

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP547/2016

**CATCHWORDS**

DOMESTIC BUILDING DISPUTE – Whether applicant and respondent entered into a contract for the installation of a fibreglass pool; whether a Domestic Building Contract; whether respondent breached the *Domestic Building Contracts Act 1995* and the *Building Act 1993*; whether the respondent breached the *Australian Consumer Law*: s 18 misleading or deceptive conduct; ss 20 and 21 unconscionable conduct; whether breach of consumer guarantees: s 54 whether goods of acceptable quality; s 56 whether goods supplied corresponded with their description; s 60 whether respondent supplied services to applicant with due care and skill; s 61 whether the services reasonably fit for a particular purpose.

<b>APPLICANT</b>	Natalie Broomfield
<b>RESPONDENT</b>	Ideal Transport & Training Pty Ltd (ACN 079 569 967)
<b>JOINED PARTY</b>	Matthew Brumby
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	F. Marks, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	3 March and 5 April 2017
<b>DATE OF ORDER</b>	4 August 2017
<b>CITATION</b>	Broomfield v Ideal Transport & Training Pty Ltd (Building and Property) [2017] VCAT 358

**ORDER**

The proceeding is dismissed.

F. Marks  
**Member**

**APPEARANCES:**

For the Applicant	Ms S. Hooper of Counsel.
For the Respondent	Mr A. Meddings, Director, by telephone.
For the Joined Party	Mr M. Brumby, by telephone.

## REASONS

### The parties

- 1 The applicant (**Ms Broomfield**) is the owner of a property in Victoria.
- 2 The respondent (**Seller**) is a company based in New South Wales. The Seller carries on business under the name Australian Kit Pool Sales, selling kit pools throughout Australia. The Seller also carries on business as a licensed pool builder in New South Wales under the name [swimspaplungepool.com.au](http://swimspaplungepool.com.au).
- 3 The joined party (**Mr Brumby**) is a former employee who worked in the sales department of the Seller.

### The dispute

- 4 Ms Broomfield alleges that on 29 October 2015 she entered into a domestic building contract with the Seller for the purchase and installation of a fibreglass pool. She alleges that in late January 2016 the Seller installed, or supervised the installation, of the pool. She alleges that the installation works are defective.
- 5 Ms Broomfield's expert, Mr Xavier Smith, prepared a report dated 1 March 2016 on the installation of the pool. He considered that the installation of the pool did not comply with AS 1839:1994 'Swimming pools – pre-moulded fibre-reinforced plastics – Installation' (**Installation Standards**).
- 6 Mr Smith concluded that the pool drainage, the pool level and backfill did not comply with the Installation Standards. He said that the Installation Standards required the coping level of the pool to be such that the normal operating water level was a minimum of 50 mm above ground level at its highest point adjacent to the pool. He concluded in this case as the pool was not above the natural ground level. He said there was no provision for drainage around the outside of the pool shell.
- 7 Mr Smith said that the Installation Standards required the finished pool to be level to within 1/225 of the overall length of the wall being considered up to a maximum of 1/300 of the overall length of the pool. He concluded that in this case, it was not. Further, Mr Smith said that the Installation Standards required the backfill to be a 1:6 cement/sand ratio. He concluded that in this case, it was not.
- 8 Mr Smith also considered that the installation of the pool was incomplete. It is not disputed that the solar heating has not been installed. Nor is it disputed that the bond beam was not installed. Mr Smith concluded that the rectification works required the removal and reinstallation of the swimming pool.
- 9 The Seller and Mr Brumby deny that the Seller is liable for the installation of the kit pool. They say that on 29 October 2015 Ms Broomfield entered

into a contract with the Seller for the purchase and delivery of the kit pool. They say there was no contract for the installation of the kit pool. They say the Seller has not installed the kit pool. They say that Ms Broomfield, as the owner builder, was liable for the installation of her kit pool.

- 10 They admit that in late January/early February 2016 Mr Brumby assisted Ms Broomfield with some of the work on her installation of the pool. They say that Ms Broomfield engaged a number of contractors including an excavator, crane drivers and an installer Garry Williams. They say that any work done by Mr Brumby for Ms Broomfield was done of his own accord and not on behalf of the Seller.
- 11 A key question for determination is whether there was a contract between Ms Broomfield and the Seller for the installation of the pool. If there was not an installation contract, a further question is whether the respondent has engaged in conduct which contravenes the *Australian Consumer Law (ACL)*.<sup>1</sup>

### **Preliminary hearing on 10 August 2016**

- 12 At a directions hearing on 24 May 2016, a Senior Member of the Tribunal listed the proceeding for a preliminary hearing on 10 August 2016 to consider the following question: Did the Seller agree to install, or cause to be installed, the pool?
- 13 On 28 May 2016, the Seller wrote to the Tribunal and asked the Senior Member of the Tribunal to clarify what was meant by the words ‘install or cause to be installed’.
- 14 The Tribunal wrote:<sup>2</sup>

‘...the words “install or cause to be installed” mean whether the respondent was responsible for installing the pool, in the sense that it either carried out the work itself or arranged for that work to be carried out on its behalf pursuant to some contractual obligation it had with the applicant.’
- 15 On 10 August 2016 the Seller and Ms Broomfield appeared at the preliminary hearing. Ms Broomfield represented herself and Mr Meddings, director of the Seller, represented the Seller. Ms Broomfield relied on affidavits sworn on 2 June 2016 by herself and her friend, Ms Simone Thomas.
- 16 On 10 August 2016 The Tribunal, convened by another Senior Member, made the following orders:
  - 1 On the question for determination referred to in order number 1 made 24 May 2016, the Tribunal answers:

It is open and arguable that the respondent installed, or caused to be installed, at least partially, the subject swimming pool at the applicant’s property. Final determination of this issue, as one of the

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<sup>1</sup> Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

<sup>2</sup> Email from the Tribunal to Ms Broomfield and the Seller dated 1 June 2016.

issues for determination in this proceeding, will be made at the final hearing of the proceeding following the hearing of oral evidence, including evidence which may be given by Mr Matthew Brumby who will, pursuant to the order made below, be joined as a party to the proceeding.

- 2 Under section 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, on the Tribunal's own motion considering the interests of Mr Matthew Brumby may be affected by the proceeding and that Mr Brumby ought to be bound by, or have the benefit of, orders of the Tribunal in the proceeding, Mr Matthew Brumby is joined as a party to the proceeding. Mr Brumby is to be named as a joined party. Mr Brumby's address is "care of" the respondent at the respondent's address.<sup>3</sup>

17 Neither Ms Broomfield nor the Seller sought to join Mr Brumby.

### **The final hearing**

18 Ms Hooper of Counsel represented Ms Broomfield at the final hearing before me. Mr Meddings, director of the Seller, represented the Seller. He appeared by telephone from New South Wales. Mr Brumby represented himself and appeared by telephone from Tasmania.

### **Witnesses**

- 19 Ms Broomfield and Simone Thomas gave evidence for Ms Broomfield. They relied on their affidavits sworn on 2 June 2016. They also gave oral evidence at the hearing.
- 20 Mr Xavier Smith, civil engineer, was engaged by Ms Broomfield. He gave evidence about the state of the installation of the fibreglass pool. He relied on his report dated 1 March 2016.
- 21 In addition to the documents annexed to her affidavit, Ms Broomfield relied on her building permit dated 18 December 2015, engineering drawings attached to the building permit, the site plan of her property, additional photographs and a copy of the page of the Seller's website 'australiankitpoolsales' showing sample colours of the fibreglass pool. She also relied on pages from the Seller's website 'swimspaplumgepools.com.au'.
- 22 Mr Meddings and Mr Brumby gave sworn evidence for the Seller and for Mr Brumby at the hearing. The Seller relied on the documents which it filed with the Tribunal for the preliminary hearing on 10 August 2016.

### **Ms Broomfield's claim**

- 23 Ms Broomfield claims that:
  - (a) on 29 October 2015 she entered into a domestic building contract with the Seller, which was partly written, oral and implied, for the purchase

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<sup>3</sup> The Tribunal's orders dated 10 August 2016.

and installation of a fibreglass swimming pool with a filtration system and solar heating system for \$17,880;<sup>4</sup>

- (b) in so far as the contract was in writing she alleged it was contained in the Seller's Order dated 29 October 2015 (**Seller's Order**) and the Seller's Tax Invoice no 2150 dated 29 October 2015 (**Seller's Tax Invoice**);<sup>5</sup>
- (c) in so far as the contract was oral, she alleged that the contract was contained in conversations between herself and Mr Brumby and herself and Ron Thomas, a pool installer, who visited her at her property in Victoria in October 2015;<sup>6</sup>
- (d) she alleged that Mr Thomas measured the available space and access for the pool at her property and told her that the pool could be completed in the first week of December 2015;<sup>7</sup>
- (e) in so far as she alleged that the contract was implied she alleged such implication arose as was necessary to give business efficacy to the relationship between herself and the Seller;<sup>8</sup>
- (f) in her written submissions she alleged that the contract price was \$20,380 which comprised \$17,880 for the supply of the pool and \$2,500 for the installation;<sup>9</sup>
- (g) Garry Williams arrived on site on 29 January 2016;<sup>10</sup>
- (h) in late January/early February 2016 the Seller installed the pool without a filtration system and solar heating;
- (i) Mr Brumby and Garry Williams supervised the installation works for the Seller; and
- (j) Mr Brumby supervised the tradesmen installing the pool who Ms Broomfield paid on Mr Brumby's instructions.

24 Ms Broomfield alleges that in breach of the domestic building contract the Seller:

- (a) failed to inform Ms Broomfield before entering into the contract that she was to be an 'owner builder' to install the pool and pay for supplies and suppliers;
- (b) failed to ensure that she obtained an inspection by the Council of the excavation of the pool grounds before the shell of the pool was installed;

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<sup>4</sup> Points of claim [3].

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Written submissions dated 3 March 2017 handed to the Tribunal at the start of the hearing.

<sup>10</sup> He was identified as Garry by Ms Broomfield but he was identified as Garry Williams by Mr Meddings and Mr Brumby at the hearing.

- (c) failed to provide her with the required insurance for the domestic building works;
  - (d) failed to bring the works to completion by the first week of December 2015 or at all; and
  - (e) claims that the works are defective and not complete and relies on the report of Mr Xavier Smith dated 1 March 2016.
- 25 In breach of the *Domestic Building Contracts Act 1995* Ms Broomfield alleges that the Seller has failed to comply with ss 11, 29, 31, 32 and 33.
- 26 She claims the alleged domestic building contract gave rise to the following implied warranties under the *Domestic Building Contracts Act* [s8]:
- (a) the work would be carried out in a proper and workmanlike manner;
  - (b) all materials to be supplied by it for use in the works would be good and suitable for the purpose for which they were used and that unless otherwise stated in the contract, those materials would be new;
  - (c) the work would be carried out in accordance with and would comply with all laws and legal requirements including the *Building Act 1993* and regulations made under that Act.
- 27 In breach of the *Domestic Building Contracts Act* she claims the building works are defective and incomplete.
- 28 Alternatively she claims the Seller was required to comply with the following consumer guarantees under the ACL:
- (a) supply goods of an acceptable quality (ACL s54);
  - (b) supply goods which corresponded with their description (ACL s56);
  - (c) supply services with due care and skill (ACL s60);
  - (d) supply services which were reasonably fit for the relevant purpose (ACL s61).
- 29 Ms Broomfield claims against the Seller:
- (a) damages of \$33,588 for the cost of the removal and re-installation of the swimming pool;
  - (b) alternatively, damages for engaging in misleading or deceptive conduct in breach of the ACL (s18) by:
    - (i) advertising on its website that it was a registered builder and all of its work was covered by insurance;
    - (ii) failing to identify that it required her to be an ‘owner builder’ responsible for obtaining the building permit for installation while the Seller engaged various suppliers and tradesmen for payment by Ms Broomfield including each of Mr Brumby and Garry who supervised and worked on the installation of the pool and were paid by her;

- (iii) informing her that they would be running the job and that the owner builder position was to save her money;
  - (iv) telling her that she needed to obtain domestic building insurance certificates from the individual trades as they did not have insurance cover;
- (c) further or in the alternative, she alleges that the Seller breached s 20 of the ACL by engaging in unconscionable conduct in relation to the supply or acquisition of goods or services in trade or commerce in:
- (i) failing to disclose that it required Ms Broomfield to be an ‘owner builder’ responsible for obtaining the building permit for installation whilst the Seller engaged various suppliers and tradespeople for payment by her; and
  - (ii) failing to inform her that she was not covered by the Seller’s insurance for the domestic building works;
- (d) alternatively, damages for allegedly failing to comply with the consumer guarantees under the ACL;
- (e) alternatively, an order that the Seller remove the swimming pool, reinstate her property and provide a refund; and
- (f) damages for loss of amenity.

### **The Seller’s and Mr Brumby’s defence**

- 30 The Seller and Mr Brumby deny Ms Broomfield’s claims. They say:
- (a) the contract entered into by Ms Broomfield and the Seller on 29 October 2015, was for the purchase and delivery of a kit fibreglass swimming pool;
  - (b) there was no contract between the Seller and Ms Broomfield for the installation, or the supervision of the installation of the pool;
  - (c) Mr Brumby was the Seller’s former sales representative who sold pools and did not install pools for the Seller;
  - (d) Ms Broomfield was an owner builder who obtained a building permit, as owner builder, to install the swimming pool and carry out the associated works at her property;
  - (e) Ms Broomfield, as owner builder, was liable for the installation of her pool;
  - (f) Ms Broomfield paid the balance of the purchase price of \$17,880, prior to the delivery of the pool;
  - (g) following delivery of the pool in late January 2016, Mr Brumby did some work to assist Ms Broomfield with her installation as she required help;

- (h) any work carried out by Mr Brumby for Ms Broomfield while on site at her property following delivery of the pool, was done in his own time and not as the Seller's employee; and
- (i) the colour of the pool as delivered was the colour ordered. Ms Broomfield accepted the colour of the pool on installation.

### **Issues**

- 31 The issues for determination are:
- (a) Did Ms Broomfield enter into a domestic building contract with the Seller for the installation of the fibreglass pool?
  - (b) If yes to (a) what were the terms of the contract?
  - (c) Did the Seller breach any of the terms of the contract?
  - (d) Alternatively did the Seller contravene the ACL by:
    - (i) engaging in misleading or deceptive conduct;
    - (ii) engaging in unconscionable conduct; or
    - (iii) failing to comply with various consumer guarantees?

### **Facts**

- 32 At the end of the day a number of the facts were not in dispute although the legal character of the facts was disputed. I set out below a summary of the facts which were not disputed unless indicated otherwise.
- 33 The Seller has two websites which are relevant to this proceeding. The first website has a URL domain name address: 'http://swimspaplungepool.com.au'. This website states that the Seller is the national distributor for Modern Pool Manufacturing Pty Ltd. The website states that the Seller will come to the customer's site to give professional advice and a detailed fully inclusive quote and can take care of all Council approvals and insurances. The site allows the customer to send queries to the Seller by email but not via eBay. The website states that the Seller is fully licensed and insured. Mr Meddings said that the Seller was a licensed pool installer in New South Wales.
- 34 The Seller also has a second website with a URL domain name address: 'http://australiankitpoolsales.com'. The Seller sells kit pools throughout Australia from this site. Again, the seller is stated to be the national distributor for Modern Pool Manufacturing Pty Ltd. The site provides for a customer to visit its store via eBay for current pricing.
- 35 In October 2015 Ms Broomfield, through eBay, sent the Seller an email to enquire about a plunge pool she had seen on the Seller's website. She exchanged emails with Mr Brumby about the cost of the pool and what she wanted to have included with it.



- 36 The Seller sent Ms Broomfield a quotation dated 15 October 2015 for a 2 metre x 5 metre slimline fibreglass plunge pool (**Quotation**). The Quotation is on Australian Kit Pool Sales' letterhead and was valid for 30 days. Mr Brumby prepared the Quotation.
- 37 The Quotation is for \$16,220. It is expressed to be for a slimline 5 m x 2.5 m pool. The equipment kit is for 'VS340, 150, PS25, H/O, Chem'. The colour of the pool is 'chrysal'. The kit pool includes a water feature blade and solar heating. The quotation allows for a discount of \$3,780.
- 38 The quotation does not make any reference to delivery or installation of the pool. Nor does it include any costs for the installation of the pool.
- 39 I find that the Quotation is for the purchase of a kit pool because there is no reference to installation, the installation work to be performed or costings for installation.
- 40 At about the same time as sending the Quotation, Mr Brumby spoke to Ms Broomfield and gave her the name and phone number of Ron Thomas, a licensed pool installer, based in Victoria. In her oral evidence Ms Broomfield said she contacted Mr Thomas and arranged for him to come and give her an estimate for the cost of installation of the pool.
- 41 Mr Thomas met Ms Broomfield at her property in Victoria. He measured the available space for the pool and gave Ms Broomfield estimates of the costs of installation of the pool. After Mr Thomas visited Ms Broomfield, she telephoned Mr Brumby and told him that she wanted to go ahead with the purchase and the installation of the pool.
- 42 There is no dispute that on 28 October 2015 Ms Broomfield paid the Seller a deposit of \$3,200. There is a dispute about whether this happened before or after Mr Brumby gave her Mr Thomas' name. In her affidavit she said she paid the deposit before being given his name. In her oral evidence she said the same as Mr Brumby, that she paid the deposit after Mr Thomas' visit.
- 43 I prefer Ms Broomfield's oral evidence and Mr Brumby's evidence to that of Ms Broomfield's affidavit. I find that she paid a deposit to the Seller after receiving an estimate of costs from Mr Thomas. I make this finding as it is more probable than not that she would have obtained a quotation for the costs of installation before deciding to purchase the pool.
- 44 On 28 October, 2015 shortly after Mr Thomas's visit to her property, Ms Broomfield went to the Wyndham City Council (**Council**) to apply for a building permit to install her pool and pool fence.
- 45 At the Council Ms Broomfield met with one of the Council's staff, who assisted her with her application for a building permit. The Council employee made a number of notes on the site plan relating to the pool and the pool fence, including the size of the pool. Ms Broomfield filled out the owner builder application form for a building permit, with the assistance of the Council employee.

- 46 Ms Broomfield filed various documents with the Council. Initially Ms Broomfield said the Seller gave her all the documents for filing with the Council, including her site plan of the property in Victoria. However, Mr Meddings said that the Seller did not draft the site plan for her. Nevertheless she continued to state that the Seller had drafted the site plan which she had taken to Council. On my request, Ms Broomfield produced the site plan of her property dated 23 May 2005 (**Site Plan**) which she had brought to the hearing. The site plan was made available to the parties.
- 47 The title box on the Site Plan states that it has been drafted by Diamond Valley Drafting Pty Ltd for the builders, Zuccala Family Builders. After looking at the Site Plan Ms Broomfield then stated a number of times that the Site Plan had been drafted by the Council employee who assisted her with her application.
- 48 After being asked why she continued to state that the Site Plan had been drafted by the Council employee she said that she had been given the Site Plan by the vendor when she purchased her home. She finally conceded that the Site Plan had not been drafted by the Seller or the Council.
- 49 While at the Council she lodged her completed owner builder application for a building permit. She also lodged the Seller's engineering drawing of the pool, the specifications for the pool fence and the Site Plan of her property, amongst other documents.
- 50 There is no dispute that Ms Broomfield applied for a building permit as owner builder. There is no dispute that Mr Brumby and Ms Broomfield had discussions about her obtaining a building permit, as owner builder, from the Council. There is a dispute about when these discussions took place and the content of those discussions.
- 51 In her affidavit she said she was given documents to complete, including a VBA application for an owner builder permit and that she telephoned Mr Brumby asking him what the documents were for.
- 52 In her Points of claim Ms Broomfield said on 29 October 2015 when she visited the Council,<sup>11</sup> she contacted Mr Brumby and said to him, 'Do I look like Bob the builder?' She said he told her 'not to worry' as he would be running the job. She said he told her that she was an owner builder so that she could pay each of the trades people involved separately saving money and eliminating the need for the pool company to be involved and putting their bit on top.
- 53 In her oral evidence she said that she telephoned Mr Brumby after she left the Council. In cross examination she said that she contacted Mr Brumby before she completed the application form, as reading the form prompted her to ring Mr Brumby.

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<sup>11</sup> Ms Broomfield agreed at the hearing that she visited the Council on 28 October 2015.

- 54 In cross examination Ms Broomfield was asked a number of questions about being an owner builder. She continued to assert that although she was expressed to be the owner builder on the building permit, she was not the builder and had never assumed such a role. She continued to assert that she had been told by Mr Brumby that he was the builder and that this was a formality. She said she did not understand the forms that she had completed and had relied on what Mr Brumby told her.
- 55 In cross examination she agreed that when she went to the Council's offices on 28 October 2015, she completed a lengthy owner builder application for a building permit where the ramifications of being an owner builder were expressly stated. Ms Broomfield relied on photos which she produced as evidence of Mr Brumby running the installation. Ms Broomfield said that she signed the documents at the Council on being relieved of her concerns by and under the direction of Mr Brumby.
- 56 Mr Brumby agreed that he had discussions with Ms Broomfield, about her being an owner builder and the fact that this would reduce her installation costs. However he denied making any of the alleged statements. He also denied her claims that she spoke to him at the Council offices prior to signing the application for an owner builder building permit.
- 57 In cross examination he said he told Ms Broomfield that as owner builder she would be doing the drawings, the excavation and other things and would save herself about \$15,000. He said he thought that these discussions with Ms Broomfield took place at an earlier stage to that stated by Ms Broomfield.
- 58 I prefer Mr Brumby's evidence to that of Ms Broomfield's. I do not accept Ms Broomfield's evidence of her discussions with Mr Brumby, for the following reasons. On receiving the Quotation from the Seller and being given Mr Thomas' phone number, she arranged for Mr Thomas, an independent installer of pools in Victoria, to provide her with an estimate of the costs of installation.
- 59 Following Mr Thomas's agreement to install the pool, it is implausible that Mr Brumby, a pool salesman and not a pool installer, would have said that he was the builder and that he was installing the pool for her. It is implausible because Mr Brumby had just given Ms Broomfield the telephone number of an independent pool installer in Victoria.
- 60 I found Ms Broomfield's evidence of her discussions with Mr Brumby to be inconsistent. I also found her continued assertions about matters which were expressly clear from the face of the documents, to be surprising and implausible. I reject Ms Broomfield's evidence that because she considered Mr Thomas to be an employee, that he was an employee. I find that Mr Thomas was an independent installer based in Victoria who Ms Broomfield contacted to give her an estimate of the costs of installation.

- 61 I accept Mr Brumby's evidence that he gave Ms Broomfield Mr Thomas' phone number for her to arrange for Mr Thomas to give her a quotation for the installation. I also accept his evidence that he did not say to Ms Broomfield that he was the builder and installing her pool.
- 62 I find that Mr Brumby did not say to Ms Broomfield at the time that she paid the deposit and entered into the contract with the Seller, that he was installing her pool. In fact I find her evidence to be inconsistent with Mr Brumby's text dated 9 December 2015. In his text he explained to Ms Broomfield that he had found another installer because Mr Thomas would not install her pool. I also find it inconsistent with her text of 16 November 2015 to the Seller in which she confirmed that she had booked Mr Thomas to install the pool.
- 63 On 29 October 2015, the Seller sent Ms Broomfield order No 2150 dated 29 October 2015 on swimspaplungepool.com.au's letterhead (**Seller's Order**). The Seller's Order is expressed to be for the purchase of a modern pool model: 6 x 2.5m slimline plunge and listed items. The purchase price is \$17,880. The deposit of \$3,200 is expressed to have been paid.
- 64 The Seller's Order refers to delivery of that pool. The Seller's Order does not make any reference to the installation of a pool, including the alleged installation costs of \$2,500.
- 65 The items appearing in the Seller's Order under the heading 'Pool Inclusions' include, amongst other things, a chlorinator, a skimmer box and a hydrostatic valve. They also include engineers plan, design compliance 1507 certificate and a dig template. Extras to be provided include a sun catcher solar heating system kit.
- 66 The word 'delivery' appears under the heading 'Pool Inclusions'. Payment terms are set out in the Seller's Order. They provide for staged payments of the purchase price of \$17,880.
- 67 On 29 October 2015 the Seller sent Ms Broomfield its tax invoice for the purchase of the pool, on Australian Kit Pool Sales' letterhead, dated 29 October 2015 (**Seller's Tax Invoice**). The Seller's Tax Invoice stated the purchase price of the pool to be \$17,880. The description of items in the Seller's Tax Invoice is in identical terms to description in the Seller's Order.
- 68 In her oral evidence Ms Broomfield conceded that the Seller's Order and the Seller's Tax Invoice were for the purchase of a 6 m x 2.5 m slimline plunge pool.
- 69 I find that the Seller's Order and the Seller's Tax Invoice are documentary evidence of the order and purchase of a 6 m x 2.5 m slimline plunge pool by Ms Broomfield for \$17,880. I find that the contract between Ms Broomfield and the Seller as evidenced by the Seller's Tax Invoice, was for the purchase and delivery but not the installation of her pool.

- 70 In her email dated 9 November 2015 at 14.31 pm sent to the Seller at the Seller's email address [australiankitpoolsales@live.com.au](mailto:australiankitpoolsales@live.com.au), she said:
- All systems go here for first week of December so far. Ron may be the hardest to get if you drop the ball.
- My permits are all on track and should be right in a week or 2. The guy who grants the permits is the one who helped me fill it all out. Doubt he'd knock back his own work.
- Get the lads on the job.<sup>12</sup>
- 71 Ms Broomfield also sent the following email to the Seller on 16 November 2015 at 4:16 pm:
- Matty,
- I've sorted my permits. I'll have them Wednesday. My builder boy is ready to build the pool fencing and feature wall. Ron is booked to do the install and my excavator is waiting for the go-ahead. If you shut me down now some won't be available until next year.
- Please call ASAP and give me an update.<sup>13</sup>
- 72 I find that Ms Broomfield's email of 16 November 2015 to the Seller confirmed that she had booked Mr Thomas, the independent pool installer in Victoria, to install her pool.
- 73 At some time prior to installation, Ms Ron Thomas decided not to install the pool for Ms Broomfield. There is no dispute that Mr Brumby sent Ms Broomfield a text on 9 December 2015, about the installation following Mr Thomas' decision not to install the pool. There is a dispute about whether the text amounted to an agreement by the Seller to install the pool.
- 74 In her affidavit Ms Broomfield said that following her engagement of Bill Preston the excavator, Mr Brumby told her that a man called Garry would assist him with the installation of the pool.<sup>14</sup> She gave oral evidence that by text dated 9 December 2015 Mr Brumby agreed to install the pool for \$2,500. She said the quotation was for the installation up to a stage where the pool would be full of water, all filtration running and instructions given on how to use the pool.<sup>15</sup>
- 75 Ms Broomfield said she later spoke to Mr Brumby by telephone about the installation and agreed to the quotation of \$2,500. She asked Mr Brumby to telephone Garry to arrange the installation because she was not comfortable ringing him.
- 76 Mr Brumby disputed Ms Broomfield's evidence. He was concerned that there were a number of text messages which Ms Broomfield had failed to produce at the hearing which clarified the position. He disagreed with her

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<sup>12</sup> Document D in bundle of the Seller's documents filed before the preliminary hearing.

<sup>13</sup> Document D in bundle of the Seller's documents filed before the preliminary hearing.

<sup>14</sup> Ms Broomfield's affidavit [12] and [13].

<sup>15</sup> Exhibit NB 4 to Ms Broomfield's affidavit.

interpretation of various text messages. However Mr Brumby did not produce copies of emails or texts.

77 Mr Brumby said that Mr Thomas no longer wanted to install the pool for her. He said the purpose of his text was to help Ms Broomfield find another installer. He said that the installer, Garry Williams, to whom he was referring in his text, was not employed by the Seller.

78 In cross examination he denied that his telephone discussions with Ms Broomfield, around the time he sent the text, were about Ms Broomfield wanting him to deal with the installation. He said that those discussions arose at a later time. He did not elaborate on those discussions.

79 Mr Brumby's text dated 9 December 2015 stated:

6m would fit as long as your council guy is happy! As for Ron he wasn't happy! I just spoke to an installer I trained and he can do it for you he and another guy for \$2,500 with you supplying base backfill but would need to sort the concrete bond beam yourself as they would do everything up until that time. So the pool would be full of water and all filtration running and would give you instructions how to use it all then leave. Would you like his number?<sup>16</sup>

80 I reject Ms Broomfield's evidence that Mr Brumby's text amounted to the Seller agreeing to install the pool. The words of the text are clear. There is nothing in the text to suggest that Mr Brumby agreed to install the pool. In fact the statement in the text is to the contrary.

81 The text states that Mr Brumby had found an installer who, with another person, would install the pool for \$2,500. The text sets out the responsibilities of the installer and Ms Broomfield. Amongst other things, Ms Broomfield was required to organise the concrete bond beam.

82 I find that Mr Brumby's text to Ms Broomfield on 9 December 2015 did not amount to an agreement by Mr Brumby, or the Seller, to install the pool for Ms Broomfield.

83 On 18 December 2015, the Council issued a building permit to Ms Broomfield, as owner builder, for the pool and the pool fence (**Building Permit**).<sup>17</sup>

84 In her affidavit Ms Broomfield said that, at the request of Mr Brumby, she googled a local excavator to dig the hole for the pool because Mr Brumby said he did not have anyone in the area. She secured Bill Preston of Preston Earthmoving and gave his details to Mr Brumby. She said Mr Brumby coordinated Bill Preston's work and she paid Bill Preston \$3,500.<sup>18</sup>

85 On 27 January 2016, Ms Broomfield paid the Seller the balance of the purchase price of the pool.

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<sup>16</sup> Ms Broomfield's affidavit [NB 4].

<sup>17</sup> Building permit No 106322 of 2015.

<sup>18</sup> Ms Broomfield's affidavit [11].

86 In her affidavit Ms Broomfield said preparatory work began on 29 January 2016 with the excavation. She said Mr Brumby arrived with the pool on 30 January 2016. She said the pool would not fit through her garage and so she had to organise a crane at a cost of \$500 to lift the pool into her garage.<sup>19</sup> I presume that she meant to say that the crane was required to lift the pool over her garage. She said no allowance was made for lifting the pool into the excavated hole and that this cost a further \$1,000.

87 In her affidavit she relied on a screenshot of her text exchange with Mr Brumby in relation to the crane payments. The text stated:<sup>20</sup>

crane guy said if it was his crane would be 1000 but he is going to ask around as his crane is getting serviced he has no walker crane but will get back to me

88 Mr Brumby said that his text was to follow up a second crane driver as the one that Ms Broomfield organised brought a crane that was too small and did not want to return to Ms Broomfield's property to assist her. He said Ms Broomfield did not know of another crane operator and so he organised it for her.

89 Mr Brumby was on site at Ms Broomfield's property until 2 February 2016. He sent Ms Broomfield the following text at 2.57 pm on that day:

I'm glad that's in!! I have to leave here at 5 to get to the boat. I will get 1500 from you nat to cover the stuff I have paid and when it's done the rest will go to Garry! Talk to him tonight after he finishes how long He thinks there is left

90 On 2 February 2016 Ms Broomfield paid Mr Brumby \$1,500 in cash for his costs and expenses, after which Mr Brumby travelled to his home in Tasmania by ferry.

91 A person identified as Garry Williams<sup>21</sup> worked on the installation of the pool at Ms Broomfield's property. The points of claim allege that Garry arrived on 29 January 2016. After Mr Brumby left Ms Broomfield's property, Ms Broomfield and Mr Brumby exchanged text messages on 3 February 2016, about Garry Williams asking her for more money for installing the pool. They exchanged the following texts on 3 February 2016.

92 Ms Broomfield wrote:

Garry just said he's going to call Andrew for more \$\$ and perhaps I should ring Andrew?<sup>22</sup>

93 Mr Brumby wrote in reply:

Andrew won't give Garry more no reason for him too. I told Garry he just has to finish your pool and wear it! I lost 4 days doing it and made 250\$ you

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<sup>19</sup> Ms Broomfield's affidavit [14].

<sup>20</sup> Ms Broomfield's affidavit [14].

<sup>21</sup> Ms Broomfield gave evidence at the hearing that she did not know Garry's surname. Mr Meddings gave evidence that his name was Garry Williams.

<sup>22</sup> Ms Broomfield's affidavit [NB6].

were unlucky with Mohammed and then another crane and the rain it is what it is it's just had to get finished. Just getting home off the boat.<sup>23</sup>

- 94 There was a dispute as to the interpretation of these texts. Ms Broomfield said that Garry was employed by the Seller who was responsible for the installation. She said that Mr Brumby's text confirmed that the Seller would not pay Garry more money for the installation. In contrast, Mr Brumby said that Garry was not employed by the Seller and that he was an independent contractor and not paid by the Seller.
- 95 Garry Williams worked on the installation of the pool at Ms Broomfield's property until the evening of 4 February 2016. On that evening, on completion of his installation work, Ms Broomfield paid him \$1,000 in cash.
- 96 Ms Broomfield paid tradesmen directly for their labour and materials associated with the installation of the pool. She also paid third party suppliers for materials required for the installation. Ms Broomfield said that she was directed to do so by Mr Brumby.
- 97 Ms Broomfield continued to assert throughout the hearing that Garry Williams was employed by the Seller and hired and fired by Mr Brumby. Her evidence did not support her assertions. I do not accept Ms Broomfield's assertions. I accept the evidence of Mr Meddings and Mr Brumby that Garry Williams was not employed by the Seller. I therefore find that Garry Williams was an independent contractor and not an employee of the Seller. I find that he was paid cash of \$1,000 by Ms Broomfield for his installation work.
- 98 Overall, there is little dispute between the evidence of Ms Broomfield and Mr Brumby as to the assistance that Mr Brumby gave her following delivery of the pool. Mr Brumby admitted that he assisted her in arranging various tradesmen and in speaking to tradesmen who she had organised. However, he denied that he ever agreed to install or supervise the installation of her pool.
- 99 The photographs on which Ms Broomfield relied, show Mr Brumby in a wheelchair.<sup>24</sup> It would have been impossible for him to carry out the installation work, as claimed by Ms Broomfield. The photographs show Garry manoeuvring the pool being craned into the excavated hole.
- 100 The photographs show the crane operator, the installer, Garry, and Mr Brumby in his wheel chair, at the side of the pool after the pool had been lowered into the excavated hole. They also show the crane operator and Garry standing next to Mr Brumby in his wheelchair at the end of the pool after the pool had been lowered by the crane into the excavated hole.
- 101 Mr Brumby said that he had not been to the site before and that he did not organise the first crane or the excavator. He said on arriving at Ms

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<sup>23</sup> Ms Broomfield's affidavit [NB6].

<sup>24</sup> See the photographs in Ms Broomfield's affidavit exhibit [NB 7].



Broomfield's property he checked the site because the pool would not fit into the excavated hole. He said he sold Ms Broomfield a larger pool at no extra cost, being a 6 m x 2.5 m pool, that was 100 mm deeper than the 5 m x 2.5 m pool, which was in the Quotation.

- 102 He said that the Council told Ms Broomfield that her property could fit a larger pool if she wanted it. He said Ms Broomfield rang him and asked for a 6 m pool. He said the pool did not fit under the garage when Mr Thomas has said it would fit. He said it was not his job to do the measuring for the installation of the pool as he was not installing the pool.
- 103 Additionally he said that there was a problem with the excavated hole. He said the hole had not been dug correctly and the excavator had severed pipes that needed to be changed and moved. He said Ms Broomfield organised and paid for a plumber to do this work. He said that it had rained during the installation which resulted in the pool collapsing. He said Ms Broomfield never mentioned the colour of the pool to him.
- 104 Mr Brumby said he tried to help her put the pool in. He helped organise the second crane operator because Ms Broomfield was unable to get a crane operator to come. He said he never told Ms Broomfield that he was a licensed installer. He said Ms Brumby failed to take any responsibility, as owner builder, for the installation of the pool.
- 105 He agreed that he helped Ms Broomfield with steps relating to the excavation, the crane and the backfill. He said he spoke with the excavator, Bill Preston, because Ms Broomfield gave him his details. He said he discussed with Mr Preston moving the sewer pipe that Mr Preston had dug through. He said he did not tell Ms Broomfield what to pay Mr Preston. He agreed that he told Ms Broomfield to purchase the backfill for the pool.
- 106 Mr Brumby agreed that he was on site with Garry Williams but said that he did not organise Garry. He agreed that he had a conversation with Garry about what Garry was to be paid. He said that another person called Murray was also on site working with Garry. He agreed that he spoke to Mr Meddings about Garry when he was on site about installing a hydrostatic valve but not about what Garry was to be paid.
- 107 He said he had discussions with Mr Meddings when he was on site about the delivery but not about the progress of the installation. He said that on his arrival at her property things were going wrong. In cross examination, at one stage, he said he oversaw the installation of the pool. He later said he did not provide directions on what went where and how things fitted together. He said that they did not have a pool installer on site and so he helped Ms Broomfield. He said the difficulty was that Ms Broomfield was taking no responsibility for being an owner builder.
- 108 In cross examination Mr Brumby denied that he was paid \$1,500 for supervising the pool installation. He said when he was on site he did labouring work which included gluing pipes, helping other labourers and

other people. He said the \$1,500 that he was paid in cash was for labour and accommodation and that he did not have receipts because Ms Broomfield paid him in cash. He said he paid for the hire of a pump to remove water due to it raining.

- 109 He said he stayed on site because no one else would do the pool. He said everyone started bailing on Ms Broomfield and left her in the lurch. He said Mohammed, the first crane operator did not want to come back to her property and that the back garden had collapsed with rain. He said if it had been his responsibility, he would have done all of the measuring and everything necessary for the installation of the pool.
- 110 He said the excavator had the specifications for the pool. At the end of being questioned he said that Garry Williams was not a licensed installer but a labourer who installed the pool.
- 111 In cross-examination Mr Brumby agreed that he had discussions with Ms Broomfield about the delivery of the pool because she had to organise a crane. He said the delay in delivery, which was originally arranged for December 2015, was caused by her failing to fill out the owner builder certificate. He said that the delay in installation was not the reason for Ron Thomas not doing the installation. He said Mr Thomas did not do the installation because he considered Ms Broomfield too hard to work for.
- 112 Having heard the evidence, I prefer the evidence of Mr Brumby to Ms Broomfield. I am not persuaded by Ms Broomfield's evidence that she entered into a contract with the Seller for the installation of the pool. Nor am I persuaded that she entered into a contract with the Seller for the supervision of the installation of the pool. I am not persuaded for the following reasons.
- 113 There are a number of inconsistencies with Ms Broomfield's evidence. In her points of claim she alleged that the oral contract with the Seller was with Mr Thomas. However, in her affidavit she said Mr Brumby advised that Mr Thomas would come to her home.
- 114 In her oral evidence she said Mr Brumby gave her Mr Thomas' telephone number to ring. In her email of 9 November 2015 she said that she had arranged her permits with the assistance of the Council. In her email of 16 November 2015 she had sorted her permits and booked Ron Thomas the installer and the excavator. I have found Mr Thomas to be an independent pool installer.
- 115 Ms Broomfield also alleged that the oral contract with the Seller was with Mr Brumby. However I have found that at the time Ms Broomfield entered into a contract with the Seller on 29 October 2015, she entered into a contract to purchase a pool and not to install a pool. Ms Broomfield has conceded that the Seller's Order and Seller's Tax Invoice were for the purchase of a pool.

- 116 In her Points of claim Ms Broomfield alleged that Garry, a representative of the Seller, was on her property issuing instructions in relation to the works.<sup>25</sup> She also said that Mr Brumby was initially on the telephone and issued instructions to Garry. It is not clear how Ms Broomfield can give this evidence when she said in her affidavit and oral evidence that she spent all her time inside her home during the installation with asthma apart from doing coffee runs.<sup>26</sup>
- 117 Further, in her Points of claim Ms Broomfield said that the installation works were supervised by Mr Brumby and Garry for the Seller.<sup>27</sup> In her affidavit she relied on photographs of the pool shell being installed which she said evidenced Mr Brumby and Garry supervising the installation.<sup>28</sup> As I have observed, Mr Brumby appeared in Ms Broomfield's photographs, next to the pool in a wheelchair.
- 118 I find, on the evidence that Mr Brumby did not agree to supervise the installation of Ms Broomfield's pool either on his own behalf, or on behalf of the Seller. It is not disputed that a number of people helped Ms Broomfield install the pool and that she paid each of them cash. It is not disputed that she paid the excavator \$3,500, the first crane operator \$500, the second crane operator \$1,000, Mr Brumby \$1,500 and Garry Williams, the installer \$1000.
- 119 Two days after Mr Brumby left Ms Broomfield's property Garry remained on site. Ms Broomfield said she had discussions with Garry about his installation work. She said Garry told her that the pipes sticking up from the ground were for the solar heating that he was not doing. She said she asked Garry why he had placed pipes on top of bricks. Ms Broomfield contacted Mr Brumby about these issues. She said he told her that he was only doing a partial and not a full installation. Mr Brumby denied having made these statements.
- 120 On about 4 February 2016 Ms Broomfield and Mr Brumby exchanged texts.<sup>29</sup> Mr Brumby's text stated 'the only solar guy I know is Ron'. Ms Broomfield's text was 'you never told me install didn't include all the stuff I bought from y'all. What were you thinking that I'd scale the roof and do it.'
- 121 Mr Brumby's text in response stated:
- Now are you kidding? Never ever have we said we would do the solar. The install only ever was to get the pool fall and filtration running. You never asked me did I know anything about solar.
- 122 I am not satisfied that the emails, sent after the event can be taken as amounting to an agreement by Mr Brumby on behalf of the Seller, to install

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<sup>25</sup> Points of claim [13] and [16].

<sup>26</sup> Ms Broomfield's affidavit [16].

<sup>27</sup> Points of claim [15].

<sup>28</sup> Ms Broomfield's affidavit [18] and exhibit NB 7.

<sup>29</sup> Ms Broomfield's affidavit [20] an exhibit NB 8.

or supervise the installation of the pool. It appears from the evidence that at some stage after arranging the second installers for Ms Broomfield, following Mr Thomas' refusal to do the installation of the kit pool.

- 123 Mr Brumby became involved in assisting Ms Broomfield at some level with the installation. However, I am not satisfied on the evidence that the Seller, through Mr Brumby, entered into a contract with Ms Broomfield to install the pool or supervise the installation of the pool.
- 124 There was no dispute that numerous people were involved in the installation of the pool and that problems arose along the way as a result of Mr Thomas' withdrawal. However, Ms Broomfield has not set out any terms of the installation contract that Mr Brumby is alleged to have entered into on behalf of the Seller.
- 125 Following completion of the installation works Ms Broomfield contacted the Seller to complain about the installation of the pool. On 10 February 2016 she had a telephone conversation with Mr Meddings about the installation of the pool. Both Ms Broomfield and her friend Ms Simone Thomas relied on their affidavits. Ms Thomas, in giving her oral evidence was unable to recall much of the conversation and relied on her affidavit evidence. Their evidence was not disputed by Mr Meddings. Mr Meddings told Ms Broomfield that she had only paid for a standard supervised install and not a proper one.<sup>30</sup> At the hearing Mr Meddings gave evidence that he was mistaken about the Seller's contract with Ms Broomfield and that he later found out, after speaking to her on the telephone, that the contract was only for the purchase of a pool.
- 126 Mr Meddings gave evidence that the Seller carried out full installations of pools in New South Wales for about \$14,000 to \$15,000. He said that the Seller had, at an earlier time, done supervised standard installations which ranged from about \$1,400 to \$2,000. He said this required a customer to arrange a number of things, including the labour. He said it required the Seller to arrange for a supervisor, generally himself, to make sure that the pool was level when placed in the excavated hole.
- 127 Mr Meddings said that such installation work would be clearly set out in the Seller's invoice. He said here there was no reference to installation work in any of the Seller's Quotation, Order or Tax Invoice. In cross examination he agreed that it was coincidental that Ms Broomfield paid Mr Brumby \$1,500. He said there was no confusion about what the Seller had provided to Ms Broomfield as she, like all customers, had to contact the Seller to discuss what she wanted.

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<sup>30</sup> Ms Broomfield's affidavit [24] and Ms Simone Thomas' affidavit sworn on 2 June 2016 [2] and [3].

## **Was there a domestic building contract to install the kit pool?**

### **Findings**

- 128 I find that Ms Broomfield did not enter into a written contract with the Seller to install her kit pool. I make this finding for the following reasons. Ms Broomfield has conceded that the Seller's Order and the Seller's Tax Invoice, each dated 29 October 2015, were for the purchase and supply of a 6 m x 2.5 m slimline plunge pool.
- 129 I have found that the Seller's Order and the Seller's Tax Invoice were expressed to be for the purchase and delivery of a 6 m x 2.5 m slimline plunge pool. I have found that there is no reference to installation in the Seller's Quotation, Seller's Order or the Seller's Tax Invoice. Nor is there any reference in these documents to any terms relating to the installation of the pool.
- 130 I have found that, contrary to Ms Broomfield's assertions, the text message from Mr Brumby to Ms Broomfield, dated 9 December 2015, did not amount to a contract with the Seller to install Ms Broomfield's pool. I have found that Mr Brumby agreed to telephone the installer for Ms Broomfield, in light of Ms Broomfield not wishing to ring the installer. I have found that the text amounted to confirmation by Mr Brumby that he had found another installer to install the pool.
- 131 I find that any representations made by Mr Thomas to Ms Broomfield when he visited her property did not amount to an oral contract by the Seller to install her pool by December 2015, or at all. I make this finding for the following reasons. I have found that Ms Broomfield contacted Mr Thomas to arrange a time for him to visit her property to give her a quotation for the installation. I have found that Mr Thomas was an independent pool installer based in Victoria.
- 132 I find that any quotation or estimate of costs of installation that Mr Thomas gave Ms Broomfield was given as an independent contractor and not as an employee of the Seller. I find that any agreement that Ms Broomfield reached with Mr Thomas was an agreement with him personally and was not an agreement with the Seller. It is not disputed that Mr Thomas did not install Ms Broomfield's pool.
- 133 I find that Ms Broomfield did not enter into an oral contract with Mr Brumby, on behalf of the Seller, to install her pool. I make this finding for the following reasons. I have rejected Ms Broomfield's evidence of her discussions with Mr Brumby at the time that she entered into the contract to purchase the pool, about her becoming an owner builder and Mr Brumby agreeing to be the builder and run the installation.
- 134 I have found Ms Broomfield's evidence to be inconsistent and implausible for the same reasons that I have found Ms Broomfield did not enter into an oral contract with Mr Thomas on behalf of the Seller. Further, I have found

that Ms Broomfield sent an email to the Seller on 16 November 2015 confirming that she had booked Mr Thomas for the installation.

- 135 I have found Ms Broomfield's evidence to be at times surprising, inconsistent, and implausible. Ms Broomfield continued to make assertions which were contrary to the documentary evidence. Her evidence was inconsistent with the owner builder application form for a permit, the building permit, the Site Plan of her property and the engineering drawings that she asserted the Seller gave her to file with Council to obtain the building permit.
- 136 During the hearing Ms Broomfield changed her claim against the Seller. Her initial claim was that the Seller agreed to install the pool. At the hearing Ms Broomfield alleged that Mr Brumby supervised the installation of the pool. Ms Broomfield's photos show Mr Brumby at all times in a wheel chair. Clearly, he did not have the capacity to install the pool. In so far as he assisted Ms Broomfield I have found that he did not supervise the installation of the pool on behalf of the Seller. Ms Broomfield, as owner builder, paid him cash for his costs and expenses as she did for all the other tradesmen.
- 137 I find that Ms Broomfield did not enter into a domestic building contract with the Seller because the Seller neither agreed to carry out, nor carried out, any building works for Ms Broomfield. The agreement was for the purchase and delivery of a pool. It was not for the installation of the pool, or any building works associated with installation of that pool.
- 138 Accordingly, Ms Broomfield's claim against the seller for breach of the *Building Act* and the *Domestic Building Contracts Act* must be dismissed. Further, the claims against the Seller for breach of the warranties under s 8 of the *Domestic Building Contracts Act* must be dismissed as no such warranties can be implied into a contract for the purchase of a pool.

### **Did the Seller engage in misleading or deceptive conduct?**

139 Section 18 of the ACL provides:

#### **18 Misleading or deceptive conduct**

- (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

### **Relevant principles**

140 I set out the relevant principles relating to s 18 of the ACL:<sup>31</sup>

- (a) The test is objective and fact-based. It is to be determined having regard to all of the contextual circumstances within which something was said or done;<sup>32</sup>

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<sup>31</sup> Summary of principles as set out in *ACCC v Dukemaster Pty Ltd* [2009] FCA 682; see also *Equity Access Pty Ltd v Westpac Banking Corp* [1990] ATPR 40-994; (1989) 16 IPR 431.

<sup>32</sup> *Global One Mobile Entertainment Pty Ltd v ACCC* [2012] FCAFC 134.

- (b) The section is concerned with the effect or likely effect of conduct on the minds of those likely to be misled or deceived;
- (c) The section is not designed for the benefit of those who fail to take reasonable care of their own interests;
- (d) It is wrong to select particular words or acts which, although misleading in isolation, do not have that character when viewed in context. A person's intention or belief concerning the accuracy of the statement of fact is not relevant, unless the statement involved the maker's state of mind;
- (e) The question is whether the statement conveys a meaning that is false. A false meaning will be conveyed if what is stated concerning the past or present fact is inaccurate but also if, although literally true, the statement conveys a meaning which is false.

### **Ms Broomfield's Points of claim**

141 Ms Broomfield alleged that the Seller made the following representations:<sup>33</sup>

- (a) the Seller advertised on its website 'swimspalungepool.com.au' that it was a registered builder and all of its work was covered by insurance;
- (b) the Seller's Order dated 29 October 2016 was on 'swimspalungepool.com.au' letterhead; and
- (c) the words 'Builders Licence 241014C' appeared under the heading on the Seller's Order.

142 She said the representations were misleading or deceptive as the Seller was not licensed, nor insured, to install pools in Victoria. There was no dispute that the Seller, in selling Ms Broomfield a pool, was supplying goods in trade or commerce.

143 I have set out details of the Seller's two websites at paragraphs 33 and 34 of my reasons. I can see where confusion may have arisen between the two websites. The Seller is stated on each website to be the national distributor of Modern Pools. Each website has similar photos of the slimline plunge pools, amongst other types of pools that the Seller sells.

144 The 'Australian Kit Pool Sales' website provides an option for a customer to contact the Seller through eBay. It is not disputed that Ms Broomfield made enquiries of the Seller through eBay. In contrast, the 'swimspalungepool.com.au' website does not provide this option. The customer can only contact the Seller by email and not via eBay.

145 Mr Meddings said the Seller operated as a licensed builder, under the business name 'swimspalungepool.com.au', in New South Wales. He said that the Seller sold kit pools throughout Australia under the business name Australian Kit Pool Sales. He said the Seller previously did partial

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<sup>33</sup> Points of claim [25(a)].

installation work outside New South Wales which involved him personally signing off, after installation, on the pool being level. However, he said the Seller never agreed to install Ms Broomfield's pool. I have accepted Mr Meddings' evidence.

- 146 I have preferred Mr Brumby's evidence, about their discussions relating to the installation of the pool, to Ms Broomfield's. I have found that Ms Broomfield arranged for Mr Thomas, an independent installer, to give her a quotation for the installation of the pool.
- 147 I have found that Ms Broomfield received a Quotation for the purchase of a kit pool following her enquiries and subsequent emails to the Seller. I have found that the Quotation from Australian Kit Pool Sales did not include the installation of the pool. However, it was not explained by the Seller why the Order was on 'swimspaplungepool.com.au' letterhead.
- 148 I find that although Ms Broomfield viewed the two websites, she received the Quotation from the Seller's business Australian Kit Pool Sales which sells kit pools. I have found that she paid a deposit and was then sent the Seller's Order on 'swimspaplungepool.com.au' letterhead. By this time she had arranged for Mr Thomas to give her a quotation on installation.
- 149 The representations on the 'swimspaplungepool.com.au' website and the Seller's Order should not be viewed in isolation. They should be viewed in the context of the Quotation and her discussions with Mr Brumby.
- 150 In so far as the website 'swimspaplungepool.com.au', did not clearly differentiate between New South Wales and Victoria, I find that Ms Broomfield did not rely on them. I find that she purchased the pool from the Seller through its business Australian Kit Pool Sales which only sold kit pools.
- 151 I have found that Mr Brumby did not say to Ms Broomfield that the Seller installed pools in Victoria. I have found that Mr Brumby gave Ms Broomfield the phone number of an independent Victorian pool installer, for her to contact to obtain a quotation.
- 152 I find that Ms Broomfield purchased the pool following her discussions with Mr Brumby about installation and having been put onto an independent pool installer. I find that there is no evidence to support Ms Broomfield's allegations that she relied on these representations on the 'swimspaplungepool.com.au website' when she entered into her agreement with the Seller to purchase the pool.
- 153 Ms Broomfield also made other allegations in her Points of claim that the Seller failed to identify that it required her to be an 'owner builder' responsible for obtaining the building permit for installation. This allegation was not pressed by Ms Broomfield in her submissions.
- 154 Ms Broomfield alleged that Mr Brumby informed her that they would be running the job, and that he in fact ran the installation job. I have not accepted this evidence.



- 155 Ms Broomfield also alleged that the Seller did not tell her that she needed to obtain domestic building insurance certificates from the individual trades as they did not have insurance cover. This allegation was not made at the hearing.
- 156 I have found that Ms Broomfield installed the pool as owner builder. Ms Broomfield submitted that if I made this finding, then she alleged that the Seller engaged in misleading or deceptive conduct by representing that it was a builder licensed to carry out work in Victoria and insured in Victoria.<sup>34</sup> I reject this submission which I have dealt with in paragraphs 141 to 152 above.
- 157 I found Ms Broomfield's allegations of misleading or deceptive conduct to be confusing. Having heard all the evidence and having made earlier findings of fact, I find the allegations not to be supported by the evidence. The onus is on Ms Broomfield to prove her claim. I find that she has not done so. On the evidence it cannot be concluded that the Seller engaged in misleading or deceptive conduct. Accordingly, I must dismiss Ms Broomfield's claim against the Seller for breach of s 18 of the ACL.

#### **Did the Seller engage in unconscionable conduct?**

158 Section 20 of the ACL relevantly provides:

**20 Unconscionable conduct within the meaning of the unwritten law**

- (1) A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.
- (2) This section does not apply to conduct that is prohibited by section 21.

159 Section 21 of the ACL relevantly provides:

**21 Unconscionable conduct in connection with goods or services**

- (1) A person must not, in trade or commerce, in connection with:
  - (a) the supply or possible supply of goods or services to a person (other than a listed public company);engage in conduct that is, in all the circumstances, unconscionable.

160 Ms Broomfield alleged that the Seller engaged in unconscionable conduct in breach of s 20 of the ACL. The relevant provision is s 21 of the ACL which relates to the supply of goods and services. Section 20 of the ACL does not apply to conduct that is prohibited by s 21 of the ACL.

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<sup>34</sup> Points of claim [25(d)].

### Relevant principles

- 161 The term ‘unconscionable conduct’ is not defined in the Act, nor is it a term of art. Put simply, it is conduct against conscience by reference to the norms of society.<sup>35</sup> The relevant test is not what is ‘fair’ or ‘just’; nor does it depend on the personal approach of a judge, based on his or her view of commercial morality.<sup>36</sup>
- 162 In any given case, the conclusion as to what is, or is not, against conscience may be contestable. That is inevitable given that the standard is based on a broad expression of values and norms. The evaluation is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules. It is an evaluation of business behaviour (conduct in trade or commerce) as to whether it warrants the characterisation of unconscionable, in the light of the values and norms recognised by the statute.<sup>37</sup>
- 163 The statutory norm is one which must be understood and applied in the context in which the circumstances arise. The context here is consumer protection directed at the requirements of honest and fair conduct free of deception. Notions of justice and fairness are central, as are vulnerability, advantage and honesty.<sup>38</sup>

### **Ms Broomfield’s Points of Claim**

- 164 Ms Broomfield alleged that the Seller failed to disclose that it required her to be an owner builder responsible for obtaining the building permit for installation of the pool, while the Seller engaged various suppliers and tradesmen to be paid by her.<sup>39</sup>
- 165 This was not developed in argument. This was rejected on the evidence.
- 166 Ms Broomfield alleged that the Seller failed to inform her that she was not covered by the Seller’s insurance for the alleged domestic building works.<sup>40</sup> This was not developed in evidence or argument.
- 167 Ms Broomfield claimed that had the Seller, Mr Brumby or Garry Williams, informed her that the Seller was not a registered domestic builder and did not have insurance to cover its works, was going to later maintain that it was not responsible for the installation and was not going to complete the works, then she would not have engaged the respondent.<sup>41</sup>

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<sup>35</sup> *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90.

<sup>36</sup> *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199; appeal dismissed in *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28.

<sup>37</sup> *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 per Allsop J [304].

<sup>38</sup> *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90.

<sup>39</sup> Points of claim [25].

<sup>40</sup> Ibid.

<sup>41</sup> Ibid [26].

168 This allegation was not developed in evidence or argument. I have found that Ms Broomfield entered into a contract with the Seller to purchase a pool. She did not enter into a contract for the installation of a pool.

### **Ms Broomfield's written submissions**

169 Ms Broomfield submitted that the Seller represented that it was a registered builder, fully licensed and insured and 'running the job' and that Mr Brumby would be managing and did manage the installation. She alleged that these representations were made prior to her paying for the pool. She alleged that this conduct was unconscionable. She made the same claims in support of her claim against the Seller for misleading or deceptive conduct.

170 This was rejected on the evidence.

171 Ms Broomfield does not allege that the Seller was dishonest or abused its position as the Seller of pools. There was no evidence of such matters existing. The Seller's Quotation did not refer to the installation of a pool. Further, the contract for the purchase of the pool was set out in the Seller's Order and Seller's Tax Invoice. Neither made any mention of the installation of a pool.

172 There was no allegation that Ms Broomfield did not understand the Quotation, Seller's Order or Seller's Tax Invoice. In fact Ms Broomfield's evidence is that the Seller's Order and Seller's Tax Invoice, each for the amount of \$17,880, were for the purchase of the pool. Her admission was inconsistent with her submission at the hearing that the contract for the purchase and installation of the pool was for \$20,380.

173 There was no evidence that Ms Broomfield was forced to enter into the contract for the purchase of the pool or that any pressure was placed on her to enter into the contract with the Seller. It was a matter of choice for Ms Broomfield.

174 Ms Broomfield paid the balance of the purchase price prior to delivery, as part of the terms of the purchase contract. I have rejected her evidence of her discussions with Mr Brumby about her being an owner builder and Mr Brumby being the builder and running the job.

175 I find that it cannot be concluded on the evidence that the Seller engaged in unconscionable conduct. I find that Mr Brumby in offering to assist Ms Broomfield as owner builder, on delivering the pool, did not do so as a builder and did not do so on behalf of the Seller.

176 Accordingly I must dismiss this claim against the Seller.

### **Was the kit pool of acceptable quality? (ACL s54)**

177 Section 54 of the ACL relevantly provides:

#### **54 Guarantee as to acceptable quality**

(1) If:

- (a) a person supplies, in trade or commerce, goods to a consumer; and
  - (b) the supply does not occur by way of sale by auction;
- there is a guarantee that the goods are of acceptable quality.

178 Ms Broomfield alleged that the pool, as delivered, was not fit for purpose, acceptable in appearance, free from defects, safe and durable.

179 This was not developed in argument. This was rejected on Ms Broomfield's own evidence. Mr Xavier Smith prepared a report dated 1 March 2016 on the installation of the pool. He considered that the installation of the pool did not comply with AS 1839:1994 'Swimming pools – pre-moulded fibre-reinforced plastics – **Installation.**' He did not conclude that the pool itself was defective. Accordingly, I must dismiss this claim against the Seller.

### **Did the colour of the kit pool correspond with its description? (ACL s56)**

180 Section 56 of the ACL relevantly provides:

#### **56 Guarantee relating to the supply of goods by description**

(1) If:

- (a) a person supplies, in trade or commerce, goods by description to a consumer; and
  - (b) the supply does not occur by way of sale by auction;
- there is a guarantee that the goods correspond with the description.

181 Ms Broomfield alleged that the Seller supplied a pool which did not correspond with its description as required by s 56 of the ACL. She alleged she purchased a 'dark blue shimmer (aka crystal blue) pool but that the pool as delivered was a lighter shade of blue'. She relied on a photograph of the sample colours of the pool which she had downloaded from the website of Australian Kit Pools Sales. She claimed that the pool as delivered was a lighter colour than the sample colour of the pool taken from the Seller's website.

182 There was a dispute about the discussions that took place over the colour of the pool after delivery. Ms Broomfield said she questioned Mr Brumby about the colour of the pool and he told her it would look darker when in the ground and filled with water. Mr Brumby denied having any discussions with Ms Broomfield about the colour of the pool.

183 Ms Broomfield said she did not reject the pool because Mr Brumby assured her it was dark blue. She said as the pool was about to be craned over her garage and into the excavated hole, she did not think that she could do much about it.

184 Mr Meddings said that the gel coats had a lighter consistency. He questioned why Ms Broomfield had accepted the pool if she considered that it was not the colour that she had ordered.

- 185 I prefer the evidence of Mr Brumby to Ms Broomfield for the following reasons. I am not satisfied on the evidence that Ms Broomfield discussed the colour of the pool with Mr Brumby prior to its installation. It is more likely that if discussions took place about the colour of the pool then Ms Broomfield would not have gone ahead immediately with the installation of the pool. Further, the pool was out the front of Ms Broomfield's property for some time prior to installation by the second crane operator, allowing her to observe the colour prior to installation.
- 186 Mr Meddings said that the gel colour was a lighter consistency than a non gel colour. He also said that the colour of the sample downloaded by Ms Broomfield from the Australian Kit Pool Sales' website was not the actual colour of the pool. Further, Mr Meddings said that the pool was manufactured as a dark blue pool but that the colour looks closer to a medium blue than the dark blue. I accept Mr Meddings' evidence.
- 187 I have compared the colour of the pool, as delivered as shown in Ms Broomfield's photos, with the sample colour chart that Ms Broomfield downloaded from the Australian Kit Pools Sales' website. In my opinion the colour of the pool as delivered, appears to be lighter than the colour sample of the 'dark blue' as downloaded from the Seller's website Australian Kit Pool Sales. The sample does not refer to 'gel coat' or 'shimmer'.
- 188 The question is whether Ms Broomfield has accepted the colour of the pool as delivered. Ms Broomfield had every opportunity to stop the installation of the kit pool but did not do so if she considered the colour to be different from the colour that she ordered. Ms Broomfield could have rejected the pool on delivery or after the initial failure by the first crane operator to crane the pool in under her garage. She could have rejected the pool before Mr Brumby arranged for a second crane operator to install the kit pool. However Ms Broomfield allowed the second crane operator to crane the kit pool into the excavated hole. I find that Ms Broomfield accepted the pool as delivered. I must therefore dismiss this claim against the Seller.
- 189 If I am wrong in finding that Ms Broomfield accepted the pool as delivered and relied on representations made by Mr Brumby, I am not satisfied that she has suffered any damage. No evidence has been given or argument made by Ms Broomfield about the damages claimed for supplying a kit pool which allegedly was not the colour that she purchased.
- 190 The Quotation for the kit pool listed the colour as 'chrysal' for a quoted price of \$900. However, both the Seller's Order and the Seller's Tax Invoice stated the colour of the kit pool to be 'Dark Blue Shimmer (aka Crystal Blue)' and noted the price as for the colour as '\*\*FREE\*\*'.
- 191 Therefore, I am not satisfied on the evidence that Ms Broomfield would have been entitled to any damages had she rejected the kit pool because of its colour, because she did not pay the quoted price of \$900 or any amount for the 'Dark Blue Shimmer (aka Crystal Blue)'.

### **Did the Seller install the kit pool with due care and skill? (ACL s60)**

192 Section 60 of the ACL relevantly provides:

#### **60 Guarantee as to due care and skill**

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

193 Ms Broomfield alleged that the Seller failed to install the pool with due care and skill in breach of s 60 of the ACL. I have found that the Seller did not enter into a contract with Ms Broomfield to install her pool. I have found that the Seller did not provide installation services to Ms Broomfield. Accordingly I must dismiss this claim against the Seller.

### **Was the kit pool reasonably fit for a particular purpose? (ACL s61)**

194 Section 61 of the ACL relevantly provides:

#### **61 Guarantees as to fitness for a particular purpose etc**

(1) If:

- (a) a person (the **supplier**) supplies, in trade or commerce, services to a consumer; and
- (b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.

195 Ms Broomfield alleged that the Seller breached s 61 of the ACL by supplying a pool that was not fit for purpose.

196 Section 61 is a consumer guarantee relating to the supply of services. I have dealt with Ms Broomfield's claim that the pool was not reasonably fit for a particular purpose (ACL s 54) in paragraphs 177 to 179 above. This claim was not in evidence or developed in argument. I must therefore dismiss this claim against the Seller.

### **Conclusion**

197 Ms Broomfield has the onus of proving her claim. I have found that Ms Broomfield has not made out her claim against the Seller for breach of contract. I have found that the Seller did not carry out any building works for Ms Broomfield and that the Seller did not enter into a domestic building contract with Ms Broomfield. I have made findings and concluded on the evidence that Ms Broomfield has not made out her claim against the Seller for misleading or deceptive conduct and unconscionable conduct or contravention of the consumer guarantees under the ACL.

198 Having made these findings I must dismiss Ms Broomfield's claim against the Seller.

199 Mr Brumby was joined by order of the Tribunal, by its own motion, on 10 August 2016. Neither Ms Broomfield nor the Seller have made any claim against the Seller in his personal capacity. Accordingly, I must dismiss the proceeding against Mr Brumby as no claim was made against him.

200 I will make orders dismissing the proceeding against the Seller and Mr Brumby.

F. Marks

**Member**

4 August 2017