VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D501/2011

CATCHWORDS

Swimming pool contract, SPASA standard form, variations, prime cost items, provisional sums, foreseeability of collapse of excavation due to rain, suspension, repudiation, cost to complete.

FIRST APPLICANT	Ron Clark
SECOND APPLICANT	June Downs
RESPONDENT	Lazaway Pools & Spas (ACN 007 171 520)
WHERE HELD	Melbourne
BEFORE	Senior Member Lothian
HEARING TYPE	Small Claim Hearing
DATES OF HEARING	19 October 2011
DATE OF ORDER	11 November 2011
CITATION	Clark and Anor v Lazaway Pools & Spas (ACN 007 171 520) (Domestic Building) [2011] VCAT 2131

ORDER

1 The Respondent must pay the Applicants $8,958 forthwith.

2 I direct the Principal Registrar to send a copy of this decision to SPASA Victoria Limited at Unit 55, 41-49 Norcal Road, Nunawading VIC 3131, to bring to its attention that the standard form contract might need to be amended.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For First Applicant Mr R. Clark in person

For Second Applicant	Ms J. Downs in person
For Respondent	Mr J White, manager

REASONS

1 The applicants, Mr Clark and Ms Downs, ("Owners") own a home in Darley. They entered a contract with the respondent, ("Lazaway") to build a swimming pool. The parties agree that the swimming pool is incomplete, but disagree about who is responsible. The parties agree that Lazaway sought payment for two amounts described by them as variations which the Owners refused to pay. Lazaway then suspended the works.

2 Although the amount claimed is not great, the hearing took the whole afternoon allocated to it and the parties took time to try to negotiate a settlement, so it was necessary to reserve my decision. Further, Mr John White of Lazaway, who appeared and gave evidence, asked for reasons in writing. I understand that his request was to enable Lazaway to minimise the risk such difficulties in future.

THE CONTRACT

3 I accept the evidence of Mr John White that the contract is the SPASA standard form. The date of the contract is 11 December 2010 and the contract sum before adjustment was $47,000. There was one agreed variation for $1,650 for a change to the design of the pool to add a "swim out" seat. The parties agree that of the contract sum and the agreed variation, all but $1,000 has been paid.

Prime costs and provisional sums

4 Page 8 of the contract, which was initialled by Ms Down, concerns prime costs and provisional sums. It contains the following "Warning to Building Owner as to Prime Cost Items":

> It is always better to get a fixed price for all work. However, some fixtures and fittings need to be selected after the contract is signed eg a stove, type of taps etc. If these items are specified as prime cost items the construction manager will allow an amount in the contract price which should cover the expected cost of the item.
>
> NOTE: If the actual cost is more than the amount allowed you will have to pay the extra amount. You may also have to pay the construction manager's margin in the extra amount. If this is intended, the margin should be specified, or cannot be claimed unless the building owner agrees to such additional amount. If the prime cost is less that allowed for in the contract, the difference should be deducted from the contract price. Prime cost items to include GST and delivery and related costs.

5 Written into the section headed "prime costs" is $24 per square meter for tiles, then item 3:

> Excavation – using 3.5 tonne excavator, $10m^3$ tip truck & bob cat (allowance) $3,500.

Special conditions

6 Page 11 of the contract has the following written in by hand, under the heading “Special Conditions”:

> Rock excavation if required $276 per m^3 to be determined on site at time.
>
> Below ground excavation if required $150 per lineal meter to be determined on site at time.
>
> Out of ground shoring if required $150 per lineal meter to be determined on site at time.
>
> Site cut + soil removal if required $65 m^3 on soil removed from site.

Alleged representation about “fixed price”

7 I accept the evidence of Ms Downs that she believed she was entering a fixed price contract. She said that she and Mr Clark had obtained a quote from another swimming pool company, but the other company had pointed out that if various site conditions were discovered, the price could increase. She said the salesman for their pool was Mr Ray White, not Mr John White who appeared before the Tribunal, and he told her that the $47,000 price was a fixed price. This view is supported by the notation in Mr Ray White's hand at the top of page 6 of the contract "$47,000 – fixed price x 12 months." I accept her evidence that she told Mr Ray White that she had a quote from another swimming pool company who said that there would be extra for rock, and he said $47,000 was “the total cost to build the pool”. I also accept her evidence that she told Mr Ray White that she chose Lazaway because she “didn’t want any surprises”.

8 Mr John White said that he did not believe Mr Ray White would have made a representation that the price would be a fixed price. However Mr Ray White was not called as a witness and Mr John White could provide no direct evidence of what was said between the Owners and Mr Ray White. Although the Tribunal is not bound by the rules of evidence, I have regard to the rule in *Jones v Dunkel* (1959) 101 CLR 298 which provides that if a party could call a witness but fails to do so, a court or tribunal can draw the inference that their evidence is unlikely to assist that party.

9 The provision on page 8 of the contract about an allowance for excavation tends to militate against Ms Downs’ submission that the contract was a fixed price contract. However I accept her evidence that she thought the sum of $3,500 “covered all eventualities”.

10 Further, on page 2 there is a warning that changes to price are possible. I accept the evidence of Ms Downs and Mr Clark that when the contract was presented to them for signing by Mr Ray White, he had folded back the first four pages and did not draw their attention to those pages. Mr John White said that page 1 of the SPASA contract allowed the Owners to end the contract under a five-day cooling off period. They therefore had the

opportunity to read the contract after signing it, discover that they were in error about it being a fixed price contract and bring it to an end.

11 Nevertheless, I find that Mr Ray White made a representation to the Owners that the contract was a fixed price contract and that they were entitled to rely on that representation. I am not satisfied that the possibility that the Owners might go away and closely read a contract they have just signed excused Mr Ray White or Lazaway, from the effect of the representation. Lazaway is therefore not entitled to adjustments to the contract sum, unless agreed.

12 I now consider the other submissions of the parties, in case I have inaccurately characterised the contract between these owners and Lazaway as a fixed price contract because of Mr Ray White's representation.

The variations which were not agreed

Builder's obligations concerning variations

13 Section 37 of the *Domestic Building Contracts Act* 1995 ("DBC Act") imposes certain obligations on a builder who wishes to vary the contract. These are paraphrased in clause 13.1 of the SPASA contract:

> (a) If a Builder wishes to vary the Drawings or the Specifications, the Builder has to give the Building Owner a notice that explains all of the following: the nature of the variation, why it is necessary, the effect that it will have on the Domestic Building Work, whether a variation to any Statutory Approval is necessary, the cost of the variation and the impact it will have upon the Contract Price and the Completion date.
>
> (b) The Builder cannot proceed with the variation unless:
>
> the Building Owner gives a Notice of consent in writing to the Builder to the variation attached to the Notice required under Clause 13.1(a) OR the following intervening circumstances apply:- a building surveyor or another authorised person under the Building Act 1993 requires the variation to be made; and the variation occurred as a result of matters that were outside the Builder's control and the Builder included a copy of the building Notice or building order in the Notice required under Clause 13.1(a) and the Building Owner does not advise the Builder in writing within 5 (five) Business Days of receiving that Notice that the Building Owner would dispute the building Notice or building order.
>
> (c) The Builder cannot recover any money from the Building Owner unless:
>
> the Builder-
>
> (i) has complied with the above conditions; and
>
> (ii) can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen

by the Builder at the time that the Contract was entered into; or

the Tribunal is satisfied-

(i) that there are exceptional circumstances or that the Builder would suffer a significant or exceptional hardship by the operation of (i) above; and

(ii) it would not be unfair to the Building Owner for the Builder to receive the money.

Variation 31482 dated 2 January 2011

14 This variation for the "swim out" seat demonstrates that Lazaway understands at least some of its obligations because the variation is in writing, describes the additional work to be undertaken and, importantly, is signed by the Owners before the work was undertaken.

Variation 32296 dated 18 February 2011

15 The variation is filled in as follows:

EXTRA COST FOR EXCAVATION OVER AND ABOVE CONTRACT ALLOWANCE	
FINAL EXCAVATION COST	4382
+25% BUILDERS MARGIN	1095
SUB TOTAL	5478
LESS CONTRACT ALLOWANCE	(3500)
	1978

Variation 29118 dated 28 February 2011

16 This variation is filled in as follows:

Extra cost due to Formwork + extra Engineering Requirements	
22 L/M of Formwork @$150 per meter	$3300
80 extra Steel Bars @ $4,60	$368
Labour for Extra Steel	$176
Builders Margin on Steel + Labour	$136
	$3,980

Discussion of Variations 32296 and 29118

17 These variation notices are on the printed forms that are the same as the form used for variation V31482 but they were not signed by the Owners, nor was evidence given on behalf of Lazaway that either were presented to the Owners for signature before the work was undertaken.

18 According to Mr John White the disputed variations arose from excessive rain that filled the excavated hole for the swimming pool, caused Lazaway

to incur extra cost for excavation and necessitated construction of formwork instead of enabling it to spray concrete directly onto the walls of the excavation.

19 If these claims for additional sums can accurately be described as variations, in accordance with both s37 of the DBC Act and clause 13.1 of the contract, Lazaway would only be entitled to be paid if it could prove in this proceeding that:

- there are exceptional circumstances that excuse it from complying with the obligation to obtain the Owners' consent in writing for each variation, or
- the Builder would suffer a significant or exceptional hardship by being required to obtain the Owners' written consent; and
- it would not be unfair to the Owners for the Lazaway to receive the money.

20 Mr John White gave evidence that 72mm of rain fell on the second day of excavation and that as a result of the rain there were complications on site that led to the need for additional works. Nevertheless, he gave no evidence as to why the Owners' consent could not be obtained before any additional work was done which would lead to an increase in the price charged.

21 I accept the evidence of Mr Clark that it was vital to the Owners to know if there might be an additional charge, before it was incurred. I accept his evidence that if he had known the extra cost sought by Lazaway for the second and third variations, he would have "dropped the pool", which I understand meant that he would have been willing to leave the pool unfinished rather than incur the extra cost.

22 I find that it would be unfair to the Owners if Lazaway recovers the amounts it seeks.

Clauses 3(g) and 3(t)

23 Mr John White drew my attention to clauses 3(g) and 3(t) of the contract. They are:

> **3. CONTRACT PRICE EXCLUSIONS**
>
> The Builder shall not be responsible for any works not specified in this Contract and without limitations the following items are deemed specifically excluded from the Domestic Building Works unless this Contract provides for the contrary:
>
> ...
>
> (g) Shoring up of wet or unstable soil or reinstatement of any cave-in of the pool excavation.
>
> ...

(t) Shoring or retaining walls or other means of stabilisation to ensure stability of overburden excavation and/or to protect adjacent buildings.

24 Mr John White submitted that if such works became necessary, Lazaway was entitled to undertake the work and charge the Owners without seeking their permission. His submission is surprising as a similar submission by Lazaway was unsuccessful before Senior Member Walker in *Wilson and Anor v Lazaway Pools & Spas Pty Ltd* [2001] VCAT 1827. Mr John White was present at the *Wilson* hearing on 9 September 2011. The decision was published on 21 September 2011. His submission in this proceeding is even more surprising because he made no mention of *Wilson*, and it was only in the course of my research for this decision that I discovered it.

25 SM Walker referred to s 33 of the DBC Act:

> **33. Contract must contain warning if price likely to vary**
>
> (1) This section applies to a major domestic building contract that contains a provision-
>
> (a) that allows for the contract price to change; but
>
> (b) that is not a cost escalation clause as defined in section 15.
>
> (2) A builder may not enter into such a major domestic building contract unless there is a warning that the contract price is subject to change and that warning-
>
> (a) is placed next to the price; and
>
> (b) is in a form approved by the Director; and
>
> (c) specifies the provisions of the contract that allow for the change.
>
> Penalty: 50 penalty units.
>
> (3) If a warning is not included in a contract as required by subsection (2), any provision in the contract that enables the contract price to change only has effect to the extent that it enables the contract price to decrease.

26 SM Walker's conclusion, with which I agree, is:

> Since there is no warning as required by s33(2) of the [DBC] Act placed next to the price in the Contract, none of the provisions in the Contract relied upon by the Builder can have effect except insofar as they enable the price to decrease.

27 If rather than a provision that simply allows the price to change, clause 3 of the contract is seen as clarification of the items the builder under the SPASA contract is not providing, then the need for such items necessitates a variation. Whenever there is a need for a variation, the provisions of clause 13 of the contract apply, and as discussed above, Lazaway failed to comply with those provisions.

28 I remark that some of the items are clearly matters of delineation between contract and non-contract items. For example, item (x) excludes "architectural or landscaping details or drawings", which properly makes it clear to both owners and pool builders that a contract to build a swimming pool does not extend beyond the pool itself unless specifically stated. However the Respondent, or possibly SPASA, might need to reconsider some of the clause 3 exclusions. Presumably a swimming pool, once commenced, cannot be completed if 3(g) or 3(t) events occur.

29 Such events might arise from matters that cannot be reasonably foreseen by an experienced swimming pool builder, but if they arise from, say, a normal rain event, they are likely to fall foul of clause13.1(c)(ii) of the SPASA contract. That clause provides that even with the owner's consent to a variation, the builder cannot recover money for it unless the builder:

> can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen by the Builder at the time that the Contract was entered into. [emphasis added]

These exclusions therefore have the potential to mislead the parties to a SPASA contract.

Was either claim an adjustment to a prime cost or provisional sum item?

30 As stated above, the allowance for excavation is written into the prime cost section of page 11 of the contract. Clause 6 of the contract provides:

> Where the Builder specifies the Prime Cost Item and/or Provisional sums the Builder warrants that they have been calculated with reasonable care and skill taking into account all the information reasonably available at the date the Contract is made, including the nature and location of the building site. Prime cost and provisional sum allowances must be based upon reasonable estimates. The exact details and breakdowns of provisional sums and prime costs must be listed in the specification. [emphasis added]

Excavation

31 An allowance for excavation to be arranged or undertaken by a builder is a provisional sum allowance, rather than a prime cost item. Prime cost items concern the selection of items by building owners, such as tiles, which is printed into the SPASA contract as prime cost item 2. As SM Walker said in *Wilson*:

> Notwithstanding this clause [6] and the requirements of the [DBC] Act[1], no detail or breakdown of the excavation figure ... has been provided. All that is specified is the equipment that shall be used. Neither the time allowed for nor the quantity of excavated material to be removed that has been allowed for in the Contract price is stated. ...

[1] The clause paraphrases sections 20 to 23 of the DBC Act

> It is not possible to see whether an extra claim is justified because it is not known how the figure of $3,500[2] has been arrived at. Not every cost over-run is necessarily recoverable from an owner. The Builder cannot pay whatever it likes to its sub-contractor and recover the difference from the Owners without having to justify the increase by reference to what was allowed for in the Contract and what is reasonable. It is not sufficient just to say that the overall cost was greater. The contract required the exact details and breakdowns of the provisional sum to be provided and they have not been.

32 As SM Walker found in *Wilson*, I find that Lazaway was not entitled to a prime cost or provisional sum adjustment for excavation.

Shoring

33 The claim for shoring in variation V29118 appears to be based on the third special condition quoted above. This and the other special conditions are imprecise to the point of being meaningless. If there is any meaning, the shoring was "to be determined on site at the time" by agreement between the parties. To find otherwise would give Lazaway an unfettered right to change the contract price at its own whim.

34 Any provision for shoring should have been included in provisional sums, but was not. Lazaway is not entitled to shoring as a prime cost or provisional sum item, and I find this special condition does not entitle it to extra sums for shoring.

Application of the margin to the prime cost or provisional sum

35 A matter of concern between the parties was whether the profit margin allowed for at item L of the contract details should be applied to the difference between the estimated and actual sum, or to the whole of the actual sum. As can be seen above, Lazaway has applied it to the whole of the actual sum claimed for excavation and shoring.

36 It is not necessary for me to decide this matter because I have found that Lazaway is not entitled to these adjustments. Nevertheless, I remark that the "Note" on page 8 contains the words "If the actual cost is more than the amount allowed you will have to pay the extra amount. You may also have to pay the construction manager's margin in the extra amount" [sic].

37 As the contract price written into the contract must be the whole sum an owner is required to pay, variations and adjustments aside, it is reasonable to assume that allowances include GST and profit margin. It is therefore likely that claiming the margin on the whole of the allowance is a double claim for the margin. In this proceeding it is impossible to tell because, as mentioned above, Lazaway failed to provide a breakdown of the excavation or shoring allowances.

---

[2] The same allowance as in the contract between the Owners and Lazaway

SECTION 16 OF THE DBC ACT

38 Section 16(1) of the DBC Act provides:

> **Builder must not seek more than the contract price**
>
> 16. Builder must not seek more than the contract price
>
> (1) A builder who enters into a domestic building contract must not demand, recover or retain from the building owner an amount of money under the contract in excess of the contract price unless authorised to do so by this Act.
>
> Penalty: 100 penalty units.

39 Seeking a sum in excess of the contract price and other than in accordance with the provisions that allow for the adjustment of the contract price risks breaching this provision.

SUSPENSION

40 The invoice for variation V32296 was dated 21 February 2011. The invoice for variation V29118 was dated 2 March 2011. I accept the evidence of Ms Downs that she had no knowledge of any additional claim by Lazaway until 4 March 2011.

41 By letter dated 8 March 2011 Mr John White on behalf of Lazaway wrote to the Owners as follows:

> Lazaway Pools and Spa's [sic] gives notice of Suspension of Building Work, due to non-payment by the Building Owner.
>
> Under clause 14 of the contract the building owner must pay the builder within two business days of receiving a written claim at the completion of a stage.
>
> To date your account is presently overdue and in arrears by $5,958.00 as per invoices #91273 & #91347.
>
> Also under clause 11(i) Delays, any cause beyond the control of the builder, i.e. non-payment. We are entitled to claim the number of days you have delayed the process, from the time the works are started.
>
> Should the delay be extended sufficiently we are also entitled to re-cost the contract to allow for any cost price increases incurred during this time.

42 As found above, Lazaway was not entitled to any additional payment for either variation or adjustment to provisional sums or prime cost items. It therefore follows that the Owners were not in breach of the contract, Lazaway was not entitled to suspend the contract and in doing so it repudiated the contract. Repudiation of a contract is when a party demonstrates that it is not willing to abide by the terms of the contract.

43 Because of its repudiation of the contract, Lazaway was not entitled to additional time to complete the works due to the suspension. The swimming

pool should have been completed by early April 2011, but remains incomplete.

RESPONDENT'S WILLINGNESS TO COMPLETE

44 During the hearing the parties negotiated in my absence. The only matter under negotiation of which I am aware was whether both parties would agree that Lazaway would complete the pool. At one point it appeared that there might be agreement on this point, but by the end of the hearing Mr John White said that he could not obtain authorisation from his superiors to agree to finish the pool, regardless of the outcome of my decision.

45 A series of letters has been received since the hearing. On 31 October 2011 Lazaway wrote to the Tribunal as follows:

> Please be advised that the above matter has now been resolved and the matter closed.

46 On 2 November 2011 the Owners sent in a further copy of this letter with a hand-written note on the bottom:

> Please be advised that the above matter has not been resolved and we await the Members ruling.

47 On 3 November 2011 Lazaway sent in a further letter:

> Please be advised that the above applicants have again changed their mind after both verbally agreeing to settle this matter, which was to be followed by written confirmation.
>
> It is Lazaway Pools and Spas intention to complete this pool without fuss or delay. We would ask the Member to provide their orders to be based on this and not others completing works.

48 Given Lazaway's behaviour in claiming additional payments to which it was not entitled and repudiating the contract by suspending works when it was not entitled to, in the absence of written agreement that both parties are willing to have Lazaway return to complete the works, I will not make this order. The Owners are entitled to be put in the position they would have been in if Lazaway had not breached the contract. I find the only reasonable means of doing so is to allow them the cost of having the works completed by others.

COST TO COMPLETE

49 Ms Downs gave evidence that the cost to complete the pool, using contractors other than Lazaway, is $9,958. The Owners have received a quotation from InPools dated 23 June 2011 to clean out and acid wash the shell, cut and seal pipes apply "Quatzon" to the pool and spa and acid wash the Quartzon for $3,950. She also gave evidence that she had obtained oral quotations for the supply and installation of the pool lights at $3,008.46 and supply of Quartzon for $3,000.

50 Mr John White said he believed the cost to complete the Owners' pool would be about a third of the amount they claimed, but he provided no details. He also did not distinguish between the cost to Lazaway of completing the works, and the cost to the Owners of having other contractors do so.

51 I accept the evidence of the Ms Downs that the cost to the Owners of completing the pool is $9,958.

DELAY

52 I have not made any order for delay costs in favour of the Owners because they did not claim them. I note that the contract does not allow for agreed or liquidated damages, but note that an owner who suffers loss through delay would be entitled to the actual loss they have suffered.

CONCLUSION

53 Lazaway must pay the Owners $8,958 forthwith, being the cost to complete of $9,958 less $1,000, which the parties agree was not paid under the contract.

SPASA

54 I direct the Principal Registrar to send a copy of this decision to SPASA Victoria Limited at Unit 55, 41-49 Norcal Road, Nunawading VIC 3131, to bring to its attention that the standard form contract might need to be amended.

SENIOR MEMBER M. LOTHIAN