VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D609/2004

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – swimming pool construction – claim and counterclaim – entitlements of parties – directors' liabilities.

APPLICANTS	Tony Brien, Robynne Brien
FIRST RESPONDENT	Brighton Pool Shop Pty Ltd (ACN 005 786 872)
SECOND RESPONDENT	Terrence Bernard Keyhoe
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	26 April 2006
DATE OF ORDER	29 August 2006
CITATION	Brien v Brighton Pool Shop (Domestic Building) [2006] VCAT 1810

ORDER

1 Order on the claim $42,847.45 with interest to be calculated.

2 Order on the counterclaim $4,000.00 with interest to be calculated.

3 Reserve costs.

4 List for hearing before me for one day after 10 October 2006 on costs unless parties notify Registry of their agreement by that date.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicants	Mr P. Baker of Counsel
For the First Respondent	Mr B. Reid of Counsel

For the Second Respondent Mr B. Reid of Counsel

REASONS

A INTRODUCTION

1 The proceeding in this matter commenced by Application filed on 9 September 2004.

2 The matter was set down for hearing on 21 June 2005 by orders made in a directions hearing held on 8 February 2005.

3 Both parties were legally represented at that directions hearing and gave the Tribunal a completely inaccurate estimate of hearing time of 2 days.

4 I heard the matter for 2 days on 21 June 2005. After two adjournments I then heard it for another 5 days on 13 December 2005. Then I heard final submissions on 10 March 2006 and 26 April 2006.

5 I am at a loss to know how such an inaccurate time estimate was given. It is particularly puzzling when there had been mediation in the matter on 29 October 2004. There was also a Compulsory Conference on 15 June 2005.

6 Despite the Tribunal's various initiatives, the parties have been unable to resolve their differences. In reality, each has, I consider, wanted to proceed to the bitter end.

B THE PROCEEDING

7 There is both a claim and a counterclaim in this matter.

8 By the Points of Claim (dated 9 September 2004) the Applicants allege they entered into a building contract with the Respondents on or about 19 August 2003 to construct an in-ground swimming pool and retaining wall and provide associated tiling and concreting work at their premises at 94 Wilson Street, Brighton, for $48,400.00 (including GST). The Second Respondent is sued as a director of the First Respondent. The Applicants allege that the terms of such contract included that the Respondents would perform the works in a proper and workmanlike way and in accordance with the drawings and specifications set out in the contract; that they would use materials that were good and suitable for the purpose; that they would perform the works in accordance with legal requirements; that they would carry out the works with reasonable care and skill and by the date specified. Other terms also are alleged.

9 It is alleged the Respondents commenced the works on or about 1 September 2003 and purported to complete them on 15 December 2003. On or about 17 November 2003 it is alleged there was a varied contract price agreed in the sum of $47,100.00 (reduction of rear feature wall of $1,100.00 and exclusion of rendering of rear retaining wall of $200.00). It is alleged that between 21 August 2003 and 22 December 2003 the

Applicants made payments in instalments totalling $47,800.00 for the works although during the period from 19 August 2003 to 28 January 2004 they were rendered invoices of $53,107.50.

10 The Applicants allege that the works carried out are defective in a number of ways including in respect of: the interior lining of the pool; the construction of the masonry wall; soil movement; the pool cleaning system. This list is not intended by me to be exhaustive. It is alleged the works are defective both in breach of the terms of the building contract and in breach of the provisions of s8 of the *Domestic Building Contracts Act* 1995. Further or alternatively, it is alleged the works are defective in having been performed or carried out negligently. There are also allegations of unauthorized variations; wrongful removal of goods; failure to obtain a building permit; breach of the *Goods Act* 1958; breach of the *Fair Trading Act* 1999. As well, it is alleged the Second Respondent is independently liable.

11 By reason of the matters alleged, the Applicants claim they have suffered loss and damage. In their Points of Claim they claim $41,462.45 made up as follows: $31,918.00 for demolition and rectification of works (alleged to be defective); $700.00 overpaid; and $8,844.45 for equipment replacement. They also claim interest.

12 The Applicants filed and served Amended Points of Claim on 25 July 2005. In that document they amend some of the allegations they made previously but more importantly perhaps they amend the sum claimed for loss and damage. They now claim $55,341.75 "alternatively (depending on how the tree is dealt with) $46,865.75" made up as follows: demolition, repairs and replacements, etc. $37,851.75; $700.00 overpaid; costs of maintaining poplar tree $16,790.00 or its removal and replacement $8,035.00; consultants' fees.

13 There is also a document on file dated 17 June 2005 giving further particulars of the Applicants' loss and damage under paragraph 36 of their Points of Claim.

14 Points of Counterclaim of the First Respondent are dated 15 March 2005. By way of counterclaim the First Respondent claims a sum of $5,307.50 together with interest and costs. The sum of $5,307.50 represents an alleged difference between variations for which progress claims were issued ($53,107.50) and payments made ($47,800.00). The variations are alleged to include construction of a new back wall, a 600 mm high retaining wall around a tree (the poplar) and sewer repair and connection.

15 The Defence of the First Respondent (in a separate document) is also dated 15 March 2005. Mostly this document is uninformative. It admits that the contract with the Applicants contained the terms alleged in paragraph 5(a) – (f) of the Points of Claim and admits that works were undertaken and that the same commenced around 1 September 2003 and concluded around 15 December 2003. As set out in the Counterclaim, the First Respondent

admits the Applicants made payments totalling $47,800.00. It admits it owed the Applicants a duty to perform the works with due skill and care (which I consider is significant) and it admits it provided a sample to the Applicants but says that the product applied to the swimming pool in its construction matches the sample. The First Respondent, otherwise, makes denials or admissions or non-admissions as the case may be, or does not plead.

16 The Defence of the Second Respondent (again in another separate document) is dated 15 March 2005 as well. This document also is mostly uninformative. It does, however, say (in paragraph 4) that the Second Respondent never entered into a contract with the Applicants: it was the First Respondent which undertook "all" contractual obligations with them.

17 The Applicants' Defence to the Counterclaim is dated 12 April 2005. In this they admit they have not paid the First Respondent the sum of $5,307.50. They deny, however, they are liable to do so. They admit they have made payments totalling $47,800.00. They say that the variations referred to in paragraph 9 were not authorized by them and they otherwise refer to and repeat paragraphs 11 and 12 of the Points of Claim dated, as mentioned, 9 September 2004.

C THE HEARING

18 The hearing of this matter, as I have noted, took considerably more than the estimated 2 days. Various witnesses gave sworn evidence over the length of the hearing – both lay and expert. The main lay witnesses, I consider, were Mrs Brien (the Second Applicant), Mr Terence Keyhoe (the Second Respondent) and, his son, Mr Matthew Keyhoe. It was evident to me, I should add, that Mr Terence Keyhoe does not enjoy good health and giving evidence was quite a burden for him. Amongst the expert witnesses called, all of whom I found helpful to greater or lesser degrees, I was particularly impressed with the evidence given by Mr Plant and Mr Lees.

19 All witnesses were cross-examined and I was in a good position to observe the demeanour of each in the witness box. In that regard I should indicate that, where there is conflict, I prefer the evidence of Mrs Brien over that of Mr Keyhoe and his son. She impressed me as a person who had an accurate recollection of events – far surpassing that of theirs. She did not impress me as a person given to over-statement. I considered Mr Terence Keyhoe at times was confused in his recollections. Whether this is due to his medical conditions or not – including a hearing problem – I am unable to say. I regret I must indicate I was not impressed with the evidence of Mr Matthew Keyhoe, his son. It seemed to me he was imprecise on various critical matters. I did not regard him as objective.

20 I should add I was assisted by a view which I conducted at the premises on a fine, clear day on 23 June 2005 as I recall. All the parties, and experts, attended that view. The view enabled me to see for myself the basis being put forward for the allegations being made and for those being denied. The

view was, for me, decisive on a number of points in understanding the evidence that was later given. Each party was able to explain its position relatively informally.

D THE ISSUES

21 I consider that the issues which call for my decision are as follows:

i The masonry wall: in particular, whether I should find I should allow for demolition and reconstruction of the same;

ii The pool lining: in particular, whether this is the one that should have been supplied and installed;

iii The poplar tree: in particular, whether I should find I should allow for removal and replacement of the same or ongoing attention;

iv Pool equipment: in particular, whether I should find I should allow for any losses incurred following removal of the same;

v Other claims: whether I should find I should allow for other miscellaneous claims;

vi Variations: whether I should find I should allow for any miscellaneous variations.

22 On each of these issues I heard detailed evidence and received very detailed submissions. I have duly noted and duly considered the evidence given by each witness. I called for the submissions of the parties to be detailed because of the passage of time. Each issue involves various sub-issues not confined to factual matters but going into areas of credibility. The submissions of both sides I have found most helpful.

23 The burden of proof is clear in this matter, as in all matters. The proponent of an issue must satisfy me that I should rule in their favour. This applies to Applicants as well as to Respondents. I must be satisfied on an issue of fact on the balance of probabilities. If a party fails to satisfy me on an issue of fact according to the balance of probabilities, that party cannot succeed on that issue.

E FINDINGS

24 In what follows I set out my findings on the evidence on the issues raised for my consideration.

i Masonry wall

25 I am satisfied I can make findings, as I do, in favour of the Applicants on this issue. The wall, I am satisfied, was built without a building permit. That, in itself, is a serious matter but I consider that the wall has been left in an unsafe or unstable condition or has been left in a condition where its safety and stability cannot be properly determined which, in itself, is unsatisfactory and of concern. As such it may well be dangerous. Because of serious doubts over its long-term prospects, expressed to me in evidence,

I am satisfied the only reasonable course to adopt is to demolish it. See *Bellgrove v Eldridge* (1954) 90 CLR 613.

26 I accept that the wall was constructed so as minimize damage from and to tree roots in and after pool construction. The tree in question is a poplar tree, see iii below. Although the Applicants have paid $4,300.00 for the wall's construction no variation has ever been signed by them. I comment on this defence later.

27 I agree with the evidence of Mr Plant, who impressed me, that it is indeed a serious matter to construct a footing for a wall without a building permit and inspections. Had a permit been obtained, there would have been mandatory inspections taking place in compliance with legal requirements. In that way the safety and stability of the wall could have been ensured. I cannot accept any explanation, sought to be proffered, that obtaining a permit was the responsibility of the Applicants. This appeared to be the purport of the evidence of Mr Matthew Keyhoe, at one point.

28 It follows that I cannot agree with the Respondents' submissions that, in regard to the wall, the Applicants have not discharged their burden of proof. The Respondents, however, go further and submit that "[the] wall is structurally sound". They submit that no evidence was lead to suggest otherwise. They point to the evidence of Mrs Brien (given in June 2005) that the wall has not shifted and they refer to the evidence of Mr Plant during re-examination (on 20 December 2005) that the wall appeared to be in very good condition – solid and performing well.

29 I cannot agree that this was the main purport of Mr Plant's evidence as a whole which, in my view, was to the effect I have mentioned above in paragraph 27. I am not persuaded I should place any reliance on the evidence of Mrs Brien insofar as it asserts expert opinion of a geo-technical or engineering or building kind. Nor, in my view, should I accede to a proposition, if it was put, that, if the wall is defective, it is something which is due to her agreement over the positioning of it. She is the house owner – or one of them – and is not equipped, in my view, except in a most general (untechnical) way, to express a view about where a wall should be positioned.

30 I have noted the evidence of Mr Green and Mr Calway regarding the alleged depth of the footings. I was not persuaded that their evidence was as carefully given as it might have been. In any event, though, I am not satisfied they are sufficiently expert enough to speak about whether the wall was well-founded or not.

31 I consider I am entitled to find on the evidence, having regard to the probabilities, that the wall in question is defective. It is now, or may be in time, a hazard. I note that the Applicants have young children.

32 I consider, in consequence, I am entitled to find the First Respondent liable for breach of s8 of the *Domestic Building Contracts Act* 1995. I note, in

any event, as I pointed out earlier, that the First Respondent admits it was a term of its contract with the Applicants that it perform its works with due care and skill. I consider that term has been breached in the construction of the wall. I shall have more to say about the position of the Second Respondent, below.

33 As a result I am satisfied the Applicants have suffered loss and damage – representing the cost of removing the footing and replacing the wall. For, at the moment, the Applicants have a house with building works on it for which no permit has been obtained. Premises cannot be sold in such circumstances it is pointed out to me.

34 I am satisfied I should assess their loss and damage in the sum claimed of $32,037.00 based on the reports of Faulkner Lees Constructions. I see such figures, based on the evidence, including that of Mr Lees in particular, as fair and reasonable and warranted, as the only reasonable alternative open.

35 I do not regard the evidence of the Respondents as materially detracting from the proper assessment of the figure involved as that which I have assessed.

ii Pool lining

36 I am also satisfied that I can make findings, as I do, on this issue in favour of the Applicants.

37 Most helpful to me in my decision on this issue has been my own on-site inspection. I was able to see for myself and actually feel the condition of the lining of the pool.

38 I listened carefully to the evidence of all witnesses. I have considered as well explanations given on site. However, in the end, I am satisfied on the balance of probabilities, that I should accept the evidence of Mrs Brien and, in particular, that of Mr Peter Zukowski.

39 I found Mr Zukowski's evidence particularly impressive. I consider he explained his position very well and withstood cross-examination. I consider, based on his evidence, that the workmanship on the pool lining is substandard and poorly finished off; that the finish on the steps is uneven and cracking; that the surface is not smooth but feels like sandpaper. In all, in my view, the pool lining, and finishing areas, are of an unacceptable standard.

40 As regards the evidence of Mr O. Romero I must indicate that I am unable to be satisfied about whether what was supplied, complied, or substantially complied, with the sample provided or not. As to whether his evidence about the constituent parts of the mixture was unchallenged or not, I should indicate that I was not assisted by the evidence of any of the witnesses, including Mr Romero, on the exact *ratios* of ingredients. As to the evidence of Mrs Brien regarding cuts to her children's feet, I reject the notion that I should regard this, necessarily, as hearsay evidence at all. She was in a good position, I consider, to report on matters affecting the health

and well-being of her children without it necessarily being hearsay and did not appear to be exaggerating the position. In most respects her evidence was of a general nature. In any event, the Tribunal, I point out, is not bound by the rules of evidence.

41 I consider the First Respondent is liable in consequence under s90 of the *Goods Act* 1958 for breach of the same or, in any event, on ordinary contractual principles on the basis of breach of implied terms relating to fitness for purpose or relating to (the admitted) term to take reasonable care and skill.

42 Accepting the evidence I have, I consider I should find in favour of the Applicants in the sum of $6,644.00. This is on the basis of the figure quoted by Mr Zukowski. The quotation from the Apex Pool Company for a much lower figure of $2,880.00 was not supported, in my view, by any evidence which was able to be tested. No one was called to give evidence about that sum from the company concerned. I reject the figure.

iii Poplar tree

43 I am unable, on the evidence, on the balance of probabilities, to make any finding in favour of the Applicants on this issue.

44 The tree, when I saw it, appeared to be healthy, with new growth. It offers a pleasant prospect to the premises.

45 Even if I was satisfied that the tree root mentioned in evidence had been cut (and I note the evidence of Mrs Brien that it had been) I am unable to be satisfied whether this will lead to any loss or damage to the Applicants. It may or may not do so. Mr Hetrick's evidence, to the effect that the tree appears to be in good health, was that it is too early to form a conclusive opinion. He recommended either removal of the tree or the introduction of a regular maintenance regime over 3 to 5 years with ongoing attention. However, I see this as entirely speculative I have to say. I would agree that the value of the tree is somewhere between about $2,450.00 (Mr Stone) and about $3,500.00 (Mr Hetrick) but my difficulty is that I cannot be satisfied that the tree has been damaged and, if damaged, needs to be removed and replaced or subjected to a maintenance program.

46 I reject the contention that, on the balance of probabilities, the Applicants have made out their case on this issue. The evidence, in my view, was far too speculative and uncertain. I do not believe I should engage in guesswork in a matter of this nature.

iv Pool equipment

47 I am satisfied I am able to make findings, as I do, in favour of the Applicants on this particular issue.

48 The issue is one that arises out of the conduct of Mr Matthew Keyhoe. As I understand it, he believed he was entitled to enter the Applicants' premises, uninvited, and remove items. These included a pool pump. The matter was

reported. During the hearing I think I indicated my attitude about his actions.

49 The pool pump is, I think, conceded by the Respondents and at a value of $1,556.00. I allow this sum.

50 On the balance of probabilities, however, I am satisfied that consequential losses would have been, and were, suffered. I accept the evidence of Mrs Brien that a sum of $506.00 was paid to Ace Electrical for electrical work. I allow also a sum of $264.00 for pool consultancy advice and work (Aqua Quality).

v Other claims

51 Miscellaneous claims made by the Applicants include the following:

a Pool refilling. The Applicants claim $500.00. The Respondents concede the cost may be as much as $300.00. On the balance of probabilities I find in favour of the Applicants in respect of this item but in the amount of $300.00 which I consider is the proper sum.

b Tap. I allow the sum of $126.50 as, it appears, it is conceded by the Respondents.

c Solar heating repairs (Sunlover). I allow the sum of $118.80 as, it appears again, it is conceded by the Respondents.

d Solar heating (AMR). A further sum of $40.00 appears to be conceded by the Respondents and I allow it.

e Pool cleaning system. Mrs Brien gave evidence, as I recall, of payment of $137.50. I accept her evidence and allow the sum.

f Core-drilling costs. There has been extensive core drilling at the Applicants' premises which I saw for myself. A sum of $588.99 is claimed. I allow this sum as arising from the defective works. The sum is not unreasonable in amount.

g Horticultural digging costs. These were incurred in the sum of $165.00 for investigation of the wall not being on the footing. In light of a concession made by the Respondents I consider incurring the cost was reasonable and the sum involved was reasonable also.

h Powder room repairs. This relates to an invoice dated 28 January 2004, as I recall. I consider it is reasonable in light of my other findings. I do not allow $507.50 but I do allow $364.65.

52 In respect of each of the matters mentioned in paragraph 51 I consider on the evidence that I am entitled to make findings in favour of the Applicants to the monetary extents I have indicated.

vi Variations

53 During the course of the works it is alleged that Mrs Brien instructed the First Respondent to undertake variations to such works as follows: new

block wall; retaining wall; reconnection of sewer and its repair. The sums claimed respectively are – new block wall (invoice no. 12841) $4,300.00; retaining wall (invoice no. 12842) $1,200.00; sewer (invoice no 13214) $507.50. The total of such variations is $6,007.50. It is immediately apparent that the last mentioned item I have already allowed in favour of the Applicants but in a modest sum of $364.65.

54 In all it is alleged that progress claims totalling $53,107.50 were submitted during the contract but that only $47,800.00 ever was paid by the Applicants. This would leave a discrepancy of $5,307.50. In fact, it is this figure which is claimed by the First Respondent.

55 The Applicants, as I have noted earlier, admit to paying $47,800.00 under the contract. They dispute, however, this issue of variations. They say that I should deduct off the figure of $53,107.50 the sum of $507.50 and a further figure in respect of the retaining wall claimed as $1,200.00 (for which they are prepared to allow $400.00). This would give a figure of $1,307.50 which must be subtracted from $53,107.50 leaving an amount of $51,800.00. On this basis, though, given that they have already paid $47,800.00, the difference which I should allow, on the question of variations, is $4,000.00. As regards that amount I was asked to note that a sum of $3,751.50 is held in trust.

56 Having heard the evidence of the parties, and considering the findings I have already made, I intend to find in favour of the Applicants on these issues, as I do. I have already commented on the sewer issue of $507.50. On the evidence I consider a concession of $400.00 in respect of the retaining wall is justified. That means I allow the rest of the First Respondent's claim for variations – but as a total figure of $4,000.00 only. This would be recoverable if not under legislation then on principles of quasi-contract in any event.

F SUMMARY

57 I am satisfied each of the findings I refer to above is one which I may make in law, having regard to the evidence and to the probabilities.

58 I am satisfied also, having regard to s97 of the *Victorian Civil and Administrative Tribunal Act* 1998, that each of such findings is fair having regard to the evidence given by all the witnesses and to the substantial merits of the case.

59 The result of such findings, in financial terms, is as follows:

a the Applicants are entitled to an order in their favour in the sum of $42,847.45.

b the Applicants are obliged to pay the First Respondent a sum of $4,000.00.

G LIABILITIES

60 The sum referred to in paragraph 60 a is one I consider I should order the First Respondent to pay. Such order, in my opinion, correctly addresses the loss which, in law, the Applicants are properly entitled to claim against that party so as to compensate them.

61 I consider I would be disregarding numerous authorities if I was to proceed to hold the Second Respondent himself personally liable to pay such sum. The decision of Redlich J in *Johnson Matthey (Aust) Pty Ltd v Dascorp Pty Ltd* [2003] VSC 291, as I indicated to the parties, is not one which I consider I am bound to apply or should apply in the circumstances of this case. I agree with the substance of paragraph 4 of the Second Respondent's Defence. There are grounds for saying that the liabilities of directors needs to be reconsidered by Parliament but this is neither the time nor the place to engage in discussion of that issue. I do wish, however, to make it clear that, in the absence of statutory intervention, the time may arise, in some future case, where it is appropriate to hold directors of a company personally liable for the defaults of the company – especially if the company is put out of business to defeat rightful claimants. Or, if an individual is a director of several or numerous companies in a group deliberately structured to confuse and mislead the public.

62 The sum referred to in paragraph 59 b is one which I should order the Applicants to pay the First Respondent.

63 As I have noted the sum referred to in paragraph 59 b may be met, mostly, out of the sum held in trust.

64 I allow interest, to be calculated, on both such amounts.

H COSTS

65 Submissions were directed to me on the question of costs.

66 Having heard the parties I indicated it would be preferable for the question of costs to await my principal findings.

67 Therefore, I have made no decisions about costs. I note references to open offers in the materials.

68 I wish to draw both parties attention, quite specifically, to s109(1) of the 1998 Act by which, in the first place, each party in a proceeding is obliged to bear their own costs.

69 The Tribunal is not obliged ever to depart from s109(1). There is no guarantee it will do so in light of parties' conduct of a case in its protracted length and various manoeuvrings. It retains an unfettered discretion not to do so. The basic presumption in s109(1) needs to be displaced before an order for costs will be entertained: see *Arrow International Australia Ltd v Indevelco Pty Ltd* [2006] VCAT 1485 at [11]. Nevertheless, I will reserve the question of costs. But the meaning and purport of my remarks should be noted.

CONCLUSION

70 I make orders and directions accordingly.

SENIOR MEMBER D. CREMEAN