

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D22/2014

CATCHWORDS

Domestic building – construction of pool – defects - evidence

APPLICANT	Mr Nicholas Van Haaster
RESPONDENT	Mr Paul Briscoe t/as P & D Briscoe
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	18 July 2014
DATE OF WRITTEN REASONS	2 September 2014
CITATION	Van Haaster v Briscoe trading as P & D Briscoe (Building and Property) [2014] VCAT 1624

WRITTEN REASONS PROVIDED FOLLOWING THE HEARING

I heard this proceeding on 18 July 2014. The Applicant was represented by Miss S. Kirton of counsel and the Respondent appeared in person.

After hearing evidence I ordered the Respondent to pay to the Applicant \$81,885.00 plus costs to be assessed if not agreed. I gave verbal reasons for the decision at the time but a request has now been received for written reasons.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Miss S. Kirton of counsel
For the Respondent	In person

REASONS

The application

1. In this case the Applicant claimed damages with respect to the supply and installation by the Respondent of a fibreglass pool at his home in Langwarrin as well as some paving work around the pool.
2. The pool was installed in about September 2012 pursuant to a written pool agreement dated August 2012.
3. The contract included the construction and installation of the surrounds for the pool, the excavation of the hole, the supply of the fibreglass insert, the pouring of concrete around the pool, the construction of paving, all associated plumbing and the supply of all the pool equipment. Originally the price, with some extras, was \$51,800.00.
4. Within one or two months after the pool was constructed, the Applicant had some complaints which he raised with Mr Briscoe. There were leaks at the solar hot water line, there was some lipping of the tiles, there was the heaving of the ends of the pool and various other things. Correspondence ensued in which the Applicant threatened legal action. The matter was not resolved and this proceeding was then brought.

The hearing

5. The matter came before me for hearing on 18 July 2014. Miss S. Kirton of counsel appeared on behalf of the Applicant and the Respondent appeared in person.
6. By his application the Applicant seeks the cost of having the existing pool removed and replaced.

Expert evidence

7. An expert's report dated 6 November 2013 by Mr Branko Mladichek was tendered on behalf of the Applicant. It consists largely of annotated photographs and then provides a commentary. It identifies the following defects:
 - (a) The corners of the pool have lifted relative to the middle of the pool;
 - (b) Water is accumulating around the outside of the pool shell;
 - (c) A substantial water feature was constructed out of concrete blocks and clad with a ornamental stone tiles. It was built without any foundation. The adhesion of the stone tiles has failed and they are coming off.
 - (d) The sandstone coping around d the pool is rough in places and t5hey have also lost adhesion.
 - (e) The step into the pool is not properly founded and sounds hollow;
 - (f) There is lipping in the sandstone tiles laid around the pool which Mr Mladichek said was a safety risk;

- (g) The leading edge to the tile paving is not level;
 - (h) The paving itself is not level;
 - (i) Bedding is missing under some of the tiles;
 - (j) The fencing around the pool is not straight;
 - (k) The tiles are drummy;
 - (l) There is no submersible float pump to prevent water build-up in the soil outside the pool shell.
8. Mr Mladichek was called and verified his report. The photographs included in the report support and illustrate the complaints made.
 9. A pool builder, Mr Gibson was also called. His report, dated 9 November 2013 was also tendered which contains similar criticisms. Mr Gibson added that the walls of the pool were bowing and suggested that the soil around the pool shell had not been backfilled correctly or the base was not level. He also produced some photographs and an up-to date quotation to repair the pool for a price of \$81,885.00
 10. No contrary expert witness was called on behalf of the Respondent. Mr Briscoe blamed the greater part of the problem on the presence of water in the excavation which he suggested had come from leaks. He was uncertain when they arose but there was a valve that was found to be leaking by Mr Briscoe's insurance investigator. There was also a leak found under the paving in the pipe work in the heating system that returns the heated water from the house.
 11. Whether and to what extent the heaving of the pool is due to the leaks identified by Mr Briscoe or whether it is due to him not properly founding the pool shell in the first place as Mr Gibson suggested, or perhaps a combination of the two, it seems to me that the pool has not been installed in a proper and workmanlike manner.
 12. It also appears to me that the water feature was not properly founded on a proper footing as it ought to have been. It will have to be demolished and rebuilt on a proper foundation. It is apparent from the photographs and the expert evidence that the paving was deficient in the respects set out above. The lipping seems to me to be excessive and the tiles are also drummy and coming away.
 13. I am satisfied on the expert evidence that the pool has to be replaced. I am satisfied that that is due to deficient workmanship and so the Respondent is responsible.

Damages

14. I have had two prices given to me for the cost of replacing the pool. The cost assessed by Mr Branco Mladichek, the expert who gave evidence on behalf of Applicant, was \$85,449. As against that, Mr Gibson, who is also an expert and a pool builder of some 13 years' experience, is going to re-

use much of the equipment and on that basis the replacement of the pool will cost \$81,885.

15. I will make an order that the Respondent pay to the Applicant the lower of these two sums, which is \$81,885.

Costs

16. The Applicant having made an offer of compromise to the Respondent before the hearing whereby he offered pursuant to s.112 of the Act to accept a substantially lesser sum than the amount awarded, it will be further ordered that the Respondent pay the Applicant's costs of this proceeding including any reserved costs, such costs if not agreed to be assessed by the Costs Court in accordance with the County Court Scale.

SENIOR MEMBER R. WALKER