

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT Reference: D129/2009

CATCHWORDS

Domestic building, variations, alleged defects, swimming pool, external paving, time, delays, liquidated damages

APPLICANT: Ian Barker & Associates Pty Ltd (ACN 093 099 524)

FIRST RESPONDENT: Lou Capanolo

WHERE HELD: Melbourne

BEFORE: Senior Member M. Lothian

HEARING TYPE: Hearing

DATE OF HEARING: 5 & 6 October 2009

DATE OF ORDER: 22 October 2009

CITATION: Ian Barker & Associates Pty Ltd v Capannolo (Domestic Building) [2009] VCAT 2337

ORDER

- 1 The Principal Registrar is directed to note that the Respondent's family name is spelled "Capannolo".
- 2 The Applicant must pay the Respondent \$6,161.42 forthwith.
- 3 Costs are reserved and there is liberty to both parties to apply.

SENIOR MEMBER M LOTHIAN

APPEARANCES:

For Applicant Mr I Barker, director

For Respondents Mr L Capannolo in person

REASONS

- 1 The Applicant is a landscape contractor. It entered a contract with the Respondent, Mr Capannolo, to build a swimming pool and undertake extensive landscaping works at the Respondent's home. There is a dispute between the parties about one matter concerning variations, whether the works were complete by the date for completion and consequent liquidated damages, defects and the cost of rectification. The Applicant was represented by a directors, Mr Ian Barker. Mr Scott Tymkin of the Applicant was also present and gave evidence. The Respondent appeared in person.
- 2 The Applicant claims \$9,774.08 allegedly unpaid under the contract. The Respondent counter-claims "\$19,000 approx."

THE CONTRACT

- 3 The parties agree they entered a contract for a swimming pool and landscaping works for a total of \$172,575.65. The Applicant alleges that the total sum payable under the contracts is \$200,109.43, which includes "options", "variations" and "extras", although the only items mentioned appear to be variations. Both parties agree that the Respondent has paid \$190,335.35.

VARIATIONS

- 4 The Applicant's arithmetic in its application led me to the conclusion that its claimed variations amount to \$27,533.78 – the difference between the total amount it claims is payable of \$200,109.43, less the agreed contract sum of \$172,575.65. The Applicant listed all such items in "Document D" to its points of claim. However it did agree with the Respondent that there were prime cost and estimate adjustments of \$6,111.50 and landscaping variations of \$7,489.48. It also agreed that there was a pool and water tank variation which the Respondent values at \$10,394.30. The difference between the Applicant's and Respondent's view of variations is only the claimed water credit discussed below.
- 5 The undisputed variations are as described in the Respondent's total of variations, being \$23,995.28. If no credit for water were allowed, the value of the variations would be \$26,595.28. The nett variations allowed below is this sum less the amount allowed for the water credit.

Claimed water credit

- 6 The only item of variations pleaded by the Respondent in his counter-claim with which the Applicant did not agree in his defence to counterclaim was \$2,600.00 for "water credit for 34,000 litres of water supplied by the client". The approximate cost per litre claimed by the Respondent is 7.65 cents per litre. The Applicant gave a credit of \$920.00 for this item in accordance with Document D. I accept Mr Baker's evidence that the cost to

the Applicant of supplying water is approximately 2.8 cents per litre and the retail cost charged by it is 4 cents per litre. I do not know how the Applicant calculated the credit of \$920.00. If the water is being charged at 4 cents per litre, it equals 23,000 litres. In a letter of 22 January 2009 the Applicant allowed the Respondent 13,000 litres. It seems that the Applicant later allowed the Respondent a further 10,000 litres.

- 7 The parties agree that the Respondent's neighbours needed to empty their swimming pool for repairs and 34,000 litres of water was obtained from the neighbour. Mr Barker agreed that the contract included provision of 65,000 litres of water. I accept his evidence that the Applicant supplied 31,000 litres of water to fill the pool and, because filling the pool took less than two tanker-loads of water but the price of delivery was by the truck, the remaining 21,000 litres was put into the Respondent's underground tank.
- 8 The Respondent said that he did not pay his neighbour money for the water but paid in kind for it in some manner.
- 9 Obtaining the water from the neighbour is an environmentally sensible idea and one for which the Respondent is entitled to a credit as this appears to have been the deal between the parties. The rate I allow the Respondent is 4 cents per litre, in accordance with Mr Tymkin's letter to the Respondent of 22 January 2009. An issue between the parties is how many litres should be credited.
- 10 The Respondent said that substantial amounts of the tank water had been used to top up the pool due to leaking from the spa, but his evidence on this point was inexact and not particularly convincing. I find the amount of \$920.00 allowed by the Applicant is reasonable. This is the credit to which the Respondent is entitled for water.

Nett variations

- 11 The nett variations to be added to the contract sum is \$26,595.28 less \$920.00 which equals \$25,675.28.

DEFECTS

- 12 The parties agree that there are defects. Mr Makris and Mr Cilia gave written expert evidence for the Respondent. Mr Cilia is a director of Dome Consulting and a structural and civil engineer and he also appeared to give sworn oral evidence. Mr Ian Winstonee, landscape consultant, gave written evidence for the Applicant.
- 13 At the conclusion of the hearing on 6 October 2009 I visited the site with the parties. In general the work is of high standard.

Backwash plumbing

- 14 In his report to the Respondent dated 17 August 2009, Mr Con Makris, plumber, wrote:

Summary of opinion

I advise that pool filter backwash enters the pool via the pool overflow during the pool filter backwash operation posing a health and safety risk to pool users. It is also possible that sewer effluent could enter the pool through the pool overflow causing a severe health and safety risk to pool users.

Mr Makris said that the cost to rectify would be in the order of \$2,500.00 to \$3,000.00.

- 15 There is a potential design fault in the way the pool plumbing has been installed. I accept the evidence for the Applicant that providing backwash plumbing to the sewer was the responsibility of the Respondent. I also accept the evidence of Mr Oakley, plumber, who gave evidence for the Respondent that he provided an “upstand” (vertical pipe) from the sewer to which the Applicant could attach their pipes.
- 16 The incontrovertible fact is that the Applicant did the work of which the Respondent complains. The Applicant tapped the backwash pipe into the upstand, whereas in accordance with figure 10.2 of AS 3500.2:2003 it should not be a continuous pipe – there should be an air gap of at least 75 mm between the upstand and the waste discharge pipe. The problem is exacerbated by the introduction of a gravity-fed overflow pipe from the pool cover area (which contains pool water) which joins the backwash pipe before it taps into the upstand. In the fairly rare event that sewage were to back up, say because of a sewer blockage, I accept the evidence of Mr Makris that it could enter the swimming pool via the overflow pipe. The parties agree that there should be an air gap.
- 17 I find that the design of the upstand and its connection to the sewer is the responsibility of the Respondent. However the design of the pipework that connects to the upstand is the responsibility of the Applicant. Mr Tymkin suggested a means by which an air gap could be installed with a minimum of cost and disruption of the existing system, but he is not a plumber and the Applicant did not provide the evidence of a plumber. The problem is that rectification will require work in an area where there are a number of plumbing and electrical installations and it must be undertaken with great care.
- 18 I accept the evidence of Mr Makris concerning the method and cost of rectification of this problem and in the absence of better evidence, allow the Respondent the mid-point of Mr Makris’s range.
- 19 The Applicant must allow the Respondent \$2,750.00 for the backwash plumbing.

Granite pavers

- 20 Mr Cilia reported that there are differences in levels between adjacent tiles of up to 3mm and “there is recent cracking ranging up to 5mm between tiles”. He recommends that the tiling and sub-based be removed, the sub-base compacted, a 100mm concrete slab laid and tiling laid over the slab.

- 21 Mr Winstone identified a difference in the height of pavers of between 1.5mm and 3mm at the interface between the pool paving and paving in the cabana, which is consistent with my observations on site. He also noted that the joint in the tiling adjacent to the cabana entrance is wider than in the remainder of the paving. He said that the cabana appears to lean to the rear (away from the area where there is a problem with the paving) which indicates that the cabana and the paving associated with it has rotated to a small degree. This was not observed on site, but is irrelevant as I find the level of the paving is not defective.
- 22 Mr Winstone said that he did not agree with the work proposed by Mr Cilia, but that if it were to be undertaken the cost would be \$400.00. I accept Mr Winstone's evidence that the difference in levels of the granite paving tiles is not defective. I find that AS 3737-1993 *Guide to Residential Pavements* is the Australian Standard relevant to this type of work, that it is a reliable guide in this instance to whether the pavers have been constructed in accordance with standards of reasonable workmanship, and that it is within reasonable building tolerances for there to be a stepping between adjacent paving elements of equal to or less than 5mm.
- 23 The area complained of does not appear defective, except that the silicone joint between the two bodies of paving has separated somewhat and needs to be replaced. In the absence of evidence about the cost of replacing the silicone joint, I find that a reasonable sum is \$100.00 which the Applicant must allow the Respondent.

Untreated steel angle

- 24 Mr Cilia reported that an untreated (neither galvanized nor stainless steel) steel angle has been used as a lintel inside the access panel for the pool cover. He said it has had contact with the salt chlorinated water and is showing signs of rusting. He recommends that it be replaced by a treated angle.
- 25 Mr Winstone noted that the angle has been painted with bituminous paint which has not prevented it from rusting. He also recommends that it be replaced with a galvanized or stainless steel angle and he estimated the cost at \$810.00.
- 26 Mr Barker said that he thought the amount allowed by Mr Winstone is a little low and suggested that \$1,000.00 would be a fair amount. The Respondent tendered a quotation by Mr Makris for \$1,620.00 if the angle were replaced in galvanized iron and \$1,974.00 if replaced in stainless steel. He submitted that stainless steel is superior to galvanized iron and that this should be allowed. I note that another lintel in the same area is in galvanized iron and there is no suggestion that it is defective. I prefer the Respondent's evidence and allow the cost of the galvanized iron lintel.
- 27 The Applicant must allow the Respondent \$1,620.00 for this item.

Concrete paving

- 28 Mr Cilia reported that concrete laid on the east side of the house grades towards the house rather than away from it, in consequence of which water pools beside the house. He recommends that the concrete be removed and replaced so that it falls away from the house.
- 29 The Respondent did not provide a separate quotation for the concrete paving. It is incorporated in a quotation by Garden Exposure of \$3,850.00 for the concrete paving and also the work recommended by Mr Cilia to the granite paving.
- 30 Mr Winstonee said that although the path falls away from the house for most of its length, it does fall toward the house for the last 4.8 meters. He said that he did not believe the problem justifies the removal and replacement of the whole path and I accept his evidence on this point. Mr Winstonee suggested that the concrete be removed and replaced from the crack control joint about 500mm north of the pool gate to the granite pavers, a length of 5 to 6 meters. He estimated the cost of such work at \$2,000.00. I accept his evidence. The Applicant must allow the Respondent \$2,000.00 for the concrete paving.

TIME

- 31 The parties agree that the construction period was to be 180 days from commencement, that works were to commence in mid to late September 2007 but actually commenced on 29 October 2007 and that the rate for liquidated damages payable to the Respondent if the works were not completed on time is \$250.00 per week. I accept Mr Barker's evidence that the Respondent was to arrange for the building permit which was not obtained until Thursday 25 October 2007. It was not reasonable for time to start to run until the Applicant could legally commence the swimming pool works. I therefore find that the construction period of 180 days began on the following Monday - 29 October 2007.
- 32 The Respondent claims the work is incomplete and that it should have been completed on 6 May 2008, on the basis of 180 days from 29 October 2007 plus two weeks time extension due to the installation of a water tank, a total of 194 days. I accept the Respondent's calculation that the date by which the Applicant should have finished the works was 6 May 2008.
- 33 The Applicant admits there are defects, but submits that they are not incomplete works. The Applicant claims the pool works were complete in around June to July 2008 and also that delays in works associated with the house had delayed the landscaping works which, in turn, had delayed the pool works.
- 34 The possibility that the Applicant's works might be delayed by the works of others was in the minds of the parties when they entered the contract. Special condition 1 is:

No responsibility will be taken for delays due to slow progress of cabana. No damages will be paid in any form if the cabana delays works.

- 35 Nevertheless, Mr Barker’s evidence about the date upon which the Applicant says the works were complete was inexact and unconvincing and he gave no reason why the Applicant failed to seek extensions of time in writing in accordance with clause 9.2 of the standard-form landscape contract signed by the parties on 6 September 2007.
- 36 The Respondent claims liquidated damages to the date of the Points of Counterclaim - 25 February 2009 – of \$10,535.71 plus \$250.00 per week thereafter.
- 37 In answer to my questions the Respondent said the Applicant “handed the pool back” after rectification of various leaks and problems on 5 December 2008 and that a company engaged by the Respondent, Australis Pools, rectified another leak on 9 December 2008. He admitted that he and his family had swum occasionally before that date and swam regularly thereafter.
- 38 Although there remain two defects concerning the swimming pool, I find they are not so serious as to amount to an incomplete pool. The definition under the contract is found in clause 1.1.4:
- ... that stage of execution of the Works when the Works are completed except for minor omissions and/or defects which do not prevent the Works from being reasonably fit for use for the purpose intended.
- 39 I find the date of completion was 5 December 2008. The Applicant must allow the Respondent 30 weeks and 3 days liquidated damages at \$250 per week, a total of \$7,607.00

FINANCIAL RECONCILIATION

	To Applicant	To Respondent
Contract sum	\$172,575.65	
Nett variations	<u>\$25,675.28</u>	
	<u>\$198,250.93</u>	
Paid to Applicant		\$190,335.35
Defects		
Backwash plumbing		\$2,750.00
Granite pavers		\$100.00
Steel angle		\$1,620.00
Concrete paving		\$2,000.00
Liquidated damages		<u>\$7,607.00</u>
		\$204,412.35

\$198,250.93

The Applicant must pay the Respondent

\$6,161.42

COSTS

- 40 As indicated at the end of the site inspection, costs are reserved and there is liberty to both parties to apply. The parties' attention is drawn to s109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

SENIOR MEMBER M LOTHIAN