

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.BP1124/2016

### CATCHWORDS

Domestic building - provisional sum adjustment - contract allowance for excavation - claim for provisional sum adjustment – evidence - how calculated - smaller machine than that specified in contract used - claim reduced on account of lesser capacity - tipping fees excluded from scope of works - no provisional sum adjustment in contract or variation - claim for tipping fees not recoverable by builder - *Domestic Building Contracts Act 1995 Act – s.33* - difference between prime cost and provisional sum – s.15(3) - cost escalation clause - failure to comply with requirements – collateral contract – must not conflict with owner’s rights under the Act

<b>APPLICANTS</b>	Carol Chahine, Michael Chahine
<b>RESPONDENT</b>	Freedom Pools and Spas (Vic) Pty Ltd (ACN 101 657 167)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	14 to 15 March and 29 May 2017 Submissions received 15 June 2017
<b>DATE OF ORDER</b>	7 August 2017
<b>CITATION</b>	Chahine v Freedom Pools and Spas (Vic) Pty Ltd (Building and Property) [2017] VCAT 1213

### ORDERS

1. Declare that the provisional sum adjustment to which the Respondent is entitled under the terms of the contract with respect to excavation is \$3,780.00.
2. Order the Respondent to pay to the applicant damages of \$575.00, to be set off against the said sum of \$3,780.00.
3. Declare that, subject to any future adjustments in accordance with the terms of the contract, the balance of the contract price is \$23,730.00.
4. Liberty to apply.
5. Costs reserved.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For Applicants

Mr Stanarevic, Solicitor

For Respondent

Mr L.P. Wirth of Counsel

## REASONS

### Background

- 1 The Respondent carries on business as a builder of swimming pools and spas under the name "Horizon Pools". Its director, Mr Cutugno, is a registered builder.
- 2 The Applicants are the owners of a dwelling house and land in North Altona. In the back garden of that property there is a partially complete swimming pool and spa that has been constructed by the Respondent.
- 3 A dispute has arisen between the Applicants and the Respondent concerning charges the Respondent has sought to impose upon the Applicants with respect to tipping fees and excavation that the Respondent claims to have incurred during the course of construction which it maintains is over and above the allowances that were made in the contract.
- 4 On 17 February 2017, following the suspension of work by the Respondent, the Applicants brought this proceeding to have the dispute determined and also sought the cost of repairing some damage done to their property by the Respondent's workmen.
- 5 The Respondent has defended the claim, saying that it was entitled to the amount claimed for additional excavation, which is \$13,240.00, seeking an order for that amount and a declaration that it that it was entitled to suspend the contract.

### Hearing

- 6 The matter came before me for hearing on 14 March 2017 with two days allocated. Mr Stanarevic, Solicitor, appeared on behalf of the Applicants and Mr L.P. Wirth of Counsel appeared on behalf of the Respondents.
- 7 For the Applicants, I heard evidence from both Applicants and their two sons. For the Respondent I heard from Mr Cutugno and the site supervisor, Mr Shane Adlam who is a plumber. The excavating contractors who did the work that is the subject of the dispute were not called.
- 8 The time allocated was insufficient and the hearing was adjourned part heard to 29 May 2017. On that day, the evidence was concluded and I visited the site together with the parties.

### The witnesses

- 9 Mrs Chahine impressed me as a truthful witness. She was the only witness who was on site for the whole time during construction. Her evidence was quite detailed and it was supported by the contemporaneous emails that she sent. During the construction, she was supportive of the workmen, who were a man whose name was Windal and his son Corey, preparing lunch for them each day, and even Mr Cutugno acknowledged that he had lunch there on more than one occasion. It is clear that she had a good relationship with

the workmen and it is credible that Windal might have agreed not to charge the Applicants for breaking up the rock as she claimed. She gave a plausible and comprehensive account of what occurred and she was not shaken in cross-examination.

- 10 Mr Cutugno was in Bali between the afternoon of 27 July until 31 July. Once work commenced it would seem that he visited the site only fleetingly. His evidence that the base of the pool excavation was solid bluestone is not borne out by the photographs and, as will appear below, the invoice for the hiring charges of the excavating machinery appears to have been inflated.
- 11 The Respondent's supervisor was Mr Adlam. His attendances on site were recorded by the satellite navigation records of his car. Those records show that, during the period in which the excavation was taking place, he was present at the site for a short period or periods each day but generally he did not stay for very long. Apart from the satellite navigation records he seemed to have a poor recollection of events. For example, he was uncertain whether the workmen were on site when he was there on the second day, he was unsure when it was that a pile of soil that he was complaining about was cleared. He could not recall whether he saw the workmen on site on 3 August and he was unsure what machinery was on site on the last day. According to Mr Cutugno, the Respondent was building three swimming pools a week at the time and so it is perhaps unsurprising that Mr Adlam does not have a better recollection.

### **Negotiations**

- 12 On 13 May 2016 the Respondent provided to the Applicants a quotation for the construction of a swimming pool and spa in the back garden of their house for a price of \$61,200.00. The Applicants had obtained some quotations from a number of other pool companies and, following negotiations between Mr Cutugno and Mrs Chahine, the price was reduced to \$57,000.00.
- 13 Mrs Chahine said that during the course of these negotiations Mr Cutugno represented to her that:
  - (a) the work would be done for the quoted price and there would be no hidden charges;
  - (b) there would be no charge for the disposal of clean fill;
  - (c) there would be a charge for rock and although he could not give her a price for that it would only be about \$500.00;
  - (d) they had their own excavating machines;
  - (e) they would lay plywood on the tiles at side of the Applicants' house so that the tiles would not be broken by the Respondent's machinery;

- (f) he would be on site every day and if the Applicants wanted to make any changes to the pool that could be done because he would be there.
- 14 On 22 April one of the Respondent's staff members recorded a query whether it would be possible to give a rough estimate of how much it would cost for rock excavation. From an internal memo dated 16 June, it appears that Mrs Chahine asked about tipping fees being included.
- 15 Mr Cutugno said that Mrs Chahine asked him about Rock excavation and that his "standard reply" was "between \$5,000 and \$15,000". Although this might have been his standard reply, Mrs Chahine denied that it was said to her on that occasion and so I am not satisfied that it was.
- 16 On 17 June the Applicants signed a contract to construct the pool and spa for the agreed price of \$57,000.00. It was executed on behalf of the Respondent shortly afterwards.
- 17 On 21 June the Respondent asked the Applicants for a soil report and on 4 July they sent it a soil report dated 15 May 1998 that they had obtained for an earlier renovation. I accept Mr Cutugno's evidence that the soil report did not alert the Respondent to the extent of any rock on the site.

### **Progress of the work**

- 18 Determination of the dispute requires a careful examination of the sequence of events over the days in question. In that regard I had the detailed evidence of Mrs Chahine who was on site for the whole time and I accept the account that she gave.

### **Tuesday 26 July**

- 19 Work commenced on 26 July when a 5 tonne excavator and a Bobcat arrived on site together with their operators and the Respondent's foreman, Mr Adlam. No plywood had been laid over the tiles and, following complaints by the Applicants, Mr Adlam went to Bunnings and purchased some plastic which he laid over the tiles.
- 20 The excavator started digging and putting the spoil to one side of the excavation for it to be collected by the Bobcat and then taken out and placed in a truck in the street. It had rained the previous night and the ground was wet. The wheels of the Bobcat were slipping and it eventually became bogged. The excavator continued digging until it had nowhere else to deposit the spoil, whereupon the operators concluded that it was too wet to continue and ceased work.
- 21 At that time the operator told Mrs Chahine that there were rocks there but they were "free floaters" and so they were not a problem.
- 22 Altogether the operators were on site between 30 to 45 minutes and then left with their machinery. Mrs Chahine said they were gone by 9.00 to 9.30 am.

### **Wednesday 27 July**

- 23 The following day Mr Adlam arrived at 7am with two different operators. One of them, Windal, operated a 3.5 tonne excavator and his son, Corey, operated a machine called a “Posi-trak”. Mrs Chahine said that although the Posi-Trak managed to remove the soil and put it in a truck, it was smaller than the Bobcat and the 3.5 tonne excavator was also smaller and slower than the 5 tonne excavator had been. She said that the workmen were on-site between 7am and 3pm but they were waiting around for half an hour at a time for the Respondent to book a time to deliver the spoil to the tip. They also appeared to be working on the excavator.
- 24 Mr Chahine gave similar evidence. He said that the bucket on the smaller excavator was about half the size of that of the 5 tonne excavator and it appeared to be struggling to excavate the hole with the smaller bucket. He said that when he asked Windal why he had not brought back the 5 tonne excavator he was told that the Respondent had asked him to use the smaller one.
- 25 Mr Adler said that while he was there on that day the workmen struck rock. He said that he then told Mrs Chahine that the excavation would take longer and that there would be extra charges. That was denied by Mrs Chahine and I think that she has a more reliable recollection of events than Mr Adler but nothing turns on it.
- 26 On that day, the Respondent made application to a tipping company called Earth Solutions Group to deposit 100 m<sup>3</sup> of material. There was no explanation as to why this is not be done earlier but I am unable to find that this caused any of the delay complained of. It was approved the same day.

### **Thursday 28 July**

- 27 On 28 July, Mr Adlam arrived on site again at 7.38 am and left shortly afterwards. He said in evidence that he expected that the men “would have been there”, suggesting that he could not recall whether they were there or not.
- 28 According to Mrs Chahine, excavation continued as on the previous day. She said that she was told by Windal that sorting the rocks from the soil was a nuisance but that by doing that it the spoil was cheaper to dispose of.

### **Friday 29 July**

- 29 On 29 July work continued as before until 3pm when Windal informed Mrs Chahine that he was feeling unwell but that they would be coming back the following day. Mrs Chahine said that, by then, the excavation was almost complete. Mr Chahine said that when he arrived home on that date about 4.30 pm, Windal and his son were still there and were hosing the driveway. He said that he thought that the excavation then been completed.
- 30 On that same day, the Respondent sent an email to the Applicants, stating that:

- (a) the excavator would be back on site the following day to finalise the excavation;
- (b) they were trying to arrange the steel fixing for the following Monday but that it was weather dependent;
- (c) the plumbing was to be on the following Tuesday, 2 August and the steel inspection would be on the same day.

### **Saturday 30 July**

31 Notwithstanding what the Applicants had been told, no one appeared on site the following day.

### **Monday 1 August**

32 On 1 August the Applicants received an email from the Respondent to say that the excavator would be back on site to complete the excavation on Tuesday, 2 August or Wednesday 3 August if the weather was bad on the Tuesday. Steel fixing was to be on the fifth or sixth of August, plumbing was to be on the sixth or seventh and the spray concreting was to be on the 11<sup>th</sup> approximately.

### **Tuesday 2 August**

33 Mrs Chahine said that, on Tuesday 2 August Windal and Corey arrived on site about 7 am and the excavation was completed by 11 am. She said that they then left but came back at about 4 pm and cleaned off the crossover, the street and the driveway and garage.

### **Wednesday 3 August**

34 On Wednesday 3 August Mr Adlam arrived on site at 10.26 am and was there for 28 minutes. According to Mrs Chahine he asked why the excavators had left some soil on the site. She said that she told Mr Adlam that Windal had told her that they could use it as backfill and also put on the garden. She said that Mr Adlam told her that they needed that area to put the steel. She said that Mr Adlam also asked why another area had not been cleaned and Mrs Chahine told him that Windal had said that the Respondent would clean it.

35 Mrs Chahine said that Mr Adlam then produced his mobile phone and rang Windal and she heard him tell him to come back and clean and remove the rest of the soil.

36 The applicant's son Jason confirmed that there was no excavation done on that day.

37 At 4:24 PM the Applicants received an invoice from the Respondent, dated 26 July 2016, for \$11,400 which was stated to be for "Completion of Excavation". By Clause 2.2 of the contract, that amount was payable upon completion of excavation and also delivery of steel to the site and the steel

had not yet been delivered. The invoice was paid by the Applicants on 7 August.

#### **Thursday 4 August**

- 38 Mrs Chahine said that on 4 August Windal and Corey returned with the Posi-Trak and remove the soil. She said that they left at about 3pm. The excavator was not on site.

#### **Friday 5 August**

- 39 On 5 August the Applicants received a form entitled “Requested Variation” (“Variation 1”) with an accompanying invoice from the Respondent for tipping fees of \$1,782.00, which included a builder’s margin of 20%.
- 40 There is no provision in the contract document stating that the Respondent is entitled to make such a charge. Schedule 2 says that tipping fees are not included but there is no mechanism for these to be passed on to the Applicants.
- 41 Similarly, there is a provision in Special Condition 6 to the effect that, unless specified stipulated in Schedule 2, the building owner acknowledges that the removal of rock has not been allowed for in the contract price. However again, there is no mechanism for this cost to be passed on to the Applicants.
- 42 Mrs Chahine did not sign the variation form and she queried the charge with Mr Cutugno on that day, saying that Windal had said to her that he would not charge the Applicants for the rock hammer. No resolution was reached on the invoice and no tipping fees have been paid by the Applicants.

#### **Monday 8 August**

- 43 Mrs Chahine said that, on 8 August, she received further variation form entitled “Requested Variation” (“Variation 2”) with an accompanying invoice (Invoice 61550) from the Respondent, claiming an additional \$13,240.00 with respect to “Excavation over Contract Allowance”. The amount claimed is described in the invoice as follows:

“5 days excavation @ \$1800 per day (one day included in contract)	\$9,000.00
6 days Bobcat @ \$1100	\$6,600.00
5 days rock hammer hire at \$400	\$2,000.00
Discount as per Daniel’s authorisation	\$6,160.00
builder’s margin 20%	<u>\$1,800.00</u>
	<u>\$13,240.00”</u>

The actual days are not specified in the invoice.

- 44 Mrs Chahine sent an email challenging the claim, saying that there had only been 4 ½ days of excavation and that she had been told that there would be no charge for the rock hammer. She asked that the invoice be adjusted. The Applicants have not signed the variation form nor have they paid the amount sought of \$13,240.00.
- 45 Notwithstanding this dispute the work proceeded with the installation of the internal plumbing and the structural steel. An invoice for that stage of the work was sent to the Applicants on 10 August and paid two days later.

### **Suspension of work**

- 46 On 14 September 2016 the Respondent purported to suspend work pursuant to Clause 25 of the contract on the basis of the failure of the Applicants to pay for tipping fees and the additional excavation claimed. That clause entitled the Respondent to suspend work if the Applicants should fail to pay it "...in accordance with the terms of this Contract".
- 47 By a letter from its solicitor dated 28 February 2017 the Respondent gave notice, purporting to be pursuant to Clause 17.2 of the contract, that it intended to terminate the contract unless the two outstanding invoices were paid. The notice also alleged that the failure to pay the invoices was an act of repudiation by the Applicants but, notwithstanding that contention, the Respondent did not purport to accept the alleged repudiation and bring the contract to an end.

### **The quantity of rock**

- 48 The amount of rock in the excavation was disputed. Mrs Chahine said that on 26 July the operator told him that the rocks were just floaters that were easily removed. Mr Chahine said that the excavator first hit rock after it had been there for about 40 minutes.
- 49 Mr Cutugno said that it was a non-standard excavation with a lot of rock and clay and that the finished excavation had a solid bluestone base.
- 50 The photographs show floaters on the sides of the excavation and some broken pieces of rock. I saw broken rock when I visited the site and rocks embedded in the soil in various places at the sides of the excavation but nothing to indicate solid rock.
- 51 I do not accept that the excavation was in solid rock but I am satisfied that there was a considerable amount of rock encountered later in the excavation that had to be removed. According to Mrs Chahine, whose evidence I accept, most of the rocks were small but there were a few large ones that had to be broken up with a rock hammer and she was told by Windal that, because she had looked after him and his son, he would not charge the Applicants for breaking up these larger rocks.

### **An appropriate rate**

- 52 Mrs Chahine said that, in a subsequent discussion concerning the claim for additional excavation, Mr Cutugno suggested that she offer cash to the excavators. Mr Cutugno said in evidence that Mrs Chahine agreed to pay the excavator \$10,000 in cash. Mrs Chahine denied that and I prefer her evidence.
- 53 Mrs Chahine said that she told Mr Cutugno that she would ring her nephew, who is an excavating contractor, to find out what an appropriate daily charge would be for the excavation. She said that shortly afterwards she heard Mr Cutugno on the telephone at the side of her house saying to somebody: “We need to be sticking to the same story”. Although I accept that she heard Mr Cutugno say that and that it might well have aroused her suspicions, it is impossible to make any finding as to what he was talking about or to whom he was speaking.
- 54 On 10 August Mrs Chahine sent an email to the Respondent, saying that she had made enquiries and found that the going rate for excavation machinery and operators ranged from \$150 to \$190 per hour for a five tonne excavator. In an email dated 10 August she offered to pay the Respondent \$4,560.00, being three extra days at \$1,520.00 but this was rejected.
- 55 The contract provided that a five tonne excavator was to be used. Instead, a 3.5 tonne excavator was used. From the photographs, it is apparent that the 5 tonne machine was larger and had a bigger bucket. That was also the evidence of the Applicants.
- 56 The rates claimed in Invoice 61550 are \$3,300.00 a day for the excavator, the Bobcat and the rock hammer. Presumably, the Bobcat charge includes the hire of the truck that carried away the soil. This is more than twice the amount that Mrs Chahine said she was told was the “going rate”. It is also slightly less than twice the amount set out in the prime cost schedule in the contract of \$1,800.00 per day for excavation.
- 57 No expert evidence was given to justify such a high rate as that set out in the invoice. In his evidence Mr Cutugno said that the cost of excavation was normally \$2,500.00 to \$3,000.00 a day. He did not explain why, if that were the case, Schedule 1 of the contract provided for only \$1,800.00 per day.
- 58 The invoice provides for an immediate discount of \$6,160.00. This figure appears in the invoice as originally rendered. It was not suggested that it was arrived at as a result of any negotiation with the Applicants. That raises the question why, if the original charge were genuine, would a contractor offer such a large discount without being asked?
- 59 What purports to be an invoice from the contractor, Pelle Earthmoving & Haulage, dated 13 August 2016, has been tendered. The author of this document was not called to prove its authenticity. It provides for a daily rate of \$2,066.67. With GST, that becomes \$2,273.34. If that is multiplied

by the six days claimed by the Respondent, that gives a figure of \$13,640.04 which, although not identical, is somewhat similar to the amount claimed in Invoice 61550 after the deduction of the alleged discount contained in the invoice.

- 60 I am not satisfied that this “discount” was genuine. It looks to me as though the figures were first inflated and then the alleged “discount” was taken off, possibly to increase the likelihood that the Applicants would pay the amount claimed.

### **The relevant contract terms**

- 61 General condition 6 of the contract provides as follows:

“Provisional Sum and Prime Cost Requirements.

- (a) where the builder specifies the Prime Cost Item and/or Provisional Sums the builder warrants that they have been calculated with reasonable care and skill taking account of all the information reasonably available at the date the contract is made, including the nature and location of the site.
- (b) The exact details and breakdown of Provisional Sums and Prime Costs are listed in Schedules 1 and 2 of the Contract. The Builder must provide the Building Owner with a copy of any invoice, receipts or other document that shows the cost to the Builder of any prime cost item, or that relates to any provisional sum, in a domestic building contract and must do so as soon as practicable after receiving the invoice, receipt or document.
- (c) If a lesser amount is spent, than that estimated and included in the Contract price, the unspent amount is to be deducted from the contract price and the next progress payment is reduced accordingly.
- (d) If a greater amount is spent the difference between the amount spent on the estimated amount, plus the percentage set out in Item K of the Contract Details is added to the contract price. The additional sum due (if any) is added to and due with the next progress payment.
- (e) Where there are no further progress payments to be made, the Builder must calculate the amount and notify the Building Owner as soon as practicable. The amount of the difference should be paid or allowed with the Completion payment as the case may be.”

- 62 Further, by s.21(1) of the *Domestic Building Contracts Act 1995* (“the Act”) a builder must not enter into a domestic building contract that contains an amount for a prime cost item or provisional sum that is less than the reasonable cost of supplying the article or carrying out the work to which the sum relates.

63 In Schedule 2 of the contract no provisional sums are provided. There is a place in the provisional sums section to include tipping fees as a provisional sum but the word “Nil” has been inserted. There is also a place in Schedule 2 for the Respondent to specify how any excess amount in regard to the tipping fees is to be determined and in that position on the page there are the words: “Not included”.

64 In Schedule 1 of the contract the single “Prime Cost” item described is:

“1 Day Excavation \$1,800.00”.

That is described under the heading: “Breakdown of the cost estimate for each item (show estimated quantities of materials or unit cost to the builder of the item)”. A 20% margin is said to be chargeable on any excess.

65 Special condition 1 of the contract provides as follows:

“The Building Owner acknowledges that an allowance of one day has been made for excavation. In situations where additional excavation work (“Additional Work”) is required as a result of unforeseen circumstances, the cost associated with carrying out the Additional Work will be calculated in accordance with Clause 6 Schedule 1 of this contract”

66 Special condition 6 provides as follows:

“Unless stipulated in Schedule 2 of this Contract, the Building Owner acknowledges that the removal of rock has not been allowed for in the contract price.”

### **Legal requirements**

67 By s.3 of the Act, the terms “prime cost item” and “provisional sum” are defined as follows:

"prime cost item" means an item (for example, a fixture or fitting) that either has not been selected, or whose price is not known, at the time a domestic building contract is entered into and for the cost of supply and delivery of which the builder must make a reasonable allowance in the contract;”

“provisional sum is an estimate of the cost of carrying out particular work (including the cost of supplying any materials needed for the work) under a domestic building contract for which a builder, after making all reasonable inquiries, cannot give a definite amount at the time the contract is entered into;”

68 Since additional excavation is not “an item” that is to be “selected” but rather, work to be carried out, the amount of \$1,800.00 in the contract in the present case was a provisional sum, not a prime cost allowance.

69 Sections 22 of the Act provides as follows:

“21. Details of prime cost items and provisional sums must be set out in writing

If a domestic building contract provides for any prime cost items or provisional sums, the builder must not enter into the contract unless-

- (a) in the case of a major domestic building contract, the contract contains a separate schedule for each item or sum that sets out—
  - (i) a detailed description of the item or of the work to which the sum relates; and
  - (ii) a breakdown of the cost estimate for each item or sum (showing at least the estimated quantities of materials that will be involved and the unit cost to the builder of the item or sum); and
  - (iii) if the builder proposes to charge any amount in excess of the actual amount of any increase to the item or sum, how that excess amount is to be determined;
- (b) in the case of any other contract, the builder gives the building owner before entering into the contract a written document that sets out for each item or sum the information required by paragraphs (a)(i), (ii) and (iii).

Penalty: 50 penalty units.

70 Sections 23 of the Act provides as follows:

“22. Builder must supply evidence of cost of prime cost items and provisional sums

“A builder must give the building owner a copy of any invoice, receipt or other document that shows the cost to the builder of any prime cost item, or that relates to any provisional sum, in a domestic building contract and must do so as soon as practicable after receiving the invoice, receipt or document.

Penalty: 20 penalty units.”

71 The words: “1 day excavation \$1,800” are not how a provisional sum would normally be described. However when looks also at Special Condition 1 and reads it with Schedule 1, it appears that the intention is that if the excavation takes more than one day then the Applicants are to pay for the extra days. The Act requires that the unit cost and how that excess amount is to be determined must be set out in the schedule, which in this case is Schedule 1. I think the only sense that I can make of the words and figures in Schedule 1 is that, for each additional day of excavation, the Applicants are to pay \$1,800.00. I am fortified in that interpretation by observing that the claim in the Respondent’s invoice refers to \$1,800.00 a day, although it also adds other things.

### **The number of days**

- 72 The soil that had been piled on one side of the excavation at the suggestion of Windal was removed on 3 August at the direction of Mr Adlam, not the Applicants. Mr Adlam said that it needed to be moved so that the area would be available for the steel fixers to use but according to Mrs Chahine, the steel fixers did not use that area. In any case, it does not seem to me that the removal of that soil or the subsequent cleaning and tidying up amounts to “excavation” within the meaning of the contract.
- 73 Item (e)(iii) of the specification provides under the heading “Equipment to be used” the words: “5 tonne/10 tonne”. The Applicants maintained during the hearing that this referred to the excavator that was to carry out the excavation work and that interpretation was not disputed.
- 74 The excavation done on 26 July was only for a very short time only and was not charged by the Respondent. In any case, the work was finished on 2 August in the morning so it is reasonable to assume that, had a full day’s excavation been done on 26 July, work on 2 August would not have been required.
- 75 On that basis, I find that the excavation was carried out over four days on 27, 28, 29 July and 2 August. The first of these days was included in the Respondent’s scope of works so the further time taken was three days. At the contract rate, that would be \$5,400.00.
- 76 However that was using a smaller machine than the one required by the specifications. Both Mr and Mrs Chahine gave evidence as to the amount of soil removed by the larger machine on the first day in less than an hour and suggested that the larger machine could have done the job in one day. It is impossible to make any finding in that regard because not a great deal of rock was encountered at that time. However from the description of the comparative sizes of the two machines and the evidence of the performance of each as observed by the Applicants, it is more probable than not that the larger machine would have taken less time. The agreement to pay extra if the excavation took more than one day was on the basis that the specified machine would be used.
- 77 Since the work was to be carried out in accordance with the specifications as well as the contract and the plans, the failure to use a 5 tonne or a 10 tonne excavator was a breach of contract.
- 78 Moreover, because of the high cost of excavation, the danger of the excavation taking more than one day and the considerable cost consequences to the Applicants if it did, the breach was not a minor one.
- 79 The Applicants are entitled to be put in the position they would have been in had the breach of contract not occurred. It is impossible to say on the evidence before me how long the excavation would have taken had the Respondent used the excavator that the contract required it to use. Doing the best that I can, I will accept the builder’s claim for three days at

\$1,800.00 per day, divide it by 5 and multiplied the result by 3.5 to take account of the reduced capacity of the excavator that was used. That results in a figure of \$3,780.00.

### **Rock disposal and tipping fees**

- 80 Mr Cutugno said that it costs from nothing at all to \$500.00 to deposit clean fill in a tip, nothing at all for clean rock but \$1,000.00 for a mixed load.
- 81 In an attachment to an email that she sent on 15 August, Mrs Chahine said:  
“According to your excavators – they paid for the tip fees themselves – but you required them to note when they went to the tip. When we have rung other excavators – they have all confirmed that all excavators pay their tip fees. In accordance with the contract we will pay for the tip fees provided that receipts are given that clearly indicate Horizon paid for the tip fees and that these trucks came from our property”.
- 82 She said in evidence that she was informed by the excavators that they had paid the tipping fees themselves. Mr Cutugno said that the Respondent had paid the tip fees and produced some supporting bank statements. On the evidence presented, I find that it is more probable than not that the Respondent did pay the tip fees that it claims.
- 83 However there is nothing in either schedule fixing a provisional cost for removal of rock or tipping fees. As a consequence, the cost adjustment provisions of General Condition 6 do not apply.
- 84 If the Respondent wished to charge the Applicants for removal of rock or tipping fees, it was open to it to include those as provisional sums and provide the details required by both the Act and the contract in Schedule 2, but it has not done so.
- 85 Any provision in a domestic building contract under which the price may be increased to reflect increased costs of labour or materials is a cost escalation clause within the meaning of s.15 of the Act and it is void unless a notice in accordance with s.15(3) has been given and the requirements of s.33(2) have been met. In this case there was such a warning, but only in regard to increases due to prime cost and provisional sum adjustments, variations, interest and extra costs for delay.
- 86 Item (b)(vi) of the specifications stated that tip fees were excluded but provided no mechanism for the Applicants to pay for them. Similarly, Special Condition 6 stated that removal of rock was not allowed for in the contract price but provided no mechanism for the Applicants to pay for it if the builder should choose to remove it.
- 87 Item (b)(iv) of the specifications required the Respondent to remove all spoil from site. It would have been open to the builder to seek a variation to the scope of works but it did not do so until the amount sought for tipping fees and rock disposal had already been incurred so there was no

opportunity given to the Applicants to decide whether or not to accept such a variation. They did not accept it.

- 88 The procedures for builder's variations set out in Clause 13 of the contract and also s.37 of the Act relate to variations of the drawings or specifications. In this case, it was not a variation to the scope of works that was sought. Even if the variation had been accepted it was still the Respondent's obligation to remove the spoil from the site. Indeed, it had already done so. What the Respondent was seeking was a variation to amend the contract by increasing the contract price by the amount of the tipping fees.
- 89 This Tribunal has a limited power under s.37(3)(b) of the Act to allow claims for the cost of builder's variations of the drawings or specifications in exceptional circumstances where it would not be unfair to do so. However, that power does not extend to increasing the contract price where the scope of works has not been changed.
- 90 I am satisfied that, during the pre-contractual discussions, Mr Cutugno informed Mrs Chahine that she would have to pay the tipping fees and that they could be up to \$500.00. However there was nothing about that included in the written contract.
- 91 In general, parol evidence is not admissible to add to, subtract from, vary or contradict the language of a written document (see *Cheshire & Fifoot Law of Contract* 9<sup>th</sup> Australian edition para 1.51). It is sometimes possible to spell out a collateral contract, that is, an undertaking that is given in consideration of the other party entering into the main contract. To be enforceable, a collateral contract must generally not be inconsistent with the main contract and it must not be one that would be expected to be incorporated into the main contract (see *Cheshire & Fifoot* para 1.53; 10.3), although those requirements are not inflexible.
- 92 Even if a collateral contract could be spelt out, s.132(1)(b) of the Act would render it void to the extent that it excluded, modified or restricted any rights conferred on the applicants by the Act.
- 93 Since the claim is not a variation or a prime cost or provisional sum adjustment in accordance with the terms of the contract, any contractual provision requiring the Applicants to pay these additional sums is void for the reasons given and the amounts claimed are not recoverable.

### **The change to the spa**

- 94 The Respondent's steel fixer suggested to Mrs Chahine that the design be altered by moving the spa out from the pool. After some discussion with Mr Cutugno and Mr Adlam it was agreed to make the change in consideration of the payment by the Applicants of \$600.00 to Mr Cutugno and \$600.00 to the steel fixer. Mrs Chahine produce signed receipts for each of these payments and the payments were also noted on the Applicants' copy of the contract.

- 95 On 19 August 2016 Respondent sent a variation (“Variation 3”) for the change to the spa, stating that it was done at “No Charge”. Mrs Chahine said that, since she had already paid for the change and since it was not done at no charge, she did not sign this variation.
- 96 The Applicants now seek a refund of some of this money on the basis that the engineering fees and the cost to amend the building permit did not amount to that much. I think that this claim is misconceived. It was agreed that the cost to change the spa would be \$1,200.00 and that was paid. Since the agreed alteration to the spa was made, the amount paid is not recoverable.

#### **The claim for damages for delay**

- 97 The Applicants claim damages for the delay in completing their pool and because their backyard is in a mess.
- 98 The contract period for completing the pool is well and truly past. However there is no provision for payment of liquidated damages so actual damage must be proven and there is no evidence in regard to that. I am not satisfied that there is any compensable loss of amenity.

#### **The claim for damage to the property**

- 99 Mr Adlam accidentally cut off the power cord to the Applicants’ television set in the garage and one of the drivers of the excavator damaged a wall in the garage. Each incident was witnessed and it is not denied that they occurred.
- 100 The Applicants tendered a quotation from a painter for \$550.00 to repair the hole in the wall and repaint the wall in a suede paint to match the existing surface. Mr Cutugno said that that was an excessive price considering the very small hole in the wall that was made by the machine.
- 101 It would have been open to the Respondent to take steps to rectify this damage itself but it did not do so. I have no other evidence as to the cost to rectify the damage that was caused. The surface in question has a special finish and it seems likely that the painter will have to paint the whole panel rather than the immediate damaged area. One would expect also that there would be a minimum call-out charge for a painter to attend the site. The amount sought will be allowed.
- 102 The other claim is for \$200 with respect to the plug that was cut off the television set. It seems to me that the Applicants could purchase a replacement plug at a relatively small cost. I will allow \$25.00.

#### **Cost of completion**

- 103 The Applicants seek the cost of completing the pool using another contractor.
- 104 At present, the contract has been suspended by the Respondent for non-payment of amounts that I have found are not payable. Although the

Respondent has contended that the Applicants have repudiated the contract, it has not elected to accept the alleged repudiation and bring the contract to end.

105 Similarly, the Applicants have not purported to terminate the contract.

106 While I am not satisfied that the Respondent had grounds to suspend the work the contract is nonetheless still on foot and binds both parties. It is therefore still open to the Respondent to complete construction of the swimming pool and receive the balance of the contract price, adjusted in accordance with these reasons.

### **Conclusion**

107 I find that the amount of the contract price payable to the Respondent is as follows:

Contract price	\$57,000.00
Provisional sum adjustment for excavation	<u>\$ 3,780.00</u>
	\$60,780.00
Less: Amount paid	<u>\$37,050.00</u>
Balance of contract price	<u>\$23,730.00</u>

108 Of this, the provisional sum adjustment of \$3,780.00 is payable now and the balance of the contract price is payable in accordance with the terms of the contract. However, pursuant to section 53 of the Act I think that it is fair that the amounts awarded for damage to the premises, totalling \$575.00, be set off against the provisional sum adjustment of \$3,780.00 and I will so order.

109 There will be liberty to apply and costs will be reserved for further argument.

**SENIOR MEMBER R. WALKER**