item 1 of the specification provides that the Datum Point is "To be determined on site between owner and builder at builder's pre excavation site inspection". It is clear that there was no such agreement or determination, whether in writing or otherwise. Accordingly there was no express provision in the Contract as to what the datum point was to be.
- 11 General condition 10.3 of the Contract provides that, on practical completion, the works must be plus or minus 100mm of the agreed height in relation to the datum point from the top of the coping finishes and levelled to within 50mm along the water's edge or in accordance with the Australian Standard for fibreglass swimming pool installation (whatever is the greater). There was no datum point and so nothing upon which the clause could operate. The relevant standard was also not tendered.

The discussions

- 12 Before excavation commenced the Owner, at the Builder's request, had soil tests done. Notwithstanding that, the excavation took considerably longer than anticipated and the Owners were charged extra by the Builder with respect to that. In addition, uphill of the installation site there was an embankment retained by a wall made from sleepers slotted into vertical steel members. At Mr Bloom's request the Owners had the foundations of the supporting steel members substantially deepened to take account of the extra height that the embankment would have when the excavation for the pool had been completed. Again, the Owners paid for that.

- 13 Before entering into the Contract the Builder's representative Mr Bloom showed the Owners a photograph of the pool that they had ordered depicting flat tiled paving leading up to it on all sides. The coping around the pool in the picture is also tiled at the same level. This would suggest that the pool was to be installed so that the area around it up to the House could be paved and tiled level with the top of the pool and that is what Mr Ahmeti said he expected.
- 14 Mr Smith told me that the pool could not have been constructed so as to be level with the surrounding paving. When I referred him to the photograph he responded by saying that that pool depicted in that photograph had been installed in a special situation which was above ground level. If that is the case, then it was both misleading and deceptive to provide such a photograph to a prospective customer without a warning that it did not accurately depict what was to be provided. I am satisfied that the agreement was to provide a pool substantially in accordance with the photograph supplied.
- 15 Mr Bloom said in evidence that there was nothing wrong with the pool and that it had been installed correctly. He said that he had discussed with the Owners that the pool must be 150mm above ground level. He said that the water level had to be he said 50mm above natural ground level and the coping had to be 100mm above the water level.
- 16 Later in his evidence he said that he had suggested to Mr Ahmeti that a wall be constructed near the side of the pool to separate it from the House. Mr Ahmeti denies this evidence and I am not satisfied that there was any such discussion.
- 17 Mr Smith also said that the water level had to be 50mm above the natural ground level and the coping would have to be 100mm above that. This repeats what Mr Bloom said.

The plans

- 18 The plans attached to the Contract are a dimensioned plan of a standard swimming pool of the type ordered. There is no architectural plan provided showing the location or depth of the pool on the site. However the engineering plan attached to the Contract shows the water level to be only 100mm below the top of the edge beam or coping. The same drawing shows the underside of the edge beam to sit at ground level. The thickness of the edge beam is dimensioned at 150mm and the water is shown as rising 50mm above that. The water level is therefore shown as being 50mm above ground level. Contrary to the evidence of Mr Bloom and Mr Smith, the edge beam was not to be 200mm thick but only 150mm thick.
- 19 The ground level is, of course, the level to which the pool site is excavated. When I asked them why they did not dig the hole deeper Mr Bloom said that it was not possible to do so because of the retaining wall. He said that the angle of repose of the soil behind the wall was such that it could not

have been dug any deeper. I do not accept this evidence. The supports for the wall were deepened for the very purpose of enabling the pool to be excavated to the required depth. They could have been taken down to any depth. Mr Bloom said that they encountered rock but the removal of that was to be at the Owners' expense. Also, as I pointed out on site, if the concern was the angle of repose of the additional material to be retained and if the problem was rock, solid rock does not have an angle of repose.

Conclusion

- 20 I am not satisfied that there was any good reason why the pool was constructed to the height that it was. Once constructed at this height it then became impossible to pave between the House and the pool without either constructing a wall, as Mr Bloom suggested, or otherwise isolating the House from the pool so as to provide drainage away from the House near the foundations.
- 21 I find that the construction of the pool is defective in that it was built too high given the level of the House. The House was there when the agreement was made and the levels ought to have been taken from it.
- 22 There are only two solutions that present themselves. One is to remove the pool and reconstruct it at the correct level which would give the Owners what they contracted for. The other is to reconstruct the paved area so as to allow sufficient fall away from the House, adequate stormwater drainage and a wall to split the area between the pool and the House into two levels and also award compensation to the Owners for the fact that the pool is not what the Builder contracted to provide.
- 23 The first alternative would be very costly indeed but is not what the Owners have claimed. To quantify the second would require plans, a detailed scope of works and costings, none of which I have.
- 24 I do not award any compensation with respect to the paving work done around the pool that will have to be removed. This was done by the Owners after they knew about the problem. In carrying out futile work they did not act reasonably and so that loss does not arise from the breach.
- 25 The Owners have not paid the final payment of \$6,890.00. By letter of 15 May 2008 the Respondent's solicitor demanded payment of this sum plus interest of \$1,033.00. The total demanded in this letter is \$7,923.00.
- 26 The Owners seek an order to the effect they do not owe the Respondent this sum on account of the breach by it of the Contract in that it failed to provide a swimming pool in accordance with the Contract. In effect, this is a claim for general damages of \$7,923.00.
- 27 Although the evidence as to quantum is highly unsatisfactory, it is inconceivable that the cost of replacing the pool would be less than several times the sum the Owners claim. Further, when one considers that the pool is now permanently installed at an incorrect level, that any conceivable works to be undertaken to cope with the incorrect level is not going to give

the Owners the result and appearance they were to have received, I think they are entitled to general damages of at least the sum claimed. Since that is all that is claimed that is all that will be allowed. That would result in the Owners not being required to pay anything further to the Builder.

Order

- 28 I order that the Respondent pay to the Applicants the sum claimed of \$7,923.00, such sum to be set off against the amount claimed by the Respondent.
- 29 This is an unusual order but by s.53 of the *Domestic Building Contracts Act 1995* the Tribunal may make any order that it considers fair to resolve a domestic building dispute. Since this is such a dispute and since this order takes account of the legal entitlements of the respective parties and brings the dispute to a just resolution it is an appropriate order to make.

Other

- 30 The letter dated 15 May 2008 written to the Owners by the Builder threatens to lodge a caveat over the title to their land and recover the cost of doing so from the Owners. Such a demand is contrary to both s.18 and s.16(1) of the *Domestic Building Contracts Act 1995*. I direct the Registrar to refer the letter to the Director of Consumer Affairs and to the Building Practitioners' Board for investigation.

SENIOR MEMBER R. WALKER