VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1420/2015

CATCHWORDS

Domestic Building Contract; breach due to delay in performance, assessment of damages; damages for loss of use of money; damages for loss of amenity.

APPLICANT:	Ms Vicky Tsaikos
RESPONDENT:	Lazaway Pools and Spas Pty Ltd (ACN: 007 171 520)
WHERE HELD:	Melbourne
BEFORE:	Member C Edquist
HEARING TYPE:	Hearing
DATE OF HEARING:	24 February 2016
DATE OF ORDER:	2 March 2016
DATE OF REASONS:	2 March 2016
CITATION	Tsaikos v Lazaway Pools and Spas Pty Ltd (Building and Property) [2016] VCAT 296

ORDERS

1 The Respondent must pay or allow to the Applicant, damages for breach of contract in the sum of $1,839, comprising:

(a) Damages of $839 for loss of use of money.

(b) Damages of $1,000 for loss of amenity.

Note:
The Tribunal acknowledges that the award of $839 for damages for loss of use of money is lower than the figure discussed at the end of the hearing. The reason that a lower figure has been assessed is explained in paragraph 21 of the Reasons that follow.

2 Allowing for a credit representing the sum due from the Applicant to the Respondent under the contract made between them on or about 18 November 2014, agreed to be $1,500, the Respondent must pay to the Applicant the sum of $339.

3 It is declared that the Applicant is not obliged to pay to the Respondent on the completion of the concrete swimming pool (which is the subject of the contract), the balance of the contract sum of $1,500.

4 The Applicant has liberty to apply, if the pool is not completed in accordance with the contract plans and specifications.

5 Pursuant to section 115B of the *Victorian Civil and Administrative Tribunal Act 1998*, the Respondent is to reimburse to the Applicant the filing fee paid by the Applicant of $174.10.

MEMBER C EDQUIST

APPEARANCES:

For Applicant	Ms V Tsaikos, in person
For Respondent	Mr J White, general manager, under an authority from a director

REASONS

1 The Applicant, Ms Vicky Tsaikos, has come to the Tribunal seeking damages of $8,500 for breach of a domestic building contract she entered into with the Respondent Lazaway Pools and Spas Pty Ltd (Lazaway) on or about 18 November 2014.

2 The contract was put into evidence. It provided in Section H of the Schedule that Lazaway was to complete the pool within '60 business days from date of excavation'. The parties agreed that the weekends and public holidays were excluded from those 60 days.

3 Under the contract, the work should have been completed within approximately three calendar months. However, the time in which Lazaway was to complete the pool was subject to extension for a number of causes of delays which were detailed in clause 11. Relevantly, those delays included:

(a) delays with regard to the issue of Statutory Approvals and Consents that are not caused by the builder; and
(b) any cause beyond the control of the builder.

4 Mr White appeared on behalf of Lazaway. He gave evidence that the commencement of the works was delayed because of the need for underpinning of the Applicant's house. Ms Tsaikos agreed that the need for the underpinning had been identified by the engineer who prepared the plans for the pool. It was not contested by Ms Tsaikos that this was a legitimate delay, and that the builder was entitled to an extension of time for the period that the underpinning works were being performed, even though the builder had failed to put in a written notice of delay as required by Clause 11 of the contract.

5 Ms Tsaikos agreed with Mr White that the works commenced in March 2015. Specifically, Ms Tsaikos said that the works started on 20 March 2015. Mr White said they started on 18 March 2015. I note the builder's concession that the date was 18 March 2015, and find that the work started on that date.

6 Mr White further contended that the works were delayed by the need for certification of the safety fence constructed around the pool.

7 It was conceded by Ms Tsaikos that the delay caused by certification of the fence was another legitimate cause of delay upon which the builder could rely under the contract, even though the builder had not given a written notice of that delay. However, the extent of the relevant delay was disputed.

8 The pool fence was certified by an inspector named David Allen. Ms Tsaikos initially said that she thought Mr Allen's certificate was available on 27 July 2015. After examining her emails, she conceded that there were communications about the certificate after 27 July 2015. After hearing evidence from Mr White on the matter, I am satisfied, and formally find, that his company had received the certificate from the building surveying firm which had engaged Mr Allen only on 6 August 2015.

9 Ms Tsaikos said that the delay caused by the construction and certification of the fence started as late as 8 June 2015. Mr White said the delay started as early as 14 May 2015, which is when he thought his company ceased work, pending certification of the fence. After examining some emails, Mr White conceded the work on the soper pavers around the pool continued after 14 May 2015. He was not able to contradict from his own knowledge Ms Tsaikos' assertion that work on the pool ceased after 8 June 2015, and I find that the starting date of the pool fence delay was 8 June 2015. I find that Lazaway lost 43 business days between 8 June 2015 and 6 August 2015 due to this delay, and is entitled to an extension of time of 43 business days.

10 The parties each submitted the calculation of the overrun of the contract period based on the assumptions that work started on 18 March 2015, was delayed 43 business days from 9 June 2015, and was due to be finished on 25 February 2015. Mr White said the contract overrun was 181 days, and Ms Tsaikos said it was 184 days.

11 I consider the exact number of days by which the contract period has been overrun is not material in assessing whether there has been a breach of contract. The stark fact is that the contract period had been exceeded by approximately six months, and I consider that this will amount to a breach of the contract, unless there is some explanation which entitles Lazaway to an extension of time under the contract.

12 It appears that there is no explanation for the delay in the completion of the pool that will entitle the builder to a further extension of time of the construction period. The evidence given by Ms Tsaikos was that when she contacted Lazaway after the pool fence had been certified, she was told that all owners are placed in a queue in the order in which their pool fence has been certified, and that she would in due course be told when her pool would be completed. When questioned about this, Mr White confirmed that placing owners in a queue for completion, after fence certification, was the company policy.

13 In the event, Lazaway only recently contacted Ms Tsaikos to advise when her pool would be completed. The final work began in the week prior to the hearing, and was to have been completed on 25 February 2016.

14 Ms Tsaikos contended that Lazaway did not abide by their contractual proposed commitment to complete the pool within 60 business days, and that their conduct was not acceptable.

15 I formally find that there has been a breach of the contract because Lazaway failed to complete the pool within the contractual construction period of 60 busines days, as extended under the terms of the contract. There being a breach of the contract, Ms Tsaikos is entitled to damages.

16 Ms Tsaikos said that she wanted damages of $8,500. When asked to explain this, she said that was based on a calculation involving 1% of the contract sum of $30,000 applied over a certain period. The figure put forward by Ms Tsaikos was a global figure and was not broken down into any sub-compartments. Ms Tsaikos was not able to explain the calculation in detail and accordingly the basis of her assessment of damages at $8,500 is something of a mystery. However, it was clear that Ms Tsaikos was seeking damages to compensate her for some alleged financial losses and also for loss of amenity.

17 As explained in the hearing, Ms Tsaikos is entitled to damages assessed on the principles established in the leading case of *Hadley v Baxendale* 9 Exch 341, 156 Eng Rep 145 (1854). In brief, the damages recoverable for breach of contract fall into two classes. In the first class, are damages which flow naturally and directly from the breach of contract. They are the direct losses. In the second class, there are indirect or special damages which are recoverable only if the fact that they might be incurred was a matter about which the breaching party was on notice at the time the contract was made.

18 In my view, Ms Tsaikos can recover damages flowing from the breach of the contract in respect of the loss of use of monies paid under the contract for the period of the contract overrun of six months. That is a direct loss flowing from the breach.

19 Ms Tsaikos said that the pool was financed by drawing down on the mortgage against the house. The mortgage carried an interest rate of 5.8%. I find that 5.8% is the appropriate interest rate to use in calculating Ms Tsaikos' claim for loss of use of money.

20 The evidence of Ms Tsaikos, which was not disputed, was that the following payments were made:

(a) a deposit of $1,500 on November 2014;
(b) $18,475 on 13 March 2015;
(c) two payments of $3,000 on 27 March 2015;
(d) $1,320 on 12 May 2015; and
(e) a final payment of $1,640 on 8 June 2015.

21 At the hearing, late in the day, I indicated that the appropriate measure of loss could be determined by assessing what interest had been paid on each of those sums from the date it they had been paid, to the date of the hearing. On reflection, that method of assessment is erroneous, as Ms Tsaikos has only suffered loss for the period of the contract overrun. The loss can be simply calculated by adding up the payments she has made -which total $28,935 - and applying to that figure an interest rate of 5.8% for six months. The resulting calculation is $839.

22 Ms Tsaikos also said that she has suffered financial loss because a number of packages of work were delayed by the late completion of the pool. She cited painting, fencing, landscaping, the electrical works, and plumbing.

23 This set of claims gave rise to a threshold issue, which was whether they could have been in the contemplation of Lazaway at the time the contract was made. Ms Tsaikos addressed this issue in her evidence. She said that Lazaway's sale's representative, Jason, came to her house and inspected the site of the pool in the backyard. He saw the newly completed extension, and was told by Ms Tsaikos about her plans regarding fencing and drainage. He was told that it was planned to paint the extension and do the landscaping and fencing after the pool had been completed. On this basis, I am satisfied that Lazaway was on notice about the proposed works, and must have been aware that late completion of the pool might have an impact upon the performance of those works.

24 Having made that point, I am not satisfied that Ms Tsaikos has suffered any loss regarding the painting, as a result of the late completion of the swimming pool. She said that she had obtained a quotation for painting $3,000 some months ago, and that she expected the cost to be higher today. However, she had not obtained a new quotation for the painting, and so there was no direct evidence as to the impact that the passing of time might have had on the cost of performing the painting.

25 Even if Ms Tsaikos did have persuasive evidence as to how the cost of the painting had been increased by the passing of time, she faced, as Mr White pointed out, a problem of causation. She could not demonstrate a nexus between the late completion of the pool and the commencement of the painting. She said that the painting had to be started after the pool was completed. I do not accept that, as there is an argument that it would be preferable for the equipment necessary to do the paint job to be erected before the pool is completed and the landscaping performed, in order to minimise the potential for damage.

26 While I can understand why Ms Tsaikos may have wished to wait for the pool to be completed before she painted her extension, this was her choice.

The completion of the pool did not, of itself, delay the painting. I thus find, for both lack of evidence and a failure to prove causation, that this particular claim fails.

27 There was at the hearing some discussion about the proposed fencing including the election of privacy extensions on top of the fence. Having looked at the photographs tendered by Ms Tsaikos, I formed the view that there was nothing regarding the completion of the pool that might delay the fencing work.

28 When the impact of the late completion of the swimming pool upon the proposed landscaping work was discussed, Mr White raised cusation of loss again as an issue. He pointed out that the soper pavers were in place. He said that as they formed the highest point of the pool and accordingly they could be used to establish the levels for the landscaping work. I accept this, and do not think that the landscaping work was necessarily delayed by the late completion of the pool.

29 Regarding the electricity work, Mr White contended that the electrician would have had to come back anyway after the completion of the pool, whenever that occurred. I agree with that proposition.

30 Mr White made a similar point in relation to the plumbing, and I agree with him on this also.

31 In summary, I find against Ms Tsaikos in respect of each of her claims for financial loss arising out of the impact of the delay in the completion of the pool on the specified trade works.

32 The remaining claim to be dealt with is the claim for damages for loss of amenity.

33 As discussed in the hearing, damages for loss of amenity are rarely awarded. I referred to the decisions of Senior Member Walker in two cases in the Tribunal where he had been prepared to award damages for loss of amenity. Copies of these cases were left with the parties during the lunch break.

34 The first in time of these cases was *Anderson v Wilkie* (Domestic Building) [2012] VCAT 432 (11 April 2012). In this decision Senior Member Walker said [at 27-29]:

> Where there is a breach of contract, the party in breach is only responsible for resultant damage which he ought to have foreseen or contemplated when the contract was made as being not unlikely or liable to result in (sic) his breach, or of which there was a serious

possibility or a real danger (see *Halsbury Laws of England*, 4th edition, Vol 9, para 1174).

It has been held that substantial physical inconvenience and discomfort caused by a breach of contract will entitle the party to damages (see *Burke v Lunn* [1976] VR 276 at 285-286; *Clarke v Housing Guarantee Fund Limited* (1998) 13 VAR 19 at p 21-22). Loss of amenity generally is also recognised as a head of damages (see for example *Ruxley Electronics and Construction Limited v Forsyth* [1995] 3 All ER 268. I was also referred to *Wilshee v Westcourt Limited* [2009] WASCA 87 to a similar effect.

However, damages for personal injury are not recoverable (*Domestic Building Contracts Act 1995* s 54(2)) nor are damages for disappointment, hurt feelings or damage of any other kind that was not reasonably foreseeable at the time the contract was made.

In the present case, the owners claim damages for having lived in a wet house for 2 ½ years. That is a loss of amenity which is compensable. They will also face the inconvenience of having to move out while repairs are effected.

35 On the basis of the evidence given by Ms Tsaikos I am satisfied that she and her family suffered significant physical inconvenience as a result of the late completion of the swimming pool. The swimming pool was constructed not far from the back door. The fact that it was not complete meant that access to the backyard was restricted. As Lazaway must have been aware, having regard to the sales representative's visit to the house, Ms Tsaikos has young children. She said that they were 12, 11, 5 and 1. The unfinished pool represented a safety hazard for the young children.

36 Here, there has been substantial physical inconvenience to Ms Tsaikos and her family. I am satisfied that this is an appropriate case for an award of damages for loss of amenity. The issue accordingly is what is an appropriate measure for those damages. I sought a comment from Mr White. He rejected Ms Tsaikos' claim for damages of $8,500 as unreasonable. He said that any award of damages should be small, but he did not nominate a figure.

37 In *Kounelis v Ross Horton Homes Pty Ltd* (Domestic Building) [2014] VCAT 319 (25 March 2014), Senior Member Walker awarded damages for loss of amenity of $2,000 in circumstances where remedial work was required to be carried out.

38 Ms Tsaikos has been deprived loss of use of her backyard for six months. I will allow general damages of $1,000 for loss of amenity.

39 In summary Ms Tsaikos is entitled to damages totalling $1,839, comprising:

(a) damages totalling $839 for loss of use of money.
(b) damages of $1,000 for loss of amenity.

40 Under s 115B of the VCAT Act, I order that the Respondent, Lazaway, must pay to Ms Tsaikos the filing fee paid by her of $174.10.

MEMBER C EDQUIST