

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1638/2015

CATCHWORDS

CONTRACT – Owners and builder entered into preparatory work agreement requiring preliminary work to be performed by builder prior to parties signing a domestic building contract; termination of preparatory work contract by owners on basis of being unable to obtain a planning permit and no work being performed by the builders, parties accept contract as at an end; whether builder performed preparatory work; whether owners entitled to a refund of preparatory work payment.

FIRST APPLICANT	Tom Graze
SECOND APPLICANT	Ingrid Marianne Graze
RESPONDENT	Natural Pools Australia Pty Ltd (ACN: 141 038 379)
WHERE HELD	Melbourne
BEFORE	Member F. Marks
HEARING TYPE	Hearing
DATE OF HEARING	18 March 2016
DATE OF ORDER	5 April 2016
CITATION	Graze v Natural Pools Australia Pty Ltd (Building and Property) [2016] VCAT 513

ORDERS

1. Ingrid Marianne Graze is joined as second applicant.
2. The respondent must pay the applicants \$18,800.
3. The respondent must reimburse the applicants the applicants' filing fee of \$575.30.

MEMBER F. MARKS

APPEARANCES:

For the Applicants	Mr Tom Graze in person
For the Respondent	Mr Gary Young, Director

REASONS

- 1 The applicant owners reside in Plenty. The respondent builder builds swimming pools and, at the relevant time, built houses. This proceeding is about whether the owners are entitled to a refund of \$18,800, paid for the performance of specified work under a preparatory work agreement dated 7 January 2011 (“**PW Agreement**”).
- 2 The owners terminated the PW Agreement because they were unable to obtain the requisite planning permit to build an underground room with a kitchen. It is accepted that the PW Agreement is at an end and the specified preparatory work has not been carried out. The parties have not entered into a domestic building contract for the construction of a swimming pool and associated building works.
- 3 The owners say that the builder’s right to any payment depended on performance of the PW Agreement by the builder. They say that no payment should be made because the builder has not carried out the preparatory work specified in the PW Agreement.
- 4 The builder says that the preparatory work payment is non-refundable. It says that it has carried out additional work. It says it has paid commission to its sales employee on the owners agreeing to its quotation to build a pool and carry out associated building works.
- 5 The issues for determination are:
 - (a) Whether the work performed by the builder is preparatory work as specified in the PW Agreement;
 - (b) Whether the builder is entitled to retain a sales commission of \$14,635.

The Hearing

- 6 The parties were self represented at the hearing. Mr Graze appeared for himself and his wife, Ingrid Marianne Graze. Mr Graze gave evidence for the owners. Mr Graze’s statutory declaration made on 10 March 2016 and the attached exhibits TG-1 to TG-11 were in evidence.
- 7 Mr Young, director of the builder, appeared for the builder and gave evidence. At the start of the hearing Mr Young said the builder had incurred costs and disbursements of \$25,475 under the PW Agreement.

Background Facts

- 8 On 7 February 2009, a series of bushfires, known as the Black Saturday bushfires, burnt vast areas of land across Victoria. They caused major devastation to many communities and loss of life. Following the Black Saturday bushfires, the owners decided to build a completely self-contained underground room and swimming pool.

- 9 The underground room was to operate as a fire bunker and the pool was to be a source of water supply, in the event of a bushfire. The underground room was to be connected to the owners' existing home and share a common wall with the swimming pool.
- 10 In late 2010 the builder provided a series of quotations for the construction of a swimming pool and associated works. On 15 December 2010 the builder sent a letter to the owners attaching consent forms for the owners to sign and a preparatory work agreement.
- 11 The letter specified the work to be performed by the builder. It stated that a town planning permit may be required before the builder could apply for a building permit, which could delay the commencement of building works by up to 12 weeks. It suggested the owners contact the local Council to determine whether a planning permit was needed. If required the builder would apply for the planning permit and advise the owners of any costs.
- 12 On 7 January 2011 the owners accepted the builder's revised quotation dated 15 December 2010 for \$540,504. It allowed a provisional sum of \$242,000 for the construction of an underground room and associated works. On the same day the owners entered into the PW Agreement which required the owners to pay \$18,800 to the builder for the performance of the work set out in the PW Agreement.
- 13 The PW Agreement required the builder to have drawings and engineer's specifications prepared on behalf of the owners, to make application to the relevant authority for approval of the domestic building works shown on the drawings and described in the specification and to pay all fees necessary to obtain such approval.
- 14 The PW Agreement authorised the builder to make all necessary applications for requisite approvals to the relevant authority on behalf of the owners and to pay disbursements to effect performance of the work.
- 15 On 7 January 2011 the owners signed consent forms allowing the builder to build the swimming pool on their property and obtain a soil report. Shortly after signing the PW Agreement, the owners were advised that the Council required a town planning permit for the construction of the underground room. The builder accepted that the preparatory work could not commence until the owners had obtained a planning permit.
- 16 At the end of January 2011, on the suggestion of the builder, the owners engaged and paid Chris Runting and Associates, surveyors, to survey the owners' property. On 8 February 2011 the owners and the builder signed a Proposal for Design Services ("**Design Services Agreement**"). The owners authorised the builder to prepare a landscape concept plan for the pool and spa and their garden for a proposed fee in the range of \$5,000 to \$6,000.
- 17 The owners paid the builder a deposit of \$1,500 as required by the Design Services Agreement. Between February and April 2011 Mr Meloury, the builder's landscape designer, produced an original version and revised

version of a landscaping concept design which did not meet the owners' brief.

- 18 On or about 27 June 2011, with the agreement of the builder, the owners retained the services of another designer to prepare the necessary landscaping designs. The owners agreed to the builder retaining their deposit of \$1,500 under the Design Services Agreement because work had been done on the landscaping concept plan, although it was of no use to the owners. It was accepted that the owners would use another designer to prepare the landscaping concept plan.
- 19 On or about 11 May 2012, following the completion of the concept design drawings of an integrated pool and underground room by the new designer, the owners applied for a planning permit. The council deemed the underground room to be a separate dwelling because it contained a kitchen.
- 20 The Council refused to issue a planning permit for an underground room containing a kitchen. On or about 4 December 2012 the Council issued a planning permit for the construction of the underground room which required the removal of the kitchen. The owners decided that the permit was insufficient for their requirements. The owners did not appeal the Council's decision.
- 21 During 2012 and 2013 the builder contacted the owners from time to time for an update on the town planning application. On each occasion the owners advised the builder that they were still in dispute with the Council.
- 22 In late 2014 the owners advised the builder that they could not go ahead with the construction of the pool and associated works because they could not get the requisite planning permit. They requested a refund of their preliminary work payment. The builder has refused to refund any amount to the owners.

Has the builder carried out the specified preparatory work?

- 23 Mr Young accepted that the builder did not carry out the preparatory work specified in the PW Agreement. He admitted that the builder did not provide drawings or engineering specifications to the owners, did not obtain a soil report and did not apply for a planning or building permit as required by the PW Agreement. He said that the builder was waiting for the necessary planning permit to be obtained before it could proceed with this preparatory work. However, he said that the builder performed other work for which it was entitled to be paid under the PW Agreement.
- 24 Mr Graze relied on a statutory declaration made by David Kehoe on 10 March 2016. Mr Kehoe declared that he was employed by the builder between April 2006 and December 2011. He explained his involvement in the project from August 2010 up to the time he ceased to be employed by the builder. He declared that following the signing of the PW Agreement and the owners' payment of \$18,800 on or about 11 January 2011, no further site meetings were held with the owners.

25 Mr Kehoe declared that between January and December 2011 he made follow up calls to Mr Graze to discuss the progress of the project. He declared that on each occasion Mr Graze told him that the project was on hold until a satisfactory landscape design was produced by another designer and Council permit issues were resolved regarding the design of the underground room and integrated pool.

Design development work: \$6,820

26 Mr Young claimed that the builder was entitled to be paid \$6,820 for design work carried out by Mr Meloury, the builder's landscape designer. He said Mr Meloury prepared landscaping concept design drawings for the owners and visited the owners' home on various occasions. Mr Young accepted that Mr Meloury had not provided plans to the owners' liking. However, he said that this did not mean that the owners did not have to pay for Mr Meloury's work.

27 Mr Young said he was advised by Mr Meloury that Mr Meloury spent 62 hours on the design development and that his hourly rate was \$100 plus GST. Mr Young did not provide any documentary evidence to substantiate these costs. Nor did he provide any evidence of the actual work performed or time spent on each task.

28 Mr Graze gave evidence that Mr Meloury's landscaping costs related to his work done under the Design Services Agreement and not to the preparatory work set out in the PW Agreement. He said he told Mr Meloury, when they engaged him to work on the Design Services Agreement, that they wanted to keep their current landscape. He said he briefed Mr Meloury to design an underground room connected to their home, which would run along the length of the proposed pool, with acrylic windows. He told Mr Meloury he wanted simple pool landscaping to fit in with the owners' bush block.

29 He said that on or about 25 February 2011 Mr Meloury produced an initial design that showed new landscaping around the entire home with a small underground room which was not connected to the proposed pool or the owners' existing home. He said he told Mr Meloury that the design did not respond to the owners' brief. He said on or around 7 April 2011 Mr Meloury presented the owners with a revised design which again did not respond to the owners' brief. He said the revised drawings eradicated most of the owners' current garden and again, failed to connect the underground room to his home or the proposed pool.

30 Mr Graze said that he spoke with David Kehoe of the builder on separate occasions and told him that Mr Meloury's drawings did not show a connection between the underground room and his home and the proposed pool. He said Mr Kehoe agreed that neither the original nor revised plans reflected the owners' brief.

31 He said that he agreed with Mr Kehoe to bring the Design Services Agreement to an end. He agreed to the builder retaining the owners' \$1,500

deposit as some drawings had been done, although he said they were of no use to the owners. He said Mr Kehoe agreed to the builder not requiring any further payment under the Design Services Agreement.

- 32 The initial and revised design drawings prepared by Mr Meloury were in evidence. I accept that the drawings show no connection between the underground room and the owners' home and proposed pool.
- 33 I accept Mr Graze's evidence that the builder's designs did not respond to the owners' brief. I accept that this was the reason why Mr Kehoe agreed to the owners terminating the Design Services Agreement and engaging another designer to prepare the design concept and drawings.
- 34 I do not accept Mr Young's evidence that the builder should be paid just because Mr Meloury carried out some hours of design work in addition to that which the builder charged the owners under the Design Services Agreement.
- 35 I find that Mr Meloury's work was performed under the Design Services Agreement and not the PW Agreement. The PW Agreement clearly identified the preparatory work to be done by the builder which did not include any landscaping design work. I find that the Design Services Agreement set out the landscaping design concept work which Mr Meloury agreed to do. I find that Mr Meloury failed to provide any drawings that responded to the owners' brief.
- 36 I find that the builder has not made out its claim for \$6,820 for work claimed to be carried out by Mr Meloury under either the PW Agreement or the Design Services Agreement.

Cost planning of pool options/underground room: \$726 and \$2,100

- 37 Mr Young said that the builder was entitled to claim his director's costs. He estimated these costs to be 8 hours at \$110 per hour plus GST for review, amounting to \$726.
- 38 Mr Young said that the construction project was complex and involved town planning issues. He said he had a number of meetings and telephone discussions relating to the town planning issues and did a lot of work on costing the building works. He said that when he initially went to the owners' home the concept was for a rumpus room and that the concept developed over time. He said that the PW Agreement concurrently covered the pool and the landscaping and the builder did internal drawings which were not sent to the owners.
- 39 I accept that Mr Young may have had discussions about town planning issues relating to the construction of the underground room shortly after the parties signed the PW Agreement on 7 January 2011. However, Mr Young did not provide any evidence of the actual work that he did, the date when he carried out the work and the time spent on various tasks. His evidence was couched in terms of the work that he was likely to have performed at

some time after the PW Agreement was signed on 7 January 2011. He did not provide any documentary evidence to support this claim.

- 40 I am not satisfied that Mr Young's evidence supports the builder's claim for the work claimed to be done after 7 January 2011 amounting to \$726. Further, I find that any internal work that the builder carried out did not form part of the work specified in the PW Agreement.
- 41 Mr Young said that the builder was entitled to claim the builder's estimator's costs. He estimated these costs to be 28 hours at \$75 per hour totalling \$2,100.
- 42 Mr Young said the estimator did further work after the PW Agreement was signed to determine the accuracy of the provisional sum of \$242,000 allowed in the quotation dated 15 December 2010, for the construction of the underground room and associated works. He said the estimator worked from Mr Meloury's drawings and prepared internal estimates.
- 43 Mr Graze disputed Mr Young's evidence. He said that any work claimed by the builder did not form part of the preparatory work listed in the PW Agreement. He said that the work claimed was work that had been done to prepare the quotation, prior to the revised quotation being issued. He said no further work could be done until planning approval was obtained.
- 44 I do not accept Mr Young's evidence that the costs which the builder claimed are costs for which the owners are liable to pay. Mr Meloury's drawings were not accepted by the owners as they bore no resemblance to the owners' brief. There were no approved or agreed drawings on which the builder could calculate the provisional sum beyond that which it had provided in its quotation dated 15 December 2010.
- 45 Further, Mr Young did not explain how the estimator's work formed part of the preparatory work specified in the PW Agreement. I am not satisfied that the builder is entitled to claim for the estimator's work. I find that Mr Young has not provided evidence of the actual work carried out by the estimator, the date when the work was performed, or the time spent on that work.
- 46 I find that the builder has not made out its claim for \$726 and \$2,100.

Site Visits, email and telephone attendances: \$897 and \$297

- 47 Mr Young claimed \$897 for 3 site visits, each of which he estimated to be for 3 hours at \$90 per hour. He said the builder also claimed \$297 for telephone calls and emails which he estimated to be 3 hours' work at \$90 per hour.
- 48 Mr Young did not provide any evidence of when the site visits took place, when emails were sent and telephone calls made. I find that the builder has not made out its claim for these costs.

Sales commission: \$14,635

49 Mr Young claimed \$14,635 for sales' commission allegedly paid to David Kehoe, its sales employee. He said the payment of the commission was authorised by the owners under the PW Agreement and was non-refundable.

50 Paragraph E of the PW Agreement relevantly provided:

“E. TERMS AND CONDITIONS OF THIS AGREEMENT:

“2. The Builder is hereby authorised by the Building Owner to:

-
- Make other disbursements including commission relating to the purchase of this pool.

3. The Building Owner will pay *\$18,800 (incl GST) to the Builder for the performance of the above.

*The above amount is included in the quoted price.

Please note that the disbursements to effect the above, exceeds the amount payable, therefore this amount is non-refundable.”

51 Mr Young said the builder paid Mr Kehoe commission for selling the pool to the owners. I take “selling” to mean obtaining the owners agreement to the purchase price of the pool set out in the quotation dated 15 December 2010.

52 Mr Young was unable to give evidence of the actual commission paid to Mr Kehoe or the date on which the commission was paid. He said that Mr Kehoe's employment contract allowed a commission of 3% to be paid on the agreed quoted purchase price of a concrete swimming pool, exclusive of GST. He calculated Mr Kehoe's commission as 3% of \$487,849, being the quoted purchase price of the pool set out in the quotation dated 29 November 2010. However, he agreed that the relevant quotation was dated 15 December 2010.

53 He said that the builder paid sales commission to its employees where, as in this case, a purchaser had not signed a domestic building contract for the construction of the pool and associated building works.

54 I am not satisfied that the builder is entitled to retain \$14,635 for commission. First, there is no documentary evidence that the builder has paid this amount to Mr Kehoe. Second, Mr Young's evidence is that he does not know the amount paid to Mr Kehoe. Third, the amount claimed by the builder is not based on the agreed quoted price. Fourth, the parties did not enter into a domestic building contract for the construction of the pool and associated building works. Fifth, the construction of the pool was subject to planning approval being obtained.

55 I find that if any commission was paid, the amount of which is not in evidence, such commission was paid before the parties had entered into a

contract for the construction of the building works. I find that any commission paid, was not commission paid on an enforceable contract for the construction of a swimming pool and associated works. I find that the builder is not entitled to retain the amount of \$14,635.

56 Mr Young claimed that paragraph E of the Agreement allowed the builder to retain the owners' payment of \$18,800, including commission, because it was stated to be non-refundable.

57 I do not accept Mr Young's contention. Paragraph E refers to disbursements incurred to effect the specified work performed by the builder under the PW Agreement. Here, I have found that the builder has not performed any work under the PW Agreement. Further, I have found that no disbursements have been incurred as a result of work performed under the PW Agreement because no work has been performed under that agreement.

CONCLUSION

58 For the reasons set out above I will order that the builder must pay the owners \$18,800 being a refund of the amount paid by the owners to the builder in January 2011. I will also order that the respondent must reimburse the owners their filing fee of \$575.30.

MEMBER F. MARKS

5 April 2016