

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP343/2019

CATCHWORDS

Australian Consumer Law and Fair Trading Act 2012; s 184; Australian Consumer Law: s54; whether the goods are of acceptable quality and fit for the purposes for which goods of that kind are commonly supplied, free from defects and durable; supply of water tank which subsequently failed; whether water tank as manufactured is defective; whether the tank has been installed and maintained in accordance with manufacturer's instructions; expert evidence.

FIRST APPLICANT	Deborah Laffeber
SECOND APPLICANT	Brett Lowe
RESPONDENT	Tankpool Pty Ltd
WHERE HELD	Melbourne
BEFORE	Member F Marks
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	3 July 2019
DATE OF ORDER	23 August 2019
CITATION	Laffeber v Tankpool Pty Ltd (Building and Property) [2019] VCAT 1270

ORDERS

- 1 The respondent must pay the applicants \$7,885 which comprises a refund of \$5,030 and damages of \$2,855.
- 2 The respondent must pay the applicants' costs of \$2,000.
- 3 The respondent must reimburse the applicants the filing fee paid by the applicants of \$212.50.
- 4 Within 30 days of the date of this order, or as otherwise agreed in writing by the parties, the respondent must collect the failed tank from the applicants' property in Woodend, at its cost, at a mutually convenient time.
- 5 If the respondent does not collect the failed tank within the time allowed in order 4 above, the applicants may dispose of the failed tank and their right to claim against the respondent for the costs of doing so are reserved.

MEMBER F MARKS

APPEARANCES:

For the First Applicant

Ms D Laffeber

For the Second Applicant

Mr B Lowe

For the Respondent

Mr S Palmer, General Manager

REASONS

THE DISPUTE

- 1 This dispute concerns the failure of a water tank which the applicants (Owners) purchased from the respondent (Tankpool) in November 2016, for use on their property in Woodend.
- 2 The Owners claim that the tank failed because it was defective. They claim damages of \$15,000. Tankpool denies liability. It says the tank failed because the Owners did not install and maintain the tank in accordance with the manufacturer's instructions.

THE HEARING

- 3 The Owners were self-represented and gave evidence. Mr Russell Brown, civil and structural engineer, gave expert evidence on their behalf. Mr Palmer, Tankpool's General Manager and Mr Bowles, Tankpool's tank technician and tank repairer, gave evidence for Tankpool. Tankpool did not provide a report from an independent expert or call an independent expert to give evidence at the hearing. Three hours were allocated for the hearing. I reserved my decision as the parties took the day to complete their evidence.

THE ISSUES

- 4 The issues for determination are:
 - (a) whether the tank is of acceptable quality as required by the *Australian Consumer Law (Schedule 2 to the Competition and Consumer Act 2010 (ACL))*; and
 - (b) Whether the Owners are entitled to damages and if so what amount.

THE WATER TANK

- 5 The following facts are not in dispute. On 2 November 2016 the Owners purchased a 45,000-litre fibre reinforced plastic water tank from Tankpool for \$5,030. Prior to delivery, the Owners' plumber, Mr Bone, prepared the base for the tank by laying approximately 100 mm of gravel and sand on the ground where the tank was to be located.
- 6 In late November 2016, Tankpool delivered the tank to the Owners' property. With the assistance of Mr Bone, the Tankpool driver placed the tank on the prepared base. The driver attached the following to the tank: a plastic/mesh top known as a strainer, which the driver inserted into the top of the tank; second, an overflow, being a piece of PVC pipe which the driver inserted into the wall of the tank near the top of the radius knuckle; and third, an outlet with a valve to turn off the water supply.
- 7 In July 2017 Mr Bone connected the pump to the tank and pipe which he ran to the Owners' new home. On 5 July 2017 Mr Bone issued a

compliance certificate for his plumbing work which included the installation of the tank. Shortly thereafter the builder's plumber connected the tank to the Owners' home. On completion of the building works, the builder issued a compliance certificate for, amongst other things, the connection to the water tank. The following year, on 16 September 2018, the tank failed causing a loss of water and damage to the Owners' stables.

- 8 By way of defence, Tankpool relied on a document headed "Tank Installation and Site Preparation", which illustrated different methods of installation. It relevantly stated:

To ensure a long trouble-free life for your tank please follow the recommended methods of installation. If you should have any queries regarding these or other methods of installation please do not hesitate in calling our office.

Critical points to remember

1. "Base of tanks must be supported across its entire area (base support must remain flat at all times). The site must be fully maintained throughout the tank's lifespan
2. Pipe work should not place any loading on tank wall (flexible coupling is best alternative).
3. Overflow size must equal or exceed inlet size.
4. Tank must be vented to prevent it being subject to pressure or vacuum (leaf strainer or breather must be installed).
- 5...

PLEASE NOTE: The tank must have 12" length of pipe (PVC, poly or flexible hose); as per the diagrams.

Preferred method: Natural Ground: smooth level site, free of rock, stone or tree roots, with diameter 600mm (2ft) greater than tank.

Alternative method: Sand Base: 3"(75mm) Sand Base, with Retaining Beam (sprinkle cement on exposed sand).

- 9 Tankpool also relied on the installation instructions attached to the tank which relevantly stated:

IMPORTANT PLEASE READ: INSTALLATION INSTRUCTIONS

The tank is guaranteed to the original purchaser against faulty workmanship or material, provided installation is carried out in the recommended method.

- Do not roll tank on flange
- Overflow must be piped away from base
- If sand fill base is used a retaining beam must be provided to prevent sand washing away
- The number of inlet pipes, their sizes and capacities must equal the number of overflow pipes, their sizes and capacities.
- Maximum size outlet 50 mm for domestic tanks.
- Correct tank site preparation, as well as preservation is the sole responsibility of the purchaser.
- Do not allow tank site to deteriorate after installation, due to any form of erosion.
- Tank outlets must not be subjected to any undue force

NON-COMPLIANCE WITH CONDITIONS WILL VOID GUARANTEE

INVESTIGATION OF THE FAILED TANK

- 10 The following facts are not in dispute. On 17 September 2018 Ms Laffeber telephoned Tankpool and advised that the tank had exploded. On the same day the Owners' insurers visited the site, inspected the failed tank and subsequently rejected the Owners' claim.
- 11 On 18 September 2018, Mr Bowles, Tankpool's service technician, inspected the failed tank at the Owners' property. Tankpool's log of the service call noted:
- Remarks:
17/9/18 Deb called to say tank exploded, pic in service file and on server
Deb sent pics, pics show the tank base may be the cause, please inspect.
18/19/18 9:50 Neil on site and found issues
1. That the tank had a 2x100mm feed in and a 90 mm outlet.
- Resolution:
09/10/2018 SP sent email to Deborah confirming the tank is not covered by warranty because of compromised base and plumbing.
- 12 On 18 September 2018, Tankpool sent Ms Laffeber an email rejecting the Owners' warranty claim. Tankpool's email included a copy of its text from its webpage regarding tank installation and provided a link to Tankpool's web page dealing with delivery and installation. Tankpool's email relevantly stated:
- we are rejecting the warranty claim.
- Upon inspection of your tank, our service tech says that your tank had a 200 mm feed pipe into the tank with a single 90 mm outlet. As discussed the tank was full and overflowing, this would have created excessive internal pressure on the tank.
- We also found that the base around the tank looked compromised by water overflow which appears to have added to the cause of the tank bursting.
- 13 Three days after the tank failed, Ms Laffeber sent an email dated 19 September 2018 to the Owners' builder, JG Kings Homes. She attached Tankpool's email of its investigation report. In her email she stated that the tank had exploded and was beyond repair, had damaged panels at the rear of the stables near the tank and was full at the time of its failure. She stated there was little water damage to the stables as water had flowed out across the paddock into the gully and dam at the rear of the Owners' property and that the pump was not damaged.
- 14 Ms Laffeber's email also stated that her insurers had rejected her claim because of a manufacturing/workmanship issue. When Tankpool's representative inspected the failed tank the previous day she was told that the explosion was due to insufficient overflow points in the tank to release the excess water; that over time this had pressurised and caused the tank to

explode; and that the plumber who did the stormwater connection was responsible for ensuring there were adequate overflow outlets for the volume of water feeding into the tank.

- 15 On 26 September 2018 Mr Trevor Catchia, the builder's maintenance supervisor, inspected the failed water tank. In his letter to the Owners dated 19 October 2018 Mr Catchia stated that the tank had separated about 30m apart. The tank had blown apart, first, closest to the damaged stables. He noted a vertical tear from the ground up, right through the middle of a hole drilled out by Tankpool for the connection of the pump. He also noted a varying thickness in the tank walls.
- 16 In his letter Mr Catchia gave the following reasons for the tank's failure. If the tank had faulted on any other side, then the stables would not have been damaged. The hole which had been drilled out may have fractured the tank and under pressure, torn out the side causing the damage to where the tank faced the stables. The pressure from the blast had caused the damage to the stable walls, distorting the sheets.
- 17 On 9 October 2018 Mr Palmer confirmed in an email to Ms Laffeber that Tankpool maintained its refusal to accept the Owners' warranty claim. He advised that the tank's base had not been appropriately maintained and the plumbing connections were not compliant with the Tankpool's installation instructions.

EXPERT EVIDENCE

Practice Note- PNVCAT2: Expert Evidence

- 18 In this proceeding, strict compliance with the Tribunal's Practice Note PNVCAT2: Expert Evidence is not required. On 12 April 2019 the Tribunal made orders that due to the amount of the claim (\$15,000), expert reports were to comply, as far as possible, with the practice note.
- 19 Expert witness evidence may be relied on by the Tribunal to form an opinion about a specialised or technical matter that is relevant to the issues to be determined in a proceeding. Where expert evidence is provided in the form of a written report and/or the expert being called as a witness, it is important that the expert's opinion, amongst other things, is soundly based and within the scope of his or her expertise (PNVCAT2 at [2]).
- 20 The *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) defines "expert witness" as a person who has specialised knowledge based on the person's training, study or experience [VCAT Act: s3]. A report of an expert witness must include, amongst other things, the expert's qualifications, experience and area of expertise and a statement setting out the expert's expertise to make the report.
- 21 Mr Russell Brown gave expert evidence for the Owners. Mr Brown is a chartered civil and structural engineer who commenced his training in 1960. He has worked for many years as a design and structural engineer and has a

great deal of experience in reinforced and prestressed concrete and steel. His CV states that he has used every construction material/method practically known and designed for earthquakes, tornado loadings, impact and most loads within the codes, post collapse usage/repair.

- 22 Mr Brown's CV states that he has investigated difficult failures involving ground movement or suspected structural failures. He has given numerous presentations and lectures and conducted workshops on topics such as portal frame design, including steel portals, foundation movement and building failures, residential housing construction/general issues and geotechnical engineering.
- 23 Mr Brown's CV does not set out his experience, nor make any mention of him working with fibreglass water tanks. This was evident from his opinion in his first report, given under the misconception that the tank in question was a plastic tank which was covered by Australian Standard AS/NZ4766: 2006 – Polyethylene storage tanks for water and chemicals (AS4766).
- 24 After preparing his first report and having been disabused of this fact and alerted to the composition of the tank in question, Mr Brown sought to explain the relevance of AS4766 to a tank which was not covered by that standard. Mr Brown stated that water tanks had to be structurally sound and watertight. Such a statement goes without saying.
- 25 Having heard Mr Brown's evidence I have formed the view that although he is a highly experienced structural engineer, he has no experience with water tanks. Nevertheless, Mr Brown is a structural engineer and qualified to give evidence on matters to do with structural adequacy.

IS THE TANK OF ACCEPTABLE QUALITY?

The Law

- 26 Section 54 of the ACL provides a statutory guarantee that goods supplied to a consumer, in trade or commerce, are of acceptable quality [ACL: s54(1)]. Goods are of acceptable quality if they are as fit as a reasonable consumer, fully acquainted with their state and condition, would regard as acceptable. Whether goods are acceptable includes consideration of the following: whether the goods are fit for all the purposes for which goods of that kind are commonly supplied, free from defects and durable [ACL: s54(2)].
- 27 In determining whether the goods are of acceptable quality the following matters need to be taken into account: the nature and price of the goods and any statements made on any packaging or labels and other relevant circumstances relating to the goods [ACL: s54(3) (a) (b)(c) and (e)].

The evidence

Mr Brown's evidence

- 28 In December 2018 the Owners engaged Mr Brown to review the reasons for the tank's failure. Mr Brown prepared 2 reports. His first report is dated 14 December 2018, which Mr Brown reissued on 16 April 2019 (First Report). His second report is dated 18 April 2019 (Second Report). Mr Brown did not inspect the failed tank before drafting his reports because he did not consider a great deal could be gained from visiting the site 3 months after the tank had failed. However, Mr Brown inspected the failed tank in June 2019, before the hearing.
- 29 In his First Report, Mr Brown stated that in forming his opinion, he relied on the advice of others, an investigation carried out by Mr Catchia, and Mr Catchia's letter to the Owners dated 19 October 2018. Mr Brown concluded that the tank had not been manufactured in accordance with Australian Standard AS/NZ4766: 2006 – Polyethylene storage tanks for water and chemicals (AS 4766).
- 30 Mr Brown stated that AS 4766 required the tank to be constructed in one piece and without seams but he said the photographs of the failed tank showed a major seam around the wall of the tank. He stated that AS 4766 required the tank walls to be 4.5mm thick and that in his opinion, here, the thickness of the tank walls was majorly undersized. He concluded that the proportion of resin to fibres was incorrect and the stress levels in the tank, very high.
- 31 In his Second Report Mr Brown stated that he now understood the tank to be an "epoxy resin fibreglass pool" and that the relevant standard was Australian Standard HB230–2008 Rainwater Tank Design and Installation Handbook (HB230) and not AS 4766, as he had originally stated. At the hearing Mr Brown said his original opinion was based on an incorrect assumption that the tank was made of polyester resin. He now understood that the tank was made of fibreglass.
- 32 Mr Brown said there did not appear to be an Australian Standard for fibreglass tanks. However, in his opinion the same fundamentals, as set out in AS 4766, applied to the tank in question.
- 33 Mr Brown said his visual analysis of the Owners' photographs and his assessment of the proportion of fibres to resin in the segments of the tank walls provided to him by the Owners, showed that the fibres had no resin locking onto them. As a consequence, he said that the tank was doomed to fail. He concluded that the tank did not have the requisite tensile capacity required by AS 4766 and that there had been a breakdown of good and proper manufacturing procedures.
- 34 Mr Brown said he had reviewed designs of swimming pools under AS/NZS 1838 – 1994 that used epoxy resin/fibreglass design procedures, and which varied in thickness from 5 mm to 8 mm. He said that calculations needed to

be done, including a load tests on the fibre to resin ratio and a certificate of compliance supplied.

- 35 In cross examination Mr Brown said he considered Mr Catchia to have the necessary expertise because he had worked with Mr Catchia over a number of years and considered him to be very experienced. Mr Palmer said Mr Catchia did not qualify as an expert and did not have the necessary knowledge of fibreglass to say that it was not fit for purpose. Mr Catchia's letter did not identify his expertise and/or experience in fibreglass water tanks. However, I accept Mr Catchia's observations of the failed water tank and the state of the surrounding area, set out in his letter dated 19 October 2018.
- 36 In cross examination Mr Brown agreed that the base of the tank should be firm and solid and that if it was not flat and level then undue stress could be caused. However, he said that if the base was reasonably flat then there would be limited stress on the base skin. In this case he considered the base of the tank to be flat. When asked by Mr Palmer whether he was aware there was exposed rock under the tank, Mr Brown said he had looked at various photographs and did not see a rock.
- 37 In cross examination Mr Brown said he knew much more about swimming pools than water tanks. Mr Brown agreed with Mr Palmer's proposition that swimming pools had other forces that affected them such as ground swelling, ground movement and pressure of dirt pushing onto walls. I take Mr Palmer's contentions to relate to inground swimming pools.
- 38 When cross-examined, a number of Mr Brown's answers and analogies related to swimming pools and not water tanks. When asked by Mr Palmer to explain the relevance of AS 4766, for polyethylene storage tanks for water and chemicals, to the failed fibreglass tank, Mr Brown said the products were similar, and that the volume of fibre remained the same. Mr Palmer asked how the products were similar when the glass fibres formed a very large component of fibreglass and there was no fibre content in polyethylene. Mr Brown did not directly answer this question.
- 39 In cross examination Mr Brown agreed that fibreglass was stronger than plastic and that it did not have to be the same thickness as plastic to reach the same tolerances and have the same tensile capacity. Mr Brown agreed that fibreglass absorbed resin and that a technical assessment of the product to determine the ratio of fibre to resin was better than doing a visual inspection of photographs and segments of the tank, which he had done. Mr Brown agreed that the tensile capacity of fibreglass was four times higher than that of polyester and that fibreglass of 3 mm thickness should have worked superbly. When questioned why he thought it did not work in this case, he said the tank had not been appropriately manufactured.
- 40 Although I am not satisfied that Mr Brown is an expert in fibreglass water tanks, I accept Mr Brown's opinion evidence that water tanks must be structurally sound.

Mr Palmer' evidence

- 41 Mr Shane Palmer, General Manager of Tankpool, relied on his affidavit sworn on 4 June 2019. There was no evidence of his technical qualifications. Mr Palmer deposed that the failed tank was a fibreglass tank and that AS 4766 was not relevant and did not apply, because it covered poly (plastic) tanks and not fibreglass tanks.
- 42 Mr Palmer deposed that SIA Global Certification Services (SIA) certified Tankpool's tank design and endorsed its tank as "fit for purpose". SIA certified that Tankpool operated a quality management system which complied with the requirements of ISO 9001:2015. The certificate covered the manufacture, sale and delivery of fibreglass reinforced polyester and roto-moulded polyethylene products including water tanks, swimming pools, pump covers and farm accessories.
- 43 Mr Palmer denied that there was an issue with the ratio of fibre to resin. He said that in order to obtain an accurate reading of the ratio of the fibres to resin, technical testing, and not a visual inspection, was required. I accept that technical testing would have been better but note that neither party has done that. Moreover, although Mr Brown has visually inspected the tank and made observations of the fibre to resin ratio, Mr Palmer has not.
- 44 Mr Palmer said that Mr Brown's visual inspection of the photographs and segments of the water tank should be given little weight. Mr Palmer deposed that AS 1838 referred to the design of swimming pools and was not relevant to the tank in question.
- 45 Mr Palmer deposed that the composition of the tank was verified by SAI Global. However, it is the actual composition of this particular tank that is relevant, not the composition that it ought to have had. He deposed that Mr Brown did not explain why drilling holes in fibreglass was considered dangerous when within the industry, the drilling, sanding and planing of fibreglass was a daily activity. He said that drilling was carried out on all of the tanks that Tankpool sold to customers. I accept that evidence, but Mr Brown, as a structural engineer, is qualified to say that the creation of such penetrations will weaken the structure.
- 46 Mr Palmer deposed at [29] of his affidavit that as a result of the inspection by Tankpool's technician, (Mr Bowles), the technician found issues described as:
- (a) Failure to maintain tank foundation slab and subject to wash away because of no retaining system.
 - (b) Inspection found an exposed rock under the tank base causing stress to the base including the base to wall radius of tank.
 - (c) Foundation slab not installed in accordance with company requirements by being flat and level.
 - (d) Pipework extending from the tank placed wall loading on fittings of tank. No flexible hose connection.

(e) Strainer was blocked and not maintained.

- 47 Mr Palmer did not give direct evidence about the failed tank because he did not inspect the failed tank at the Owners' property. Mr Palmer relied on Mr Bowles' notes of the service call from Ms Laffeber which Mr Bowles logged, Mr Bowles' inspection and his review of Mr Bowles' photos taken during the inspection. Mr Palmer gave evidence about the 2x100 mm inlet pipes which he said could be seen in one of Mr Bowles' photographs [annexure SP-4 photograph no 5]. He said the 2 inlet pipes would have caused a build up of pressure in the tank as there was only a 90mm outlet. He did not describe how that could have occurred.
- 48 Photo no 5 shows the remnants of a double gooseneck pipe: one of the pipes remains standing and the other has broken off near its base. The top of the gooseneck pipe as shown in the photo, would have been located directly above the strainer. When asked in cross examination whether it mattered if the outlet and inlet pipes were not the same size, rather than directly answering the question, Mr Palmer said the inflow far exceeded the outflow. That ignores the fact that the inflow was through the strainer.
- 49 I am not persuaded by Mr Palmer's evidence that the conduct of the Owners resulted in the tank failure. The photographs on which Mr Palmer relied were taken after the tank failed. In my opinion the photographs show the base under the tank to be quite flat. They do not show a rock to be located under the tank base which Mr Palmer says compromised the base of the tank. The photographs do not show a hole in the bottom of the tank or specific wear caused by pressure from an alleged rock under the tank, again said to have compromised the base of the tank.
- 50 I am not persuaded that because there were 2x100mm gooseneck pipes above the strainer and an outlet hole of 90mm, that the tank would have exploded when at capacity. On examining the photographs relied on by the parties, it is clear that the 2x100mm inlet pipes were not connected directly to the tank but were located above the strainer. This can be seen from Mr Bowles' photographs of the strainer attached to Mr Palmer's affidavit [SP-5].
- 51 Further, I am not persuaded by Mr Palmer's evidence that between delivery of the tank and its failure, that the sand had washed away from under the base of the tank. His evidence is based on photographs taken of the tank, and its surrounds after the failure of the tank. Clearly there is a strong likelihood that the loss of 45,000 litres of water at the time of the tank's failure could have washed away the sand base.
- 52 At the hearing Mr Palmer gave evidence that the stables did not have a gutter. He said this would have caused water to flow onto the ground which would have helped to erode the area under the tank. Mr Palmer based his evidence on a photo of one side of the stables. He did not inspect the site. It is unclear from the photographs whether the stables have guttering. I place little weight on Mr Palmer's evidence.

- 53 I also place little weight on Mr Palmer's evidence about the state of the pipes extending from the tank. Again, Mr Palmer did not visit the site and based his evidence on photographs of a failed tank where parts of the tank walls were spread out over a large area.
- 54 Finally, Mr Palmer deposed at [12] of his affidavit that the tank came with an express warranty. He exhibited the Tankpool warranty [SP-2] and the installation and site preparation instructions [SP-5]. He also exhibited Tankpool's email to the Owners after the tank failed, setting out those instructions and providing a link to its website. However, there was no evidence that Tankpool gave the Owners the material on installation and maintenance prior to purchase or delivery of the tank.

Mr Bowles' evidence

- 55 Mr Bowles gave evidence that he was employed by Tankpool to repair tanks. The gist of Mr Bowles' evidence was that the blocked strainer, the different sized inlet and outlet pipes, together with a rock under the base of the tank, caused a pressure build up leading to the failure of the tank.
- 56 Mr Bowles gave evidence that on 18 September 2018 he inspected the failed tank at the Owners' property and noticed 200 mm pipes going into the tank and a 90 mm outlet overflow. I took him to mean that the 2x100mm pipes were directly connected to the tank. As the photographs later showed, they were not. Mr Bowles said the size of the overflow pipe needed to be the same size as the inlet pipe or the tank would flood through the strainer.
- 57 Mr Bowles said that during his inspection he noticed the following about the failed tank:
- the base under the tank was not flat and level and the sand had washed away.
 - There was no retaining system around the base and there should have been a channel in place to allow water to run away from the base.
 - On further investigation he noticed exposed rock under the tank.
 - He also noticed the hose connection was not flexible and the strainer was blocked.
- 58 In cross examination, Mr Brown put a number of propositions to Mr Bowles which he did not directly answer. When asked if the black pipe shown in his photographs was flexible, he said it depended on its length. When asked how he knew that the sand had been washed out before the tank failure, and not at the time of the tank failure, Mr Bowles said the photographs showed the water being directed away from the pipe.
- 59 In cross examination when Mr Bowles was shown several photographs of the failed tank, he agreed that the photographs showed a split in the tank coming from where the outlet pipe had been "cut in" at the bottom of the

tank, where the water would have washed out. When it was put to Mr Bowles that the Tankpool driver should have seen any problem with the base on delivering the tank, he said if there was a “nice” sand base then the driver would have been unable to see if there was rock under the base.

60 In cross examination Mr Bowles reiterated that he had seen a rock under the tank during his inspection which should have been removed to alleviate any problems when the tank settled. Mr Bowles was asked to identify the rock in the photo and identify its location on the white board in the hearing room. On identifying the alleged rock, neither I, nor Mr Brown, were able to see the alleged rock in the photo on which Mr Bowles relied.

61 In giving evidence in reply Mr Bowles then agreed with every proposition which Mr Palmer put to him. The gist of his evidence in reply was:

- The black pipe, which he estimated to be 1.5m in length, would have applied pressure to the tank because it was unsupported.
- Irrespective of the photographs showing a slit to the wall of the tank the base had failed and worked its way to the side wall and then up the side wall.
- A cavity was caused before the tank failure because there was a definite wash away.
- There was a possibility that the actual ground under the tank may not have been compact and may have washed away.
- The ground on which the tank was located was not level and the radius on the outside of the tank was lower than the inside level resulting in it not being subject to wash away and the water washed away towards the shed.

62 I am not persuaded by Mr Bowles’ evidence. I found Mr Bowles’ evidence to be unconvincing, at times implausible and based on unfounded assumptions. The strainer may well have been blocked, and the pipes may have been different sizes but, as stated by Mr Brown, these facts did not explain the cause of the tank failure.

63 In cross examination Mr Bowles kept repeating what was set out in Tankpool’s installation and site preparation document, the contentions put by Mr Palmer and paragraph [29] of Mr Palmer’s affidavit which set out what Mr Palmer deposed Mr Bowles observed when he inspected the failed tank.

64 I do not accept Mr Bowles’ evidence that the tank failed because of the base on which it was placed or a lack of maintenance. In my opinion the photographs do not show the presence of a rock under the base, which Mr Bowles considered may have caused the base of the tank to fail. I accept Mr Brown’s evidence that the photographs show a clay base under the tank. The photos showed a split in the tank wall near the top of the tank. In my

opinion, the damage which Mr Bowles claimed to have been done to the base of the tank was not evident from the photographs in evidence.

- 65 Finally, I found Mr Bowles' evidence to go beyond his own notes made at the time of inspection and to be inconsistent with his own photographs. I also found his evidence on the direction of the flow of water after the tank failed, to be inconsistent with Ms Laffeber's contemporaneous notes of the failure and its aftermath, set out in her email to the builder dated 19 September 2018.

CONCLUSION

- 66 On the evidence before me I am not satisfied that the tank was of acceptable quality. I find that Tankpool has failed to comply with the guarantee of acceptable quality. I find that the Owners purchased a new tank in November 2016, it was delivered shortly thereafter. It was connected in July 2017 when the Owners moved into their new home and it failed in September 2018.
- 67 I have accepted Mr Brown's opinion that water tanks must be structurally sound. Having heard the evidence of Mr Bowles and Mr Palmer and for the reasons set out above, I am not satisfied that the actions of the Owners, caused the tank to fail. After reviewing the photographs on which the parties relied, I accept Mr Brown's evidence that it is highly likely that the failure of the tank resulted in some of the sand base being washed away. In my opinion one of the photographs showed part of the base under the tank that could be seen, to be flat and level.
- 68 I also find that Tankpool has not proved that the Owners were aware of the installation and maintenance instructions prior to the purchase and delivery of the tank. I accept that the instructions were on a small sticker attached to the side of the tank, but I do not consider this sticker provided the requisite notice of the installation requirements prior to purchase or delivery.

WHERE THE GOODS CANNOT BE REMEDIED

- 69 There is no dispute that the failure to the tank cannot be remedied. If the failure cannot be remedied, the consumer may reject the goods [ACL: s259(3)]. I find that the Owners are entitled to reject the tank and claim a full refund of the purchase price of the tank including supply and fitting.
- 70 If the cost of returning the goods is significant, the supplier is responsible for collecting them from the consumer at the supplier's expense [ACL: s263(2)]. I find that as the Owners' property is located in Woodend, it is likely that the cost of returning the failed tank will be significant. Therefore, I find that Tankpool is responsible for collecting the tank from the Owners' property at Tankpool's expense.

WHAT DAMAGES ARE THE OWNERS ENTITLED TO?

71 If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may recover damages for any loss which was reasonably foreseeable [ACL: s259(4)]. The Owners claim damages comprising the following:

	Item	Amount
1	Plumbing costs of MMC Plumbing to cap off the old line to the burst tank and relocate the water pump to a temporary water supply	\$550
2	Refilling 45,000 litre tank with water	\$600
3	Purchase of water	\$800
4	Replacing the damaged corrugated iron on the stables	\$600
5	Labour and materials for cleaning up the site, preparing a new base for tank and reconnecting pump and doing excavation works	\$4,169
6	Installation of new tank	\$5,090

Plumbing costs: \$550

72 Mr Palmer submitted that Tankpool should not be liable for any plumbing costs to cap off the old line and relocate the water pump to a temporary water supply. He submitted that this was because the tank should not have been the only water supply to the Owners' home.

73 I find Mr Palmer's submission not to be to the point. The fact is that the tank was the only water supply to the Owners' home a time and that there was an immediate need to relocate the pump to provide a temporary water supply to the Owners' home arising out of the failure of Tankpool's tank. I find that it was reasonably foreseeable that the old line would need to be capped off and the pump for the water tank relocated. I will allow \$550.

Loss of water: \$600

74 The Owners claim \$600 for the loss of 45,000 litres of water resulting from the tank exploding at full capacity. The Owners admitted that the tank was empty when it was delivered and that they relied on rain to fill the tank over time. I am not satisfied as to this item as the owners did not incur this cost.

Purchase of water: \$800

75 The Owners claim \$800 for the cost of purchasing water to replace the 45,000 litres of water that they lost as a result of the tank failing. They produced invoices for the purchase of water. At the hearing the Owners conceded that they did not purchase water to fill the tank and that the tank was empty on delivery. I am not satisfied as to this item.

Repair to the stables: \$600

76 The owners claim \$600 to repair the damaged iron sheets on the stables. They rely on a quotation from Macedon Ranges Roof Maintenance dated 2 May 2019. Mr Palmer submitted that if I found Tankpool liable for supplying a defective tank, the Owners were entitled to the costs of repairing the damaged stables. As I have found Tankpool liable, I will allow \$600.

Making good the site: \$4,169

77 The Owners claim labour and material costs for cleaning up the site, including removing waste, preparing the area for a new tank base, supplying a crushed rock base and plumbing costs to reconnect the storm water pipes and pump. They rely on a quotation from Boyers Excavations dated 23 April 2019 for \$4,169.

78 I have found that the failed tank washed away the sand base originally located under the tank. The owners will need to prepare the area around the base of the tank and lay a new base. I will not allow costs for the clean-up of the site as I will order that Tankpool must remove the failed tank from the site. The owners have to engage a plumber to reconnect the pump to the storm water pipes. I will allow \$880 (\$800 plus GST) for the supply of crushed rock and crusher dust. I will also allow \$825 (\$750 plus GST) for the plumbing costs as quoted by Boyer Excavations.

79 I have found that the Owners are entitled to a refund of the purchase price of the tank. Tankpool's invoice to the owners, dated 30 November 2016 no 9548, is for \$5,030 and includes the cost of purchase, supply and the fitting of the tank at the Owners' property. I will allow \$5,030.

Installation of new tank: \$5,090

80 The Owners seek damages of \$5,090 for the purchase price a new tank as quoted by Clark Tanks in its quotation dated 18 April 2019. Having found that Tankpool must refund the Owners the purchase price and associated costs of the tank, I find there is no basis for awarding the Owners damages for the purchase price of a different tank from another supplier, Clark Tanks. I am not satisfied as to this item.

CORRESPONDENCE RECEIVED AFTER THE HEARING

81 On 23 July 2019 the Owners sent an email to the Tribunal attaching a further report from Mr Brown dated 12 July 2019. I have not taken Mr Brown's further report into account as the report was drafted after the hearing and after I reserved my decision.

ORDERS

82 I have found that Tankpool failed to comply with the guarantee as to acceptable quality. I have also found that the Owners are entitled to a

refund of the purchase price and to damages which were reasonably foreseeable.

83 At the hearing the Owners requested the Tribunal to order costs against Tankpool. I consider it relevant that the respondent's evidence about the connection of the pipes to the tank, was misleading. In the light of my finding, I consider it is fair to allow the costs of Mr Brown's preparation and attendance at the hearing on 3 July 2019. I will allow Mr Brown's costs of \$2,000 based on 8 hours of work at \$250 per hour.

84 I will therefore make the following orders:

- 1 The respondent must pay the applicants \$7,885 which comprises a refund of \$5,030 and damages of \$2,855.
- 2 The respondent must pay the applicants' costs of \$2,000.
- 3 The respondent must reimburse the applicants the filing fee paid by the applicants of \$212.50.
- 4 Within 30 days of the date of this order, or as otherwise agreed in writing by the parties, the respondent must collect the failed tank from the applicants' property in Woodend, at its cost, after agreeing a mutually convenient time to collect the tank.
- 5 If the respondent does not collect the failed tank within the time allowed in order 4 above, the applicants may dispose of the failed tank and their right to claim against the respondent for the costs of doing so are reserved.

MEMBER F MARKS