

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP377/2017

### CATCHWORDS

Domestic building, swimming pool, orders for work unfulfilled, failure by respondent to undertake the work or failure by applicant to give reasonable access, orders made in substitution for earlier orders.

<b>APPLICANT</b>	Mr Nasim Sawan
<b>RESPONDENT</b>	Freedom Pools & Spas Victoria Pty Ltd (ACN: 101 657 167) t/as Horizon Pools
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Lothian
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	30 November 2018
<b>DATE OF ORDER</b>	18 December 2018
<b>CITATION</b>	Sawan v Freedom Pools & Spas Victoria Pty Ltd t/as Horizon Pools (Building and Property) [2018] VCAT 2020

### ORDERS

- 1 In substitution for the orders of 27 March 2018, as they have been breached by both parties, the claim and the counterclaim are dismissed.
- 2 **I direct the Principal Registrar to send copies of these orders to the parties by email.**

**SENIOR MEMBER M. LOTHIAN**

### APPEARANCES:

For Applicant	Mr N. Sawan in person
For Respondent	Mr D. Cutugno, director

## REASONS

- 1 This dispute has been at the Tribunal since the applicant-Owner commenced proceedings on 17 March 2017. Two months later, on 16 May 2017, the respondent-Builder, counterclaimed. The dispute concerns allegedly incomplete and defective work to the Owner's swimming pool.
- 2 The parties agree that work ordered by the Tribunal has not been undertaken. The Owner seeks an order that the Builder pay \$8,300 and arrange for the swimming pool manufacturer to repair two chips and a scratch in the fibreglass coating of the swimming pool. The Builder seeks the outstanding sum of \$3,550 and an order entitling it to complete outstanding works.

### History

- 3 A senior member heard the matter, then published his orders and reasons on 27 March 2018. Order 1 required the Builder to undertake certain works within 30 days. Order 3 required the Owner to pay the Builder \$3,550 with a stay to pay of 35 days.
- 4 The orders made on 27 March 2018 continue to apply. However, on 17 May 2018 both parties appeared before the senior member again and he extended the date by which the Builder was to complete the work until 7 June 2018. He also extended the date by which the Owner was to pay the Builder until 21 June 2018. Part of the issue between the parties had been that the Builder demanded payment before it undertook the works. In the hearing before me, Ms Saunders of the Builder said that she had misread the order regarding the date for payment.
- 5 There was yet another directions hearing before the senior member on 18 July 2018. The directions hearing was arranged because the Builder wrote to the Tribunal stating that the Owner would not allow them access to complete the work. On 9 July 2018 the Tribunal had received an email from the Owner replying to the Tribunal's email of 2 July 2018 notifying the parties of the directions hearing. It said:

On the last direction [hearing], senior member ... requested if I return to another hearing, I would need to supply quotes for the repair works in the order. I am requesting more time to obtain these quotes please.  
[sic]

- 6 No order was made adjourning the directions hearing and it went ahead in the absence of the Owner. On that occasion the senior member ordered as follows:

There being no appearance by the applicant and the respondent having given evidence that the applicant will not permit the work ordered on 27 March 2018 to be carried out and it appearing that the amount ordered is equivalent in value to the work to be done, paragraphs 1, 2

and 3 of the orders made on 27 March 2018 are vacated and instead, both the claim and counterclaim are dismissed.

The result was that the Builder no longer had to undertake or arrange any work for the Owner, and the Owner did not have to pay the Builder.

- 7 On 7 August 2018 the Owner emailed the Tribunal. It commenced:
- On 9 July, I emailed requesting [an] extension to comply with the members request. Now I am to learn the hearing went on without my knowledge.
- I am extremely disappointed that this is the case...
- 8 There was a review hearing before another member on 12 September 2018 who granted the review and revoked the order of 18 July 2018. He ordered that there be a re-hearing which I eventually heard on 30 November 2018.
- 9 The parties agree that the work has not been completed. The issue is, who was responsible for the failure to complete the works. Was it the Builder for failing to undertake the works, or was it the Owner for failing to grant access to the Builder to enable it to undertake the works? Was it a combination of both?
- 10 On 12 September 2018 the Owner was ordered to send the Tribunal and the Builder an affidavit exhibiting copies of all emails that have passed between himself and the Builder since the order of 27 March 2018 and copies of quotations for carrying out the works ordered by the senior member on that date.

### **Emails**

- 11 I have regard to the Owner's affidavit of 15 October 2018 attaching copies of emails that have passed between himself and the Builder. I note that not all emails were included as there are two references to emails which have not been provided.
- 12 Even before the decision of 27 March 2018 the relationship between the parties was difficult. Paragraph 4 of the Reasons of 27 March 2018 includes:
- No resolution [of the dispute] was achieved because there was a stand-off. The Builder would not consider the Owner's complaints until the balance claimed to be due under the Contract was paid and the Owner would not pay the balance until the defects that he alleged were attended to.
- 13 The relevant parts of the emails between the parties follow.
- 14 11 April 2018, Ms Saunders of Builder to Owner:

Hi Dim

I have just returned from annual leave and have received the VCAT order. Upon receiving the outstanding balance of \$3,550 which will correct the current breach of contract Horizon Pools will carry out the following works as per the VCAT order:

- Expose the standpipe which has been tiled over
- Complete the water feature
- Repair the 2 chips and the scratch in the pool. Please provide a photo of each chip and scratch. Once received I can forward to our pool shell manufacturer in WA who [employs] a repair specialist for review. I will advise when he is available to travel to Melbourne.
- Round the edge of the coping tiles in the internal corners.
- Pool blanket will be ordered and installed by a supplier.

As mentioned above, demanding payment before the work was undertaken was a breach of the orders of 27 March 2018 by the Builder, and following the second hearing on 17 May 2018 the Builder ceased to seek payment before the work was undertaken. This correspondence is included to demonstrate that the Builder had confirmed to the Owner that the scope of works it would undertake was the scope of works described in the orders.

15 21 May 2018 at 12:52 PM, Ms Catherine Goncalves of the Builder to the Owner:

Hi Dim

Unfortunately even though we had emailed on Thursday 17/5 [this email was not provided] and left you a voicemail on Friday 18/5 to advise that the boys would attend your site on Monday 21/5 from 8:30 AM you have turned them away from your site and did not allow access. ...

The last availability we have to complete works prior to the order expiry date is for the boys to attend Friday 25/5 arrival between 7:30 AM – 8:30 AM.

Please confirm by return email as we all want to work together to complete works.

16 21 May 2018 at 1:31 PM, Owner to Ms Goncalves of the Builder:

Hi Catherine,

Please do not email me and twist the story. You emailed me stating “Please supply access to your property to start works Monday 21/5 arrival approx. 8:30 – 9 AM”. I reply stating “please provide me am [sic] with a schedule of works”. [This email was also not provided] You didn’t reply!! You arranged your staff to come to my house without confirming with me first. It is the same thing that happened when Daniel made appointments in the past and never showed up.

- 17 21 May 2018 at 1:48 PM Ms Goncalves of the Builder to the Owner:
- Hi Dim
- I did not receive your email response hence why I did not respond but I had called you on Friday and left you a message to confirm with you that you did not return my call; as you did not return the call we were of the belief that there was no issue with the appointment that had been made.
- As you can imagine the organisation of staff to be available at short notice is hard and we wanted to endeavour to resolve and complete the order quickly for all parties.
- As advised last availability is Friday 25/5 arrival from 7:30 AM; please confirm by return email that you will provide access from 7:30 AM.
- 18 On 22 May 2018 Ms Goncalves of the Builder sent two further emails to the Owner at 5:26 PM and 7:52 PM seeking confirmation that the site would be available from 7:30 AM on 25 May 2018.
- 19 23 May 2018 at 2:41 PM, Owner to Ms Goncalves of the Builder:
- Hi Catherine,
- As discussed with you over the phone, access to the property is not a problem, as long as it is confirmed. I am short staffed and need to shuffle things around to make myself available to allow you access to the property. I have emailed you twice requesting a schedule for the scope of works to be carried out but have not received a direct answer. I would like to know what trades will be doing what job, a timeframe and duration of the works. Once I receive this information, I can work it into my schedule, and can give you confirmation for access.
- 20 23 May 2018 at 3:03 PM, Ms Saunders of the Builder to the Owner:
- Hi Dim
- As previously stated we require access on the 25<sup>th</sup> May to carry out the Works as per the VCAT order dated 27 March 2018 more specifically ORDERS 1. The order has been attached for your reference for works to be carried out. The works will be completed by Horizon Pool Representatives. Please confirm you will provide access this time.
- 21 On 24 May 2018 at 3 PM and 3:25 PM Ms Goncalves emailed the Owner seeking confirmation of access the next day. At 5:49 PM she emailed saying:
- Hi Dim
- As we have not had confirmation of access we will not attend site tomorrow.
- We await your advice on workable dates, please note we need time to organise staff availability.

22 24 May 2018 at 7:58 PM, Owner to Ms Goncalves:

Hi Catherine,

Sorry I missed your call earlier today. I have been in and out of meetings all day.

As I have stated before, I am very busy... And I have requested a schedule of works several times now. You have yet to send me one. I need to organise staff to cover me so I can make myself available to give you access.

23 25 May 2018 at 7:43 AM, Ms Goncalves of the Builder to the Owner:

Hi Dim

I have called and left numerous messages from the 18/5 regarding 2 attempts now to attend your property. 1 attempt we had boys attend your site and you would not grant them access.

Works to be carried out are as per the VCAT order that you were in attendance on receipt of this order, you know the works that need to be carried out.

We await your advice on workable dates, please note we need time to organise staff availability.

24 25 May 2018 at 8:37 AM the Owner to the Builder. Leaving aside the more acrimonious aspects of it, the email included:

We appear to be going around in circles here.

On the Friday when your employer [sic – employees] turned up without my confirmation I was leaving my house to go to work. You stated I didn't grant him access as if I was in the wrong...

...

Daniel stated in the directions hearing that only the manufacturer can repair the chips in the pool, otherwise it will void the manufacture warranty. Please confirm who will be repairing the chips, when and how long will the job take!!

I will ask one last time for you to provide me with a schedule of works!! And stop making it out like I'm the one who is doing wrong!! [sic]

...

25 25 May 2018 at 9:14 AM Ms Goncalves of the Builder to the Owner. Leaving aside responses to the Owner's email of 8:37 AM which are not relevant to this proceeding, she said:

Hi Dim

...

You know the works that need to be carried out, you know that we require access to your property for us to obtain photos of the chips for

our manufacturer to assess we need to send these to the manufacture so they can see what is required to fix the problem.

Horizon Pool representatives will be attending to the VCAT order except for the chips which as you have said that Daniel has made clear the manufacture will need to fix.

You asked for the duration of the works, until we can come to site and start works and assess we cannot give you that answer: the key to this problem is that you need to allow us access to the property to commence the works.

Please advise dates we can obtain access to your property [sic]

26 28 May 2018 at 3:30 PM the Owner to the Builder. The email included:

As I have told you before, I am very busy and [struggle] for any spare time. The reason I have asked you several times for a schedule of works, is that I work 7 days a week and I would need to put on extra staff to cover my shift. I have attached photos of the chips on the pools to save horizon pools the time and my time... I think it would be better suited if the repair works are done all on one day, so if you can organise the manufacture and use staff to both come out on the one day, that would be highly appreciated.

The 2 chips are under water and the scratches are above water, so I would say the pool would need to be emptied.

27 28 May 2018 at 4:35 PM Ms Goncalves of the Builder to the Owner:

Hi Dim

Thank you for the photos we will forward on to the manufacturer but please note that we cannot control the manufacture's availabilities. We cannot predict how long the works will take but like you we would like to complete the works as soon as possible.

If you could please advise dates of available access so we can see if it is workable to schedule in works

Looking forward to your reply. [sic]

28 31 May 2018 at 3:35 PM Ms Saunders on behalf of the Builder to the Owner:

Hi Dim

I am currently in the process of providing all information requested by the manufacturers technician for next week's work based on the assumption you will provide a date of site access. [There follows questions about the 2 dents and 1 scratch] this information is required before the technician will attend the site.

Just a reminder we are still waiting for you to provide availabilities of access to your site.

29 Saturday, 2 June 2018 at 10:26 AM the Owner to Ms Goncalves of the Builder as follows:

Hi Catherine

One chip is on the floor of the pool, and the other chip is on the step. The pool will need to be emptied to repair them. I can give you access on Wednesday, 6 June at 11 AM. Please confirm?

30 5 June 2018 at 12:37 PM Ms Saunders to the Owner:

Hi Dim

Confirming the Horizon Pool Employees will be at your site tomorrow at 11 AM to prepare the pool for the Aqua Technics Technician and to conduct other work as per the VCAT order. The Aqua Technician Dave will contact you as he will attend your site on Thursday.

31 5 June 2018 at 5:37 PM Ms Saunders to the Owner. Leaving aside potentially self-serving comments, she said:

Hi Dim

Catherine Our Scheduling Co-ordinator has advised you called today at 3:55 PM to advise you are no longer providing access tomorrow. [There follows accusations concerning the content of the conversation and a recitation of the dates upon which the Builder sought access.]

Horizon Pools has tried to work with your very limited availabilities of [an] 11 AM access time for the 6th June .... Horizon Pools has flown the Aqua Technics Repair Specialist from Perth to Melbourne to attend your site for the completion of the works [ordered on 27 March 2018] the specialist had arranged the colour match for your pool to be delivered to Melbourne last week in preparation for the Works. The specialist travels back to Perth on Friday.

We request you reconsider your cancellation of the access date you provided to allow Horizon Pools staff to attend site to carry out the minor works as ordered... and to prepare the pool for the Aqua Technics Repair Specialist for the following day. Please note the repair Specialist will not attend your site until Horizon Pools have conducted the preliminary works as required by the manufacturer.

...

I look forward to receiving a positive response from you including access dates so we can complete the minor works and comply with the VCAT order. I will send you a text notifying you of this email and will check my emails and text tonight outside of business hours in the hope that Horizon Pools can attend your site tomorrow...

32 On 6 June 2018 at 6:18 AM the Owner sent the Builder an email accusing the Builder of acting in bad faith and concluding "It appears we are once again in dispute".

33 6 June 2018 at 7:19 AM Ms Saunders of the Builder to the Owner:



Good Morning Dim

Thank-you for your response can you please confirm you are cancelling today's appointment. I need to advise the boys and rearrange their days schedule and this will also mean cancelling the repair technician appointment tomorrow which is his last day in Melbourne.

If you are cancelling today's appointment ... are you going to provide any other access date for Horizon Pools to complete the minor works with the exception of the surface repairs as the manufacture will have flown back to Perth?

I will text notification of the email to your mobile.

### **Evidence at the hearing**

- 34 In answer to my question about how long the work would take, Ms Saunders said it would be at least a day, but it might have to be done over a period of two weeks, and that emptying the pool might be necessary. Neither of these matters were raised in the Builder's emails, although the Owner had expressed the view twice, that emptying the pool might be necessary.
- 35 I asked the Owner whether the Builder could gain access to the pool without going through the house, so that he would not have to be present for the whole period of the pool repairs. He responded that access was only available through the front door or the garage. He then agreed that there is a side gate but said there was junk in front of it. He said that there is a trust issue. He also mentioned pets in the back garden.

### **Evidence regarding repair costs**

- 36 The Owner relied on a quotation from Ecraft (Aus) Pty Ltd of 18 July 2018, for \$8,300 to undertake all work except rectification of the dents and scratch. I note that this company is not DBU registered and I am not satisfied that I can rely on the quotation.
- 37 The Builder did not give evidence about the cost to it of completing the job, although Mr Cutugno gave evidence that the cost to it of the pool blanket was \$336.64 and that the work other than the surface repairs could be completed in a day.
- 38 In the absence of better evidence, I find the value of outstanding work, and the risk that the Owner might not be able to arrange for the swimming pool manufacturer to rectify his pool, is equal to the sum otherwise outstanding of \$3,550.

### **Discussion**

- 39 Both parties have behaved towards the other in ways that are inconsistent with the orders of 27 March 2018. For example, it was not reasonable for the Owner to seek information about the trades that would be undertaking

various parts of the job because this was not provided for in the orders of 27 March 2018. The Owner was not entitled to insist on being provided with a schedule of works as a precondition to granting access, and what he meant by “schedule of works” was unclear. As a minimum, it is the scope of works, which had already been provided by the orders of the Tribunal, plus an indication of how long each item would take.

- 40 However, it was also not in accordance with the orders for the Builder to ignore the Owner’s request to know how long the job would take, particularly if the accurate answer was on and off for up to two weeks. In order 2 of 27 March 2018, the work was to be undertaken at a “mutually convenient time”. The Owner cannot possibly have known what was convenient if he was not given all relevant facts about the likely length of the works. Nevertheless, I find that the Owner’s request for information about the likely length of work was not communicated clearly, particularly as it was conflated with information that he was not entitled to seek.
- 41 It was not until the email of 25 May 2018 at 9:14 AM that the Builder told the Owner that it needed to come to site to inspect before an estimate of time to repair could be provided. The Builder had sought photographs to send to the manufacturer, and these were provided three days later by the Owner.
- 42 I am satisfied that the Owner was unreasonable in refusing the Builder access to the site on 6 June 2018 to undertake repairs. However, I note that the email of 5 June 2018 was the first occasion upon which the Builder said that it had to undertake preparatory work for the pool manufacturer and I note that at no point was there agreement between the parties that the Builder could attend site on 7 June 2018 as well as 6 June 2018.
- 43 I find both parties responsible for the breakdown in communication which has led to the Builder being unable to undertake the repairs. I therefore find both parties breached the orders of 27 March 2018.

## **Conclusion**

- 44 Although the Builder has continued to express willingness to complete the repairs and outstanding matters, I am not satisfied that the parties have any hope of behaving towards each other in a way that will enable that to occur.
- 45 As both parties have breached the orders of 27 March 2018, the Owner is no longer entitled to have the Builder undertake or arrange the work ordered on that date, and the Builder is no longer entitled to recover the sum that would otherwise be payable of \$3,550. I emphasise that I do not change those orders, as the only body able to hear an appeal from an order of a non-judicial Tribunal member is the Supreme Court. Rather, the orders I make are in substitution for the orders of 27 March 2018, taking into account the breaches by both parties since those orders.

**Note**

- 46 At the end of the hearing the Owner mentioned possible escape of water and the risk of edge heave to his home. As this issue is not part of this proceeding, mitigation of any such loss is in the hands of the Owner.

**SENIOR MEMBER M. LOTHIAN**