

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST

VCAT REFERENCE NO. BP144/2017

CATCHWORDS

Swimming pool – escape of water – who caused - whether caused damage to pool - assessment of damages – whether reasonable in the circumstances to award replacement cost.

APPLICANT	Mark Ludbey, Lara Ludbey
RESPONDENT	FRP Pools & Spas Pty Ltd (ACN 095 294 563) t/as Summertime Pools & Spas
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	1 and 2 March 2018
DATE OF ORDER	21 March 2018
CITATION	Ludbey v FRP Pools & Spas Pty Ltd (Building and Property) [2018] VCAT 408

ORDERS

1. The respondent is to pay the applicants the sum of \$72,404.
2. Liberty granted to the parties to apply on the question of costs.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants	Mr A. Donald of counsel
For the Respondent	Mr D. Epstein of counsel

REASONS

Introduction

- 1 The applicants live in Echuca Village, in northern Victoria, with their children. The family, especially the children, have been enthusiastic users of the fibreglass swimming pool in their backyard, built for them by the respondent. They designed the pool to be as maintenance free as possible, and so included a built-in vacuum cleaning and filtration system, much of which is housed in the bottom of the pool shell.
- 2 Three to four years after its construction, the pool's bottom became uneven, with what has been described variously as "undulations", "ripples", "dips and rises" forming, varying in size and shape and up to 6 inches deep. The applicants allege that this damage was the result of the actions of the respondent, albeit accidental, when it allowed approximately 42,000 litres of water to escape from the pool and flow underneath the fibreglass shell. The respondent denies that the pool was emptied at all, or if it was, it says that it was not the perpetrator.
- 3 The parties also disagree over the appropriate method of rectification of the pool. The applicants allege that the swimming pool is so irretrievably compromised that there is a real risk that the fibreglass shell and the in-pool equipment will totally fail in time and the only reasonable method of making good their loss and damage is to remove and replace the pool. The respondent's expert has proposed an alternate method of rectification, by leaving the fibreglass shell in place and adding a layer of concrete inside the shell to make a new bottom.
- 4 The questions which I need to answer are as follows:
 - a What was the event that caused the damage to the pool and who caused that event?
 - b What is the applicant's loss and damage, requiring an assessment of whether the pool is irretrievably compromised, and what is a reasonable method of rectification?

The hearing

- 5 I heard evidence from both applicants (Mr and Mrs Ludbey), their expert witness Mr Leigh Davis (by telephone from Echuca), and the provider of a quote to replace the pool, Mr Paul Briscoe. For the respondents, I heard evidence from its representatives Mr Grant Decker and Mr Neil Bowles (both by video link) and I received into evidence the unchallenged written witness statement of Mr Brock Lusty. The respondent called expert evidence from Mr Branko Mladichek of A Plus Building Advice Pty Ltd, in which he provided his opinion as to the cause of the damage, a reasonable method of rectification and the likely cost for his proposed method.

The swimming pool

- 6 On or about 21 September 2009 the applicants engaged the respondent to construct an in-ground swimming pool, with associated equipment, at their property. They signed a SPASA form contract and the works were completed at or about that time.
- 7 The pool is a 10 x 4 metre fibreglass shell Corbee 10 model, with computerised in-floor cleaning and filtration system. The cleaning works by using a series of pop-up jets or nozzles, which are located in housings in the pool bottom and on the steps. Each jet is connected to pipework coming through the shell from outside the pool, through which water flows into the jet. When operating, the jets pop up in sequence (they rise between 1 and 2.5 inches according to Mr Briscoe) and squirt water in a pattern to push dirt and debris in the pool towards a central drain located in the bottom of the pool. The dirt and debris is then sucked through the drain along underground pipes to the machinery shed located above ground next to the pool, where the water is filtered and then returned to the pool.
- 8 Mr Davis provided a general description of the work usually required to install such a pool, which includes excavate the site, dig trenches in the excavated hole for pipework and plumbing, lay crushed rock or screenings, supply and install the fibreglass shell, back fill around the shell with sand and cement mix, install a bond beam, lay coping pavers, fencing and paving, connect up the pipe work and test the computerised filtration system in the equipment shed.
- 9 There is no allegation that the respondent failed to carry out the installation appropriately. Instead, all expert witnesses noted that the pool had been well built and, other than the distortions in the bottom, it was performing soundly.
- 10 Mr and Mrs Ludbey gave evidence separately in the hearing. They both said that right from the time they took possession of the pool, they had problems keeping the water clean. It would often turn green, especially in hot weather. Mr Ludbey said that he believed that the problems were due to the filtration machine and pipes being undersized. As a result the swimming pool computer started to constantly overload and shut down.
- 11 He said that he would regularly call the respondent and they would send someone out to his property to deal with the water quality problems. He and Mrs Ludbey both said that they had no complaints about the after sales service they received from the respondent and that they had been “wonderful” and “very helpful” to deal with. They did not know the names of all the people who attended the property, and often were not home when they came, but both said that prior to 2014 they never called anyone other than the respondent to look after their pool.

The pool emptied

- 12 Mr Ludbey said that on a date which he cannot now clearly remember, he again called the respondent because the pool was green. He recalls it was before he started the renovations on his house, and so was about 2012 or 2013. Mrs Ludbey thought that it was in 2012 and remembers she was wearing a Tshirt so concluded that it was unlikely to have been during winter.
- 13 Neither Mr nor Mrs Ludbey could recall with any certainty the identity of the persons who attended at the property to carry out the servicing. Mrs Ludbey said that she had received a phone call from the respondent to say that they were coming to look at her pool on their way to another job. She spoke to the person who came before she left for work and saw that he had taken the lid off the chlorinator. She asked if he needed anything as she was leaving for work and he said no. She said that although she did not know his name, she was sure that it must have been someone sent by the respondent as they had called to say they were coming and she had never used any other pool company prior to 2014.
- 14 Mr Ludbey said that he could not be sure whether it was Neil Bowles or Steve Allen or someone else but on this date one or more people were at the property. He recalled that Mr Bowles was part of the maintenance team at that time and he thought he recalled having had a conversation with him about his family on that day. However Mr Ludbey said that he could not be sure if Mr Bowles was present on this day, and I accept that he may have been wrong about the timeframe of the conversation referred to in the previous sentence. In any event, he said that the only people he ever dealt with were those who answered the phone for Summertime Pools in Swan Hill, Mr Lusty and one other unnamed employee whose phone number he had been given.
- 15 Both Mr and Mrs Ludbey said that the person doing the repairs to the chlorinator left to get some spare parts and said they would return the next day. They believe that the person had unplugged and removed the chlorinator and cap, thereby effectively disconnecting the inflow feeder pipe returning the cleaned water to the pool. When Mr and Mrs Ludbey got up the next morning, they saw that the pool was nearly empty. Mr Ludbey estimated about 1/8 of the pool contained water and 7/8 of the pool was empty. Mrs Ludbey thought that the pool was just about empty except for some water in one end. She said she took photos on her phone, but no longer has them.
- 16 They believe that the automatic filtration system came on as programmed at 4am, and that it pumped the contents of the pool out through the disconnected inflow feeder pipe. The experts agreed that it would take about 3 hours for the pool to be drained, which is consistent with the applicants noticing it gone when they woke up.

- 17 Mr and Mrs Ludbey said that there was no sign of where the water had gone to. They agreed with the suggestion put by the respondent's Counsel that it would have been about 42,000 litres of water that had escaped. Mr Ludbey explained that the chlorinator and other pool equipment was housed in the equipment shed and its floor slopes towards the hole where the conduit for the pool piping starts. He said that the water must have flowed back into the sandy trench which had been cut into the clay soil to house the pool pipes. The water would then have flowed around and under the pool shell, saturating the crushed rock base and the surrounding soil. They both said they did not see any great volume of water on the surface of the ground and garden around the pool.
- 18 When the Ludbeys saw the empty pool they immediately called the respondent. They were told that the most important thing to do was to refill the pool, which they did with the help of a friend who has a water carting business.
- 19 Within a few weeks following the saturation they noticed several irregular undulations appeared in the pool floor, and the ledges and steps became uneven. The undulations are significant along the bottom of the pool adjacent to the drain and pop-up jets. Since then, they have also noticed cracks in the paving surrounding the pool and in the pool fence. They said that the damage has increased over time.
- 20 Mr Briscoe and Mr Mladichek both recently walked in the pool and felt the undulations with their feet. Mr Briscoe described them as "some pretty decent dips in the pool around the jets", "the main drain is worse" and the dips were unusual as they were around one side of the drain, rather than all around. Mr Mladichek said that "by dragging foot along the surface I was able to confirm allegations of dips and rises consistent with damage caused by pool base instability".
- 21 The respondent's defence, as submitted during the hearing, is that no one sent by it had attended the property at all that day and therefore it cannot be responsible for the pool emptying. It says they have no record of a service call being made. It relied on three witnesses, all of whom say they were not there at that time. Mr Decker did not commence as service manager with the respondent until 2014 and gave evidence that he did not read the historical files relating to this property when he took on that role. Mr Lusty left the respondent in 2011. Neither of these witnesses were of assistance. Mr Bowles was involved with the applicants' pool at the relevant time, and his evidence is that he did not cause the pool to drain.
- 22 Much of the respondent's witness statements dealt with events in 2014 when it changed over the filtration equipment to solve the green pool problem. This evidence was not relevant to the questions I have to answer in this claim.
- 23 Although neither of the applicants could be precise about the date, nor recall the identity of the person who came to service the pool, I accept their

evidence that in 2012 or 2013 the pool emptied of water and that the probable cause was that a technician sent by the respondent had left the plumbing disconnected overnight, without turning off the pre-programmed filter timer.

- 24 The reasons for this finding include:
- a the applicants presented as credible and honest witnesses, even after being cross examined at length;
 - b their evidence that the only people who ever worked on the pool prior to 2014 were people sent by the respondent;
 - c I accept that a person may not have a detailed recollection of dates and names from 5 or 6 years ago, especially when the event at the time was not known to have had significant consequences, and the relationship between the parties was amicable;
 - d although there are no contemporaneous written records, the applicants' recollection is consistent with an email they sent to the respondent in January 2014;
 - e it was not suggested that they had any reason to lie about the pool having been drained; and
 - f the respondent was unable to provide any positive evidence refuting the applicants' version of events. At its highest, the respondent was only able to produce one person who said he did not cause the pool to empty, in circumstances where a number of people had been working on the pool between 2011 and 2013.

The cause of the damage

- 25 Mr Davis gave evidence for the applicants. He has been involved in the pool business since 2002 and has been installing fibreglass pools since 2010.
- 26 He said that he first inspected the pool in 2014, when the applicants asked for his advice on why the water was going green. He said that Mr Ludbey mentioned to him at that time that the bottom of the pool was uneven. He said that he told Mr Ludbey that such damage is consistent with other pools he had seen where they had been flooded. Mr Ludbey then told him about the pool emptying a year or more earlier.
- 27 Mr Davis' opinion is that the volume of water flowing and settling around the outside of the pool shell would have the effect of saturating the clay soils, causing it to swell and push the soil and crushed rock screenings around, and then to move again as the soil dried out. He said there is a cavity of about 100 – 200 mm around the sides and bottom of the pool and as this filled with the pool water, the surrounding clay could swell by 30% once saturated. This would cause the divots and pockets observed in the shell.

- 28 Mr Mladichek for the respondent agreed with much of Mr Davis' opinion. He agreed that the pool had been compromised and was defective. He had felt the depressions and high spots by walking in the pool and had observed that the step was drummy, which he said indicated a separation between the fibreglass and the underlying material. He referred to his knowledge of soil mechanics and agreed with Mr Davis that the flooding of the pool surrounds would have been a cause of the damage. Where he differed from Mr Davis was that he thought that there could be other causes as well as the pool emptying overnight. In his opinion, prolonged multiple flooding caused by local weather and the escape of the pool contents, together with a failure to monitor groundwater were contributing causes. He was questioned carefully about whether the three possibilities were alternative or cumulative causes and he answered that it would have been a combination of all three.
- 29 The respondent produced records from the Bureau of Meteorology which indicated that as at 7 March 2012 there had been very heavy rainfall and localised flooding in the area around Echuca. It was submitted that this weather had caused floodwater to enter underneath the pool and have a greater effect than the overnight water escape. However in cross-examination Mr Mladichek could not identify any weather event specific to the applicants' property. Both Mr and Mrs Ludbey gave evidence that there had never been any flooding on their property caused by weather. Mr Ludbey explained that they were located on a rise and Mrs Ludbey said that the flooding in 2012 was not near them and their "feet had kept dry".
- 30 In respect of the alleged failure of the applicants to monitor groundwater, there was no evidence given of any such failure, nor of any specific mechanism by which a failure to monitor could cause the undulations in the floor of the pool.
- 31 Based on the expert evidence, I am not satisfied that the respondent has established local weather conditions or a lack of monitoring as a cause of the damage. This leaves me with the opinion of both experts that the damage was caused by the overnight escape of 42,000 litres of water from the pool.
- 32 As the respondent was supplying to the applicants as consumers, services in trade or commerce, the applicants are entitled to the benefit of a guarantee under s 60 of *The Australian Consumer Law* [ACL] that the services supplied by the respondent would be rendered with due care and skill.
- 33 Further, the respondent was providing ongoing maintenance and servicing of the pool as part of its works under the contract to install the pool. Since the ongoing servicing of the pool was done under the original contract, such works are within the meaning of *domestic building work* as defined in the *Domestic Building Contracts Act 1995* [DBCA]. Accordingly, the applicants are entitled to the benefit of the implied warranties regarding the

work set out in s 8 of that Act, including the warranty created by s 8(a) that the work would be carried out in a proper and workmanlike manner.

- 34 Based on the finding that the respondent was responsible for disconnecting the plumbing and failing to turn off the pre-programmed system, and the finding that the escape of water caused the damage to the pool shell, I find that the respondent is in breach of the ACL and the DBCA and is liable to the applicants for the damage caused by its failure to service the pool with due care and skill or in a proper and workmanlike manner.

What rectification is reasonable?

- 35 Based on the four other pools with similar damage that he had inspected previously, Mr Davis formed the view that the applicants' pool was likely to suffer from irreparable damage. He said that as the floor distorts, the pipes which are glued to the in-floor pop-up jets are likely to pull loose and the fittings to crack. The pool cannot be removed and refitted as there are approximately 60 pipes going under the pool, backfilled with a concrete/sand mix which has set, and if moved, either the pipes will break off or the shell will crack. In those circumstances, the only possible method of repair is to remove and replace the pool completely.
- 36 Mr Mladicsek was asked for his opinion as to whether the pool shell would fail in time. He answered that he did not want to speculate and that it is always difficult to see into the future. Instead, he suggested that an alternative method of rectification could be to leave the pool in place and to pour a concrete slab inside the shell. The concrete would be painted to match the colour of the fibreglass. He admitted that he had never seen such a method of construction before, and failed to provide any detail or specification or engineering evidence as to how it would be done. I do not accept his proposal. Leaving aside the lack of detail (Mr Mladicsek devoted just three lines in his 19 page report to this solution), Mr Mladicsek showed in his evidence that he had a fundamental misunderstanding of the nature of the pool in question. When asked how the in-pool cleaning system and pop-up jets could operate through the concrete slab, he appeared not to have been instructed and/or not to have noticed that there was such a system in place. He attempted to give evidence 'on the run' that the pop-up jets and the pipes to which they are attached could be lengthened and extended through the concrete slab but as this suggestion was made in the witness box without any real consideration or technical detail, I am not satisfied it would be appropriate.

The calculation of damages

- 37 I accept that the applicants are entitled to an order for damages. The relevant principles in respect of the manner in which damages should be assessed were considered in *N and J Rogers Pty Ltd trading as*

*Performance Pools v Rippingale*¹, where Senior Member Walker held as follows [at paragraph 111]:

*I considered the relevant principles in a recent case of Clarendon Homes Pty Ltd v. Zalega*². After reviewing the various authorities³ I concluded (at para 165):

“I think the following principles concerning the assessment of damages for the breach by a builder of a domestic building contract can be spelled out from the cases referred to:

- (a) Where the work and materials are not in conformity with the contract, the prima facie measure of damages is the amount required to rectify the defects complained of and so give to the owner the equivalent of a building which is substantially in accordance with the contract (Bellgrove);*
- (b) The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt (Bellgrove);*
- (c) Reasonableness is a question of fact (Bellgrove) and the onus of proving unreasonableness so as to displace the prima facie measure is upon the builder. It is the builder who is seeking to displace the prima facie position (Tabcorp per Rares J.);*
- (d) In considering whether it would be unreasonable to award the cost of rectification, the tribunal should consider all the circumstances of the case before it. The nature and significance of the breach should be looked at in terms of the bargain the parties had and the relative importance of the breach within the context of the contract as a whole.”*

38 In light of the evidence from Mr Davis, and the lack of a feasible alternative from Mr Mladichek, I am satisfied that the applicants are entitled to an order for the amount it will reasonably cost to replace their pool with an equivalent.

39 Mr Briscoe gave evidence that the cost to pull and out and replace the pool would be \$78,000, made up as follows:

Supply and install new 10.7m fibreglass shell, including <ul style="list-style-type: none">• Hurlcon sand filter,• Hurlcon pool pump• Hurlcon chlorinator,• test kit, brush, leaf rake, hose etc	\$33,733
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¹ [2010] VCAT 1899

² [2010] VCAT 1202

³ Including *Bellgrove v. Eldridge* [1954] HCA 36; (1954) 90 CLR 613 at p.617, and *Tabcorp Holdings v. Bowen* [2009] 253 ALR

<ul style="list-style-type: none"> • eye ball return • hydrostatic valve • solar suction • skimmer box • labour • Concrete and mesh • All pipes and fittings • Base and backfill materials • Excavation 1 day • Dingo hire 1 day 	
Delivery	\$2,000
Permit and insurance	\$2,400
Multicolour LED lights and transformer	\$2,096
Upgrade to Viron pump	\$950
Bullnose pavers supplied	\$2,450
Bullnose pavers laid	\$2,200
Infloor cleaning	\$6,550
Labour to install in floor cleaning	\$2,500
14 m frameless glass fence supplied and installed	\$5,390
60 m ² exposed concrete supplied and delayed	\$7,800
Removal of existing pool and materials	\$15,000
Winter discount	\$-2,069
Total (note that the figures above may not exactly equal this total but the quote allowed a rounded-off price)	\$78,000

40 During questioning Mr Briscoe agreed that he would be able to reuse some items of equipment, such as the Hurlcon sand filter, pool pump and chlorinator, and the LED lights. Mr Briscoe had allowed \$3,500 for the Hurlcon items and \$2,096 for the lights.

41 Mr Mladichek did not comment on the costing of Mr Davis' and Mr Briscoe's scope of works. The respondent did not file any expert material or witness statements contesting the applicants' costings.

42 On the morning of the second day of hearing, the respondent sought leave to call further evidence from its director as to the reasonable cost to remove and replace the pool, being the price that they would quote for such works. This application was made after all the experts, being Mr Davis, Mr Mladichek and the quoting builder Mr Briscoe, had given their evidence and had been cross examined extensively the previous day. I asked the solicitor for the applicants to ascertain whether or not Mr Briscoe could be recalled that day, but they advised he was on a building site. I refused the application, in circumstances where:

- a. the respondent had had ample opportunity to present an alternate costing prior to the hearing (Mr Briscoe's quote was attached to the initiating application, and directions had been made in May, July, September 2017 and February 2018, dealing with the filing of expert and lay witness statements);
- b. the respondent had filed expert material including a costing by Mr Mladichek, but had chosen not to instruct him to address Mr Briscoe's quotation;
- c. the proposed alternate costing had not been put to the experts during cross examination, and leave to rely on it was not sought until after all of the witnesses had been heard and cross-examined;
- d. the applicants would have been prejudiced by the adducing of late evidence after their witnesses had been heard and cross examined;
- e. section 98 of the *Victorian Civil and Administrative Tribunal Act 1998* [VCAT Act] requires the Tribunal to afford natural justice to both parties, and had the evidence been allowed, an adjournment of the hearing would have been necessary to allow the applicants to consider and respond to the respondent's new costing and to recall witnesses; and
- f. As Justice Garde P held in *Chiropractic Board of Australia v Hooper*⁴, on a similar application:

It is clear that in this case the Tribunal was requested to accede to the receipt of new and additional expert evidence in circumstances where the additional evidence was to be led orally and had not been reduced to writing or provided an advance to the applicant. The request was made late in time in a protracted hearing resulting in difficult issues of fairness and justice to both parties which the Tribunal had to decide. It was refused by the Tribunal for the reasons that it gave.

... the proceeding stands to be conducted in accordance with the directions that have been made as to expert evidence and the expert witness practice note. If a party did not, in the opinion of the Tribunal undertaking the final hearing, comply with directions or

⁴ [2013] VCAT 417

the practice note, or leaves its request to call additional expert evidence to such a late stage in the hearing that it cannot be received without disadvantage or prejudice to the other party, the party has only itself to blame.

- 43 In closing submissions, the respondent's counsel asked me to take into consideration that the cost to the respondent of removing and replacing the pool would be cheaper than that quoted by Mr Briscoe. I accept that it is common for a builder to be able to carry out work on its own projects at a cheaper price than an independent builder who has to allow for unknown risks. However even if I were to accept evidence from the bar table, I would not accept the respondent's figures in circumstances where they have not been properly provided or examined. In any event, the base figures quoted by the respondent in closing submissions were not that dissimilar to those of Mr Briscoe: \$35,517 to install a new pool including permits and excavation compared with Mr Briscoe's figure of \$35,133. The differences were in the cost of removal and disposal of the old pool (\$5000 compared with \$15,000) and the amount allowed for paving, fences and in-pool cleaning, which were not given by the respondent.
- 44 Accordingly I find that the applicants are entitled to the cost quoted by Mr Briscoe less the items of equipment that can be reused, being the Hurlcon sand filter, pool pump and chlorinator and the LED lights, totalling \$72,404.

ORDERS

- 45 There will be an order that the respondent is to pay the applicants the sum of \$72,404.
- 46 I shall reserve costs, with liberty granted to the parties to apply.

SENIOR MEMBER S. KIRTON