

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP777/2015

CATCHWORDS

Monies allegedly owed by owner to builder under a domestic building contract under the Domestic Building Contracts Act 1995 – whether the contract has been varied – whether the builder is entitled to be paid for a variation under the contract – whether the building works are defective.

APPLICANT	JST Holdings Pty Ltd trading as Seaspray Pools (ACN 006 865 827)
RESPONDENT	Stephen Tyler
WHERE HELD	Melbourne
BEFORE	Member F. Marks
HEARING TYPE	Hearing
DATE OF HEARING	6 August and 15 October 2015
DATE OF ORDER	22 January 2016
CITATION	JST Holdings Pty Ltd v Tyler (Building and Property) [2016] VCAT 136

ORDERS

- 1 The respondent must pay the applicant \$4,800.
- 2 The respondent must reimburse the applicant the filing fee of \$158.90

MEMBER F.A. MARKS

APPEARANCES:

For the Applicant	Mr John Tyzzer, director, in person
For the Respondent	Mr S Tyler in person

REASONS

- 1 The applicant (“**Seaspray**”) builds and renovates swimming pools. The respondent, Mr Tyler, owns a home in Belgrave South with a swimming pool. In December 2014 the parties entered into a domestic building contract in which Seaspray agreed to carry out building works on Mr Tyler's pool. The contract price was \$18,000. Seaspray has completed the works.
- 2 Seaspray claims that Mr Tyler has failed to pay the last three progress payments set out in the Progress Payment Schedule of the contract which amount to \$4,800. The payments were due on the completion of the interior (item (e) - \$3,800), on filling the pool and handover (item (l) - \$900) together with the completion payment (item (m) - \$100). Seaspray says that Mr Tyler has signed a completion certificate dated 3 February 2015 acknowledging that he owes Seaspray \$4,800 for the last three progress payments.
- 3 Seaspray claims that when the building works commenced Mr Tyler requested Seaspray to carry out additional works amounting to \$7,887, which was included in the original quotation but not in the contract. Seaspray says that it has carried out the additional works.
- 4 Seaspray says that the contract has been varied by agreement and that Mr Tyler has paid for the variation. It says that the contract price for the building works, including the variation, amounted to \$25,887. Seaspray concedes that it has not complied with the variation procedure set out in clauses 13.2(a) and (b) of the contract. It requests the Tribunal to allow the variation under 13.2(c) of the contract.
- 5 Mr Tyler denies Seaspray’s claim. He says that all of the building works were carried out for the contract price of \$18,000, not \$25,887. He denies requesting or agreeing to a variation of \$7,887. He says he has paid Seaspray \$21,087 and has overpaid it by \$3,087. He claims a refund of the amount that he says he has overpaid. He also claims that some of the building works are defective and should be rectified.

The issues

- 6 The issues for determination are:
 - (a) Whether the contract been varied;
 - (b) If yes to (a), whether Seaspray is entitled to be paid for the variation under the contract;
 - (c) Whether Mr Tyler owes Seaspray the last three progress payments amounting to \$4,800;
 - (d) Whether the building works are defective.
- 7 I will consider whether the additional building works were included in the contract, or are truly extras and then discuss whether the builder is entitled to

claim for them having regard to clause 13(2) of the general conditions of contract ("**Conditions**").

The hearing

8 I heard the proceeding on 6 August and 15 October 2015. The parties appeared in person on both days. Mr Tyzzer, director of Seaspray appeared and gave sworn evidence for Seaspray. Mr Tyzzer relied on written statements made by Seaspray's employees. Mr Tyler appeared for himself and gave sworn evidence.

The documents

9 Both parties relied on various documents including a quotation and standard form SPASA contract.

The Quotation

10 Seaspray's quotation for the building works is dated 2 December 2014 ("**Quotation**"). The Quotation lists proposed building works for the quoted price of \$21,842. The Quotation includes the supply of pool pavers to \$38.00 per lineal metre, the supply and plumbing of a new pool pump and filter and pressure testing of the pool plumbing lines. It also includes a pool interior which is to have a coloured quartz surface.

11 The Quotation set out the following options which were separately priced:

(a) The supply and installation a Saltigem SG20 unit which fully automatically salt chlorinates the pool with a self cleaning cell:

\$1,770.00; and

(b) A choice of one of the following interiors instead of the quartz interior:

(i) A pebble pool interior finish: \$1,120.00; or

(ii) Blue glass pebble pool interior: \$2,275.00

The SPASA contract

12 The contract is dated 15 December 2014. It is a standard form swimming pool building contract published by the Swimming Pool and Spa Association of Victoria known as SPASA ("**contract**"). The contract price is \$18,000 with payments to be made by instalments.

13 The contract includes a form pursuant to s33(2)(b) of the Domestic Building Contracts Act 1995 ("**Act**") warning that the contract price is not fixed and that the price may be altered as a result of a number of things, including variations.

14 The commencement date is stated to be December 2014 to January 2015 and is subject to weather, permits and normal conditions. The completion date is stated as mid January to February 2015 and is subject to normal conditions and the client changing the work schedule.

15 The contract price is \$18,000 with payments to be made under the following progress payment schedule (item J):

(a)	Preliminary works payment:	\$1,800
(b)	On completion of the tiling	\$3,800
(c)	On completion of the coping	\$3,800
(d)	On the supply of the filtration system (Owner to put in)	\$3,800
(e)	On completion of the interior	\$3,800
(l)	Filling the pool with water from the building owner's supply, initial chemical treatment of the water to a standard suitable for swimming and handover of the swimming pool and accessories	\$900
(m)	Completion payment	<u>\$100</u>
		\$18,000

16 The prime costs (item K) are set out in the contract specifications as:

1. Coping/walkway: \$38 per lineal metre \$950 to 1100
at 25 lineal metres of pool
2. Tiles: \$35 per lineal metre

17 The contract specifications set out the building works to be undertaken and included, amongst other things:

"an interior of "blue glass pebble - interior emerald".

18 The builders' profit margin schedule (item L) provided for the following:

Variations	25%
Prime costs and provisional sums	25%

19 Clause 13.2 of the Conditions sets out the process for dealing with variations initiated by the owner. If the builder has not complied with either clauses 13.2(a) or 13.2(b) then it must rely on clause 13.2(c) in order to be paid for the variation.

20 Clause 13.2(c) relevantly provides:

“13.2 Variations initiated by the Building Owner

- (a) ...
- (b) ...
- (c) The builder cannot be paid for a variation unless the builder has complied with the requirements of these conditions or the Tribunal considers that there would be exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of this clause and that it would not be unfair to the building owner for the builder to recover the money."

Has the contract been varied?

Mr Tyzzer's evidence

- 21 Mr Tyzzer gave evidence that he prepared the Quotation for Mr Tyler with a quoted price of \$21,842 with separately quoted options. The quoted price of \$21,842 included the supply, installation and the pressure testing of the filtration system, standard coping and a quartz interior. He said it also included the running and installation of the pipe work around the pool.
- 22 Mr Tyzzer said that Mr Tyler asked him to price the contract at \$18,000 with a reduced scope of works. He said Mr Tyler asked him to do this so that the additional works, including the optional items set out in the Quotation, could be done during the building works, if requested by Mr Tyler. He said the contract reflected the reduced scope of works. He said the contract excluded the installation and pressure testing of the filtration system, the piping work, the upgrade of the coping and the options being the supply of the more expensive blue glass pebble pool interior and the chlorination unit.
- 23 He said he incorrectly listed the emerald colour blue glass pebble interior in the specification of work in the contract because he had obtained a sample for Mr Tyler's wife as requested. He said that this interior was to remain an option which he had separately quoted at \$2,275 in the Quotation. He said that this more expensive interior was never to be included in the contract price of \$18,000.
- 24 He said Seaspray started the building work without Mr Tyler paying the deposit of \$1,800. By the time the tiling had been completed, Seaspray had paid for the tiles and the coping pavers but that Mr Tyler had not made any payment to it.
- 25 Mr Tyzzer said that during the building works Mr Tyler asked him to rectify and complete the piping work around the pool, which Mr Tyler had installed, because it was defective. He said that during the building works Mr Tyler also requested Seaspray to carry out additional building works that he had excluded from the contract but which had been included in the Quotation. This work included the installation and pressure testing of the filtration system, the upgrade of the coping, the supply and installation of chlorination unit and the upgrade of the pool interior to the blue grass pebbles ("**Additional building works**").
- 26 Mr Tyzzer gave evidence that he met with Mr Tyler on about 6 January 2015 after completing the tiling. He said the purpose of the meeting was to discuss the Additional building works and to request payment in cash from Mr Tyler before Seaspray would do any more work for Mr Tyler.
- 27 He said that at this meeting Mr Tyler agreed to pay Seaspray so that it could continue with the building works including the Additional building works. He said that in January 2015 Mr Tyler paid Seaspray \$21,087, of which \$7,887 was a cash payment by Mr Tyler for the Additional building works.
- 28 Mr Tyzzer said that the variation increased the contract price from \$18,000 to \$25,887. He said that he prepared a written variation dated 25 March 2015 which

set out the variation requested and paid for by Mr Tyler in January 2015. Mr Tyzzer conceded that he did not follow either of the variation procedures set out in clauses 13.2 (a) and (b) of the Conditions.

- 29 Mr Tyzzer said that on 3 February 2015 Mr Tyler signed the completion certificate in which Mr Tyler acknowledged that he owed Seaspray \$4,800. He said that Mr Tyler noted a couple of minor defects on the completion certificate that he considered needed rectification and that he agreed to pay the outstanding amount of \$4,800 once the minor issues had been rectified. He said the minor issues have been rectified but Mr Tyler has refused to pay Seaspray.

Mr Tyler's evidence

- 30 Mr Tyler said that the Additional building works were included in the contract price of 18,000 and were not a variation. He said that he did not request nor agree to any variation. He conceded that he had installed the pipes around the pool in the wrong place and that they were a mess. He agreed that he asked Seaspray to fix and complete the building works but said that he asked for the work to be done before he signed the contract.
- 31 Mr Tyler gave evidence that the contract specifications included the salt chlorination unit. He agreed that he had asked Seaspray to supply the chlorination unit. When asked to show where this item was listed in the contract, Mr Tyler referred to item (d) in the progress payment schedule. Item (d) refers to the “supply of filtration”.
- 32 In reply, Mr Tyzzer said that the filtration system and the chlorination unit were different pieces of equipment that did different things. Nevertheless, Mr Tyler continued to say that the filtration system was the same as the chlorination unit and that it was listed in the contract and therefore included in contract price of \$18,000.
- 33 Mr Tyler gave evidence that the contract price of \$18,000 included the supply, installation and pressure testing of the filtration system. When questioned on this point he again relied on item (d) in the progress payment schedule. However item (d) states that the owner is to put in the filtration system. That is, the contract provided for Seaspray to supply, but not install or pressure test, the filtration system.
- 34 Mr Tyler gave evidence that he paid Mr Tyzzer \$7,887 in cash when Mr Tyzzer came to his home on 12 January 2015. However he said that this was a payment made as part of the \$18,000 contract price and was not a payment for the building works comprising the variation. He also said that his wife had incorrectly paid Seaspray an amount over \$18,000 and that he was entitled to a refund of any overpayment.
- 35 Mr Tyler agreed that he had signed the completion certificate for the building works on 3 February 2015 and that the completion certificate stated that he owed Seaspray \$4,800. When questioned about why he denied that he owed Seaspray \$4,800, he said that on signing the certificate he was confirming that he had paid.

Discussion

- 36 Having heard the evidence of the parties I accept Mr Tyzzer's evidence that the Quotation set out the work that Mr Tyler initially wanted Seaspray to do. I accept Mr Tyzzer's evidence that he agreed to reduce the contract price to \$18,000 because Mr Tyler wanted to exclude a number of items and do part of the work himself. I also accept Mr Tyzzer's evidence that Mr Tyler would tell him if he wanted Seaspray to do the Additional building works during the building works. I accept Mr Tyzzer's evidence that after signing the contract Mr Tyler requested Seaspray to do the Additional building works and that Mr Tyler paid Seaspray \$7,887 for those works.
- 37 I prefer the evidence of Mr Tyzzer to that of Mr Tyler. I find that Mr Tyler gave evidence that was inconsistent and inaccurate and at times implausible. In particular, Mr Tyler's evidence about the chlorination unit being same as the filtration unit did not make sense. Further his evidence that he signed the completion certificate which showed that he had paid \$4,800 when in fact it said he owed Seaspray \$4,800 did not make sense.
- 38 Further, I do not accept Mr Tyler's evidence that his wife mistakenly overpaid Seaspray. Such evidence is inconsistent with Mr Tyler signing the completion certificate dated 3 February 2015 confirming that he owed Seaspray \$4,800 at the completion of the building works and not raising any issue of overpayment at that time.

Findings

- 39 I find that the contract allowed for an increase in the contract price and for variations. I find that after the contract was signed the parties varied the contract to include the Additional building works. As conceded by Mr Tyzzer, I find that the builder did not comply with the process for dealing with variations set out in clauses 13.2(a) and 13.2(b) of the Conditions.
- 40 I find that the Additional building works included, amongst other things, the following options from the Quotation that were priced separately: the upgrade to the blue glass pebble interior for \$2,275 and the supply of the chlorination unit for \$1,770.
- 41 I find that although Mr Tyzzer listed the blue glass pebble interior in the specification of works he did so on the basis that it was an option which was to be priced separately and comprised a part of the variation. In signing the completion certificate Mr Tyler acknowledged that he still owed Seaspray \$4,800 under the contract, having earlier paid Seaspray \$7,887 in cash for the variation which I have already found included the cost of the upgrade to the blue glass pebble interior.

Is Seaspray entitled to claim for the variation under the contract?

- 42 As I have found, Seaspray did not comply with the variation process set out in clauses 13.2 (a) and 13.2(b) of the Conditions. However Mr Tyzzer gave evidence that Mr Tyler requested and paid for the Additional building works. He

said that Mr Tyler also signed the completion certificate on 3 February 2015, acknowledging that he owed Seaspray \$4,800 on completion of the building works. Mr Tyzzer said that Mr Tyler has paid for the variation.

- 43 Clause 13.2(c) of the Conditions provides that where the builder has not complied with the conditions relating to a variation it cannot be paid for a variation unless the Tribunal considers that it would suffer a significant hardship and that it would not be unfair to Mr Tyler for Seaspray to recover the money.

Findings

- 44 I find that Seaspray would suffer significant hardship if it were not allowed to retain the amount of \$7,887, being the cost of the variation, for the following reasons. I have accepted Mr Tyzzer's evidence and made the finding that he reduced the contract price to \$18,000 by excluding work that was originally quoted in the Quotation, on the request of Mr Tyler. I have accepted Mr Tyzzer's evidence and made the finding that during the building works Mr Tyler asked him to carry out the Additional building works. I have accepted Mr Tyzzer's evidence and made the finding that Seaspray carried out the Additional building works and that Mr Tyler has paid \$7,887 for the variation.
- 45 Additionally, I find that as Mr Tyler has acknowledged in writing at the time of completion of the works that he owed \$4,800 to Seaspray, it would not be unfair to Mr Tyler for Seaspray to retain the money that Mr Tyler has paid for the variation.

Are the building works defective?

- 46 At the start of the hearing, Mr Tyler claimed that the building works were defective and that he required the following rectification work:
- (a) Clean up bluestone sharp edges;
 - (b) Clean up mud from rocks; and
 - (c) Clean up pool interior at beach and around rocks.
- 47 During the hearing Mr Tyler admitted that his claim only related to the bluestone coping having sharp edges which he claimed needed to be rectified.
- 48 Mr Tyzzer gave evidence that he and his son Aaron, visited Mr Tyler's property on 9 February 2015 and rectified the minor defects. He said that he ground the pavers that had sharp edges. He said that following completion of the work Mr Tyler agreed that the work was now complete and that he would pay the outstanding \$4,800. I accept Mr Tyzzer's evidence that Mr Tyler told him he would pay \$4,800 on the minor defects being rectified.
- 49 Mr Tyzzer relied on written statements made by his sons Aaron Tyzzer who carried out and supervised the building work and Brandon Tyzzer who coordinated the handover of the pool to Mr Tyler. The statements were signed before a member of the police force on 13 October 2015. Both Aaron and Brandon Tyler stated that Mr Tyler told Brandon around the time of handover and when Aaron accompanied his father to Mr Tyler's home on 9 February

2015, that he would pay their father the outstanding amount of \$4,800 on Mr Tyzzer fixing the minor defects.

- 50** Mr Tyler has the onus of proving that the bluestone is defective. Having heard the parties' evidence and having no photographic evidence to support Mr Tyler's claim, I am not satisfied that the bluestone coping is defective.

Finding

- 51** For the reasons set out above I find that Mr Tyler has not made out his claim that the building works are defective.

Does Mr Tyler owe Seaspray the final progress payments of \$4,800?

Finding

- 52** Having heard the evidence of Mr Tyzzer and Mr Tyler and having read the contract and relevant documents, I find that Mr Tyler has failed to pay Seaspray the final progress payments due under the contract:
- (a) \$3,800 due on completion of the interior (item (e) of the progress payment schedule)
 - (b) \$900 due on the filling of the pool with water and handover of the pool (item (l) of the progress payment schedule); and
 - (c) \$100 due on completion (item (m)).

CONCLUSION

- 53** For the reasons that I have given I will make orders that Mr Tyler must pay Seaspray \$4,800. I will also order that Mr Tyler must reimburse Seaspray for the payment of the filing fee of \$158.90.

MEMBER F. MARKS

22 January 2016