VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D847/2008

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building Contract – defective work – assessment of damages – whether reasonable in the circumstances to award rectification cost

APPLICANT	N & J Rogers Pty Ltd t/as Performance Pools
RESPONDENTS	Derek Rippingale and Jenelle Rippingale
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	27 September – 1 October 2010
DATE OF ORDER	24 November 2010
CITATION	N and J Rogers Pty Ltd trading as Performance Pools v Rippingale (Domestic Building) [2010] VCAT 1899

ORDER

1. The application is dismissed.
2. On the counterclaim, order the Applicant pay to the respondents $ $43,148.13.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr T. Sowden of Counsel
For the Respondents	Mr B. Gibson of Counsel

REASONS

Background

1 The Applicant ("the Builder") is and was at all material times carrying on business in the construction of swimming pools and spas and the supply of associated equipment. The Respondents ("the Owners") are the owners of a dwelling house and land situated in Launching Place.

2 In early 2007 the Owners were proposing to construct an external deck incorporating a swimming pool and spa at the rear of their house. They had discussions with the Director of the Applicant, Mr Rogers in the course of which Mr Rogers explained what could be provided.

3 A written quotation dated 29 June 2007 ("the Quotation") was provided and on 22 August 2007 a contract ("the Contract") was signed by the parties for the construction of a swimming pool and spa, albeit it was signed on different dates. The price in both the Quotation and the Contract was $69,000.00.

4 The swimming pool is what is called a "negative edge" pool, that is, the water is designed to overflow on one side and fall into a small collection pool below ("the Balance Tank"). It is then returned to the pool by means of the filter pump. The top of the wall over which the water flows, that is, the spillway, was to be tiled by the Builder but it was agreed that instead of tiling the spillway with pool tiles it would be tiled instead with stone pavers to be supplied by the Owners. The external wall below the spillway down to the Balance Tank was to be faced with a veneer made from sections of natural stone called "stack stone".

5 In late 2007 it was agreed that if the Owners purchased more expensive stack stone they would be entitled to a credit for the stone the Builder would have supplied. On 5 February the Owners supply the more expensive stack stone. The cost was $2,323.00 and this was written on the Owners' copy of the Contract

6 Work on the construction of the swimming pool and spa commenced in September and was to have been completed by Christmas. However progress was slow and in October or November it was agreed to extend the completion date to January 2008.

7 Work proceeded spasmodically with some lengthy delays. Claims for payments totalling $57,415.00 were made which the Owners paid.

8 Significant faults appeared early in the construction. The walls and steps were not plumb and the tiling was most unsatisfactory. These faults were acknowledged by the Builder and attempts were made at rectification. In the course of that, walls and other parts of the pool were straightened by rendering and much of the tiling was redone. The stack stone wall was removed from the external wall of the pool in order to permit that pool wall to be straightened but the wall was not straightened and the stack stone wall was not replaced before the Contract was terminated.

9 The Builder then claimed payment of $8,000.00 for the internal tiling of the pool but the Owners refused to pay, alleging that the tiling was incomplete and

defective. An impasse ensued followed by correspondence involving both the parties and their solicitors. Notices were served and both sides claimed to have terminated the Contract.

This proceeding

10 The Builder commenced this proceeding on 11 November 2008 seeking recovery of the amount of $8,000.00, being the amount of the progress claim said to have been due at the time of termination. In subsequent Points of Claim dated 9 December 2009 damages for loss of profit on the remaining stages of the Contract were also sought by the Builder but this was not pursued at the hearing.

11 The Respondents defended the proceeding, alleging that the progress claim was not due and asserting that they had lawfully determined the Contract. They also sought by way of damages the cost of having the swimming pool and spa completed by others and for equipment allegedly not supplied.

The hearing

12 The matter came before me for hearing on 27 September 2010 with 3 days allocated. The hearing took 5 days. Mr T. Sowden of Counsel appeared on behalf of the Builder and Mr B. Gibson of Counsel appeared on behalf of the Owners.

13 I heard evidence from the director of the Builder, Mr Rogers, and from the Builder's expert witness, Mr Mladichek. For the Owners, I heard evidence from Mr Rippingdale, from Mr Pettigrew, the Owners' expert, from Mr Woltering of Ultimate Swimming Pools and Spas ("Ultimate"), the builder that completed the pool and spa, from Mr Steele who rendered the spillway wall and from Mr Kader of Hocoka Landscapes ("Hocoka"), a Landscape gardener who was working at the site and was present at an important conversation.

The witnesses

14 Mr Rogers appeared to have a poor recollection of events and surprisingly, denied that he was an expert in regard to the construction of swimming pools. In answer to some questions he appeared uncertain or accepted that he might be wrong. He denied having received notices of default from the Owners on 5 August or at all, yet, in a letter of 22 August, his solicitor acknowledges having them. He swore that a blower loop was installed under his supervision yet it is clear that none was installed. All of these things cause me to doubt his reliability as a witness.

15 It does not appear that Mr Rogers personally had much to do with the pool construction. In the later stages, that task seems to have been undertaken by his supervisor, Mr Zimmerle, who was not called. No reason was given for the failure to call Mr Zimmerle. Since he acted as the Builder's site manager at critical times he would have been an important witness for the Builder. I infer that his evidence would not have assisted the Builder (*Jones v. Dunkel* (1959) 101 CLR 298).

16 In regard to the discussions that he had with Mr Rippingale Mr Rogers expressed more certainty. I had some difficulty with his evidence concerning the ordering

of the pool controller and his assertion that it was not ordered for this job, even though it was on the same invoice as the other items. I deal with this in more detail below. In this regard I prefer the evidence of Mr Rippingdale. Mr Rogers' evidence on this causes me to further doubt his reliability as a witness.

17 Although Mr Rippingdale did not pay as much attention as he should have done to either the detail of the negotiations or the terms of the Contract that was ultimately entered into I preferred his evidence to that of Mr Rogers. His manner in the witness box was more impressive and his evidence was supported by the other witnesses and consistent with the emails that he wrote whereas Mr Rogers' evidence was not.

18 I have no reason to doubt the evidence of the other witnesses. Of the experts I thought that Mr Pettigrews's evidence was more directly relevant to the subject matter of the dispute than that of Mr Mladichek. He is a swimming pool specialist whereas Mr Mladichek is a building consultant with a more general expertise. I accept that both experts were qualified to give expert evidence on the subject matter of this dispute but Mr Pettigrew seemed to go into the issues in more detail than Mr Mladichek who was more inclined to say as to a particular issue that there was insufficient evidence.

19 I do not propose to recite all the facts of the case except insofar as it is necessary to do so in order to deal with the issues that have been raised.

20 I have been substantially assisted by lengthy submissions from both Counsel in regard to these issues.

Oral representations:

20. I am satisfied that the following representations were made by Mr Rogers in the conversations that took place before the Contract was entered into:

    (a) Everything would be included and there would be no hidden extras or charges;

    (b) The pool would come with a control system;

    (c) The pool would have high specifications.

The defects and termination

21. The pool and spa were tiled in late February/early March. The work was defective. Discussions took place between Mr Rippingale and Mr Rogers and it was agreed that the defects would be rectified. A new tiler was found and more work was done.

22. The stack stone cladding that had been fixed to the spillway wall was coming off and there were gaps between the panels of the cladding. The floor and wall of the balance pool were out of level. In the pool, walls were out of square, steps were not properly formed, tiles were not properly adhered and were coming off, some tiles were projecting and there were exposed sharp edges. Some of the tiling was out of level.

23. On 17 April 2008, a meeting took place at the site between Mr Zimmerle of the Builder, Mr Rippingale and Mr Kader. According to both Mr Rippingale and Mr Kader, the existence of the defects was not disputed and Mr Kader made a list of them in a memorandum that he prepared of the meeting. Mr Zimmerle agreed that the Builder would rectify the defects. Mr Zimmerle was not called by the Builder to give evidence and I accept the evidence of both Mr Rippingale and Mr Kader as to the conversation. The memorandum made by a Mr Kader was tendered.

24. The stack stone was removed from the spillway wall and Mr Rogers agreed to render the spillway wall to make it straight. He never did so. Tiles were removed and replaced in the pool, the spa and the Balance Tank.

25. When the inside pool tiling had been replaced or patched the Builder then asked Mr Rippingale to "sign off" on the tiling. Mr Rippingale was concerned about what he considered was the patchy appearance of the tiling but Mr Zimmerle told him that the grout would blend in well after being acid washed. On 8 July he sent Mr Rippingale an email saying that the pool tiling would "clean up with the pool interior clean prior to fill". Mr Rippingale responded saying "…if it does clean up as you say then OK".

26. On 9 July the Builder sent an invoice for $8,000, said to be due"…on completion of fully tiling the pool interior". According to the Contract, that instalment is due:"…on completion of tiling if the pool interior is fully tiled.'

27. Upon receipt of this invoice Mr Rippingale objected that the stack stone on the spillway wall had still not been replaced and the spillway was not tiled. Mr Zimmerle responded saying that the stack stone was a separate progress stage and would be invoiced separately. That is indeed what the schedule of payments in the Contract seems to contemplate, but, according to Mr Pettigrew's evidence, the tiling at the top of the spillway could not be constructed until the stack stone was laid and that tiling was part of the interior of the pool. Since the water in the pool was to be in contact with it, I accept that that is the case.

28. It is common ground that it was agreed between the parties that the spillway would be tiled with stone pavers instead of pool tiles and that these would be supplied by the Owners. The Builder asserts that the parties also agreed that the Owners' Contractor would lay the stone pavers along the top of the spillway. That is denied by the Owners and it is inconsistent with Mr Zimmerle's email to Mr Rippingale of 5 June 2008 and the exchange of emails of 16 June. It is not suggested by the Builder that any credit would be allowed to the Owners for them undertaking this work. I am not satisfied that the Contract was varied in this further way. It is clear from Mr Rippingale's email of 11 June that the stone was available for the Builder to lay.

29. The provision of only $1,000 for the progress payment for the stack stone shows that the allocation of the price between the various stages did not follow the value of the work involved. Indeed, it seems, as was submitted by Mr Gibson, that the Contract was substantially "front loaded".

30. In any case, the progress payment for the tiling was not due until the interior was fully tiled and it was not fully tiled at the time the invoice was rendered because the spillway was not tiled. It was for the Builder to tile it and it could not be tiled because the Builder had not replaced the stack stone.

31. Accordingly, I agree with Mr Pettigrew's view that the rendering of this invoice was premature. Following an exchange of emails, a stand off then ensued with the Builder insisting upon payment of its invoice and the Owners maintaining that the tiling work was defective and incomplete.

32. Under Clause 25 of the Contract, if the Owners do not pay the Builder in accordance with the terms of the Contract the Builder can serve a Notice of Suspension. No such notice was served. Unless such a notice is served, the Builder remains liable to perform its obligations under the Contract unless and until the Contract is determined. There is no provision for the Builder to cease work or attempt to remove articles from the site if payment is disputed. The Builder must follow the procedure set out in the Contract.

33. On 4 August 2009, in a telephone conversation Mr Rogers threatened to remove "the equipment" from the site if the account was not paid. Precisely what he intended to remove is not clear from the evidence. He arrived on site the following day in a truck with two men, demanded payment and then instructed the men to remove the equipment. When Mr Rippingale objected they left without the equipment.

34. There is a limited right for the Builder to remove equipment conferred by Clause 22 of the Contract but it can only be exercised after the Contract is terminated.

35. Under Clause 16.2, if the Owners are in default the Builder is entitled to serve a Notice of Default which must comply with Clause 16.3. If the Owners do not comply with the notice and remedy the default, Clause 16.4 permits the Builder to terminate the Contract by serving a Notice of Termination. By 5 August, neither of these steps had been taken by the Builder and the Contract was still on foot. The attempt by Mr Rogers to remove the equipment was therefore not permitted by Clause 22.

36. On the same day, 5 August, Mr Rippingale sent an email to the Builder referring to the incident and saying that Mr Rogers had been abusive and threatening. He continued in paragraph 3 as follows:

> "In light of multiple occurrences of Nathan threatening or attempting to remove equipment without permission or legal right we need to manage access of Performance Pool staff or contractors to our site for any further work. To reasonably safeguard our interests we will only provided the access allowed for under Clause 5 on the basis of:
>
> 1. Prior to any access, receipt of a written undertaking from Performance Pools that they will not attempt to, nor will in fact remove equipment, as previously threatened, as a result of the access granted. Any removal or attempt will be regarded as illegal and persons involved strongly pursued accordingly.
>
> 2. Any further work must occur only after a full plan for completion of the project has been agreed including tasks being defined with dates and persons involved.

3. Prior notification of each instance of Performance Pool staff or contractors coming on site including the names and purpose of coming on site in relation to the plan, must be provided by email to [*email address given*] and be prior authorised by return email. Authorisation will not be unreasonably withheld."

37. A copy of that email was sent the same day to the Builder by fax, together with three notices of default. Details of the defaults alleged in these notices are as follows:

    (a) The first Notice said that the Builder was seriously overdue on the project, that no notices of delay under Clause 11 of the Contract had been served by the Builder. It stated that if all outstanding and remedial work were not completed within 10 days the Owners would have the option of terminating the Contract and completing the work themselves.

    (b) The second Notice referred to a number of uncompleted items and said that the Builder had insisted that it would not do anything else until unrelated work was finished and that this amounted to an unlawful suspension of the work. As with the first notice, the notice stated that if all outstanding and remedial work was not completed within 10 days the Owners would have the option of terminating the Contract and completing the work themselves.

    (c) The third notice stated that the Builder had still not remedied the stack stone cladding which it had earlier defectively installed and then removed. The notice went on to say that that if all remedial work were not completed within 10 days the Owners would have the option of terminating the Contract and completing the work themselves. Unlike the other two notices, this third notice only required the Builder to do the remedial work within the 10 day period.

38. On 22 August 2009, the Builder's solicitors sent a letter to the Owners enclosing a Notice of Default. The defaults specified in this notice are the failure of the Owners to pay the $8,000 tiling payment and the denial by the Owners of access to the site by the Builder.

39. Under Clause 16.2 of the Contract, the Builder was entitled to serve a Notice of Default if (inter alia) the Owners were to deny the Builder access to the Building site so as to prevent the work from proceeding. The email did not have that effect. Whether or not the Owners were entitled to impose such conditions on entry it does not appear that the conditions would have been difficult to comply with nor does it appear that the effect of the email was to prevent the work from proceeding. The Builder stopped work because it had not been paid the $8,000.00 that Mr Rogers claimed.

40. The Owners' solicitor responded by letter dated 2 September, denying that access had been refused and asserting that the Contract was still on foot. He added that if the Builder purported to terminate the Contract, such action would be considered to be an unlawful repudiation of the Contract. On 16 September 2009, the Builder's solicitor served what purported to be a Notice of Termination.

41. Mr Gibson submitted that, by merely serving a Notice of Termination under the Contract when it was not entitled to do so the Builder repudiated the Contract. That does not necessarily follow but looked at together with the other circumstances I am satisfied that the Builder repudiated the Contract. The other circumstances amounting together to a repudiation of the Contract were the Builder ceasing work without suspending work in accordance with the Contract, attempting, or at least threatening, to remove materials from the site without first terminating the Contract and then abandoning the site, refusing to carry out any further work unless it were paid an amount to which it was not entitled.

42. The Owners have now engaged other Contractors to complete the work.

Submissions

43. Mr Sowden submitted that, by the terms of the email and fax referred to, the Owners restricted the Builder's access to the site and that this amounted to a repudiation of the Contract. It was also one of the two grounds specified in the Builder's Notice of Default. He said that the Owners' obligation at law as to provide an "open gate" and full and unrestricted access to the property. He said that, by the Notice of Termination, the Builder accepted the repudiation and brought the Contract to an end.

44. Access to the property is provided for in Clause 5. That requires the Owners to provide to the Builder "…suitable access to the property at all reasonable times for equipment personnel and materials." The purpose of the access contemplated by Clause 5 of the Contract was to enable the Builder to carry out the work, not unlawfully remove equipment. There was no right of access to remove equipment unless Clause 22 applied and it did not, because the Contract was still on foot.

45. It is clear from Mr Rogers conduct that he had no intention of doing any further work unless the invoice for the $8,000 were paid and his conduct demonstrated that he considered that the Builder was entitled to remove the equipment. Since any such removal was not permitted in the circumstances, the Builder was not entitled to access for that purpose.

46. Apart from repudiation, Mr Sowden also relied upon the Notice of Default in regard to the non-payment of the tiling invoice of $8,000.00.

47. Mr Gibson submitted that the $8,000 was not due because the spillway had not been tiled. He also submitted that the work was not satisfactory and that items that were to have been delivered and for which the Owners had paid were either not delivered or were not in accordance with the Contract. In both instances I think that he is correct. The previous instalment of $8,000.00 was not due until the "filtration equipment" was delivered and installed. Since no skimmer box was provided and the chlorinator was incomplete the claim should not have been made. However it was made and the Owners paid it.

48. Payment of a particular stage is due upon that stage being "reached". The presence of defects would not prevent payment becoming due unless they were sufficient in nature or extent to prevent the stage having been reached. It is

unnecessary for me to consider whether the defective workmanship or lesser equipment in this case had that effect because I am satisfied that the tiling stage was not reached because the spillway was not tiled.

49. Mr Gibson also said that, in calculating payments (b) and (c) on page 6 of the Contract, the Builder had not deducted the cost of "accessories, landscaping and other works". I think that is right and the result is a front loaded contract but the progress payments were nonetheless agreed upon by the Owners. I do not believe that this in itself means the instalments agreed upon were not due.

50. Mr Gibson submitted that the Owners were entitled to deduct the amount due to them for the stack stone, which was $2,332, from the invoice for $8,000. I do not need to consider whether there would have been any entitlement to set off because the principal sum of $8,000 was not due and so there was nothing to set off the cost of the stack stone against. I note that the Owners did not offer the Builder the balance. They maintained, correctly, that there was nothing then due.

51. As to the access issue, I do not think that Mr Rippingale's email and fax evinced an intention on the part of the Owners no longer to be bound by the Contract. On the contrary, the Notices accompanying the faxed copy required the work to be completed. That could not be done if the Contract were at an end or if the Builder were not allowed to return to the site. The fax does purport to impose conditions on entry but, in the light of Mr Rogers' threats to unlawfully remove equipment it is understandable that the Owners would be concerned to ensure that did not happen. That is a more reasonable interpretation of their conduct than the notion that they did not consider themselves bound by the Contract.

52. If the Owners fail to provide access Clause 5 provides that the Builder, if it is not in default, will be entitled to claim a reasonable extension of time and any extra costs to complete the work. No such claim was made by the Builder.

The Owners' claim for rectification of the Contract

53. Although the Contract was in writing the Owners seek rectification of it to accord with the Quotation. By Further Amended Points of Counterclaim filed on 27 September the Owners alleged that the Quotation and discussions between the parties amounted to an agreement partly written and partly oral entered into before the Contract was signed. The oral conversation alleged was that it was agreed that a Genus IV controller would be included in the project. The pleading then goes onto provide that the Builder provided the Owners with a written Contract which was attended to embody that earlier agreement but by a mutual mistake of fact it failed to provide for the supply of certain items that had been discussed namely, a spa blower, airbeds and plumbing for a salt chlorinator and spa controller contained in the agreement.

54. Mr Rippingale gave evidence that some weeks after receiving the Quotation he contacted Mr Rogers and accepted it. He then received the form of contract. After checking that the price was the same as the Quotation, the Owners signed it without reading it carefully, assuming that it incorporated the terms of the Quotation that they had accepted. There had been no communication from the

Builder that the Contract differed in any way from the Quotation. From Mr Roger' evidence, it appears that the Contract was prepared by his wife.

55. The Builder denies any earlier oral contract predating the Contract and, in his submissions, Mr Sowden argues that I should not be satisfied that there was a mutual mistake.

56. Mr Sowden referred me to the cases of *Leibler v Air New Zealand (No. 2)* [1999] 1VR 15 to the effect that there was a heavy onus of proof upon the Owners and also *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSW LR 329 to the effect that the evidence of the party's intention must be clear and precise.

57. In the Quotation the Builder offers to supply two Blower grids and a 1300 watt blower to the spa. In the Contract, that has been changed to two 50mm Aerators with two 1000 watt Hurlcon Blowers. Mr Rogers said that he no longer installs blower grids and installs Aerators instead.

58. For the reasons given below I am satisfied that it was agreed between the parties that a controller was included in the price and that the Builder proposed to supply one, which was a Genus IV controller. I am satisfied that the absence of any reference to it in the Contract must have been a mistake and an order will be made that the Contract be rectified in that regard.

59. Save for that, I am not satisfied that there was any mutual mistake in the preparation of the Contract. Mrs Rogers might well have intended to change the chlorinating system and substitute Aerators for Blower grids thinking that they were not material differences. I cannot infer that that was a mistake on the part of the Builder, simply because the differences were not pointed out to the Owners.

60. Mr Gibson agued that if the mistake was unilateral it had been induced by the Builder in not drawing to their attention to the changes. However I am not satisfied that the Owners had any understanding of the difference between the types of chlorinator or between an Aerator or a Blower Grid, both of which are supposed to do the same thing, albeit in a slightly different way. They left those details to Mr Rogers.

The pool controller

61. Mr Woltering said that when he attended the site there was no pool controller there but there was wiring for it and there were two parts of motorised valves in the filter area lying on the ground next to the pump valve. He said they were components designed to be fitted to the front of the pump and would need a controller to operate them. He said that without a controller it would be necessary to go under the decking to turn the pool or the spa on. Mr Rogers acknowledged that the motorised valves that were delivered to the site would have been useless without the controller.

62. Mr Rippingale gave evidence that in the pre-contractual discussions it was agreed that there was to be a pool controller. I accept that evidence.

63. The various items of equipment for the pool and spa were ordered by the Builder from its supplier and all appeared on the same invoice. Amongst the items ordered was a Genus IV controller and a related item. They were not delivered because the supplier was out of stock. They are described in the invoice as being on "back order". Mr Rogers said that the controller described in that Invoice was for another job but it is stated in the Invoice that delivery of the two items was to be at the Owners' house.

64. The practice adopted by the Builder for delivery of items for the pool and spa was that they were delivered to the Owners' house, which is where the pool and spa were being constructed. The Owners had to sign for such deliveries and the items were then left there for the Builder. The Builder was not regularly on site. The Owners' house is in an out of the way location in Launching Place, a fairly remote rural area and not a convenient place for the Builder to have items delivered if they were for other jobs. There was no adequate explanation why, if these items were for another job they were not delivered to that other job or to the Builder's place of business.

65. In these circumstances, I view Mr Rogers' evidence that the controller was for another job with great suspicion. Although the two articles in question were on "back order", delivery was still, according to the invoice, required to be at the Owners' property.

66. The Quotation does not refer to a controller other than a "Rolachem automatic Ph control" and a "Digital Auto Controller" for the heating system, neither of which was the controller the witnesses were talking about. The printed form used for the Contract lists various components of a pool and has provision for the parties to indicate whether a particular item is to be included or not. Amongst the various components listed in the standard form there is no pool and spa controller mentioned. Accordingly there is nowhere in the form for the parties to indicate whether a pool and spa controller is to be provided or not or, if one were to be included, what it would be. It would be necessary to write it in. The form was completed by Mr Rogers' wife who did not give evidence although she was present at the hearing.

67. The Contract does not say that a controller is included but nor does it say that one is not included. Normally such an omission from a document would suggest that it was not included. However, apart from the document, it had been verbally agreed that a controller would be supplied and that it was included in the price the parties had negotiated before the Contract was prepared. Further, a controller was included in the list of components ordered for the job and the valves that would be attached to it were brought to the site and placed next to the pump where they would need to be installed. This indicates clearly that it was intended by the parties that a controller was to be supplied and was included in the price.

68. Mr Pettigrew pointed to the cost of the pool and spa which he said was well above what one would pay for a budget pool. Mr Rogers had told Mr Rippingdale that there would no extras and on the evidence of Mr Woltering the pool and spa could not be operated without the controller unless one were to go

underneath the decking each time something had to be done which, for a $70,000 pool seems unlikely to have been the intention.

69. Accordingly, the absence of any reference in the Contract to an item the parties had agreed upon would suggest that they omitted it by mistake.

70. I find that it was agreed between the parties that the Builder would supply and install a controller as part of the pool and spa to be supplied and that the absence of any specific reference to the controller in the Contract was a mutual mistake. I will therefore order rectification of the Contract to include a controller. I am satisfied a controller was not supplied and that it would cost $3,232.00 to provide it.

Design

71. It was the job of the Builder to design the pool but the Owners made no complaint about design in their Application.

72. At the start of the hearing Mr Gibson sought leave to amend the Points of Claim to allege defects in the design. The application was opposed and I refused to allow the amendment because the hearing had commenced and the Builder was no longer able to join other parties, such as the engineer, in relation to the design.

73. I did allow an amendment to enable the Owners to seek rectification of the Contract in regard to the absence of any reference to certain things to be included. Otherwise, the Owners were confined to the claim as articulated in the Amended Points of Claim.

The claims for incomplete and defective work

74. It is trite law that in any contract for work and materials, there are implied terms that the work is to be done in a proper and workmanlike manner using good and sufficient materials. Similar terms are found in Clause 2 of the Contract and are implied into any contract for the carrying out of domestic building work by reason of s.8 of the *Domestic Building Contracts Act* 1995.

The absence of a skimmer box

75. The Quotation refers to a “skimmer” and the Contract included a “Hurlcon” surface skimmer. Mr Rogers said that the inclusion of a skimmer box in the Contract was a mistake by his wife who filled in the form used for the Contract.

76. When the reference to the skimmer box in the engineer’s design was pointed out to him he said that that part of the design was an “optional connection”. When one looks closely at the design one sees that those words do not relate to the skimmer box itself but to its connection to a sump. The engineer’s design is post-contractual but, since it was done on Mr Rogers’ instructions, it indicates what the Builder considered had to be supplied.

77. Mr Rogers said that a skimmer box was not required because it was a negative edge pool. Mr Pettigrew said that that was not a reason to omit a skimmer box and that it was his practice to install one in such a pool to act as a skimmer box when the water was below the level of the edge and also to be used as a vacuum

point. He said that it provides a decent size basket for the collection of debris when vacuuming. Mr Woltering said that he would have installed a skimmer box if he had built the pool.

78. I do not accept that this was a mistake. It is clear from the Quotation, the Contract and the design that a skimmer box was included and it was omitted.

79. The Owners have obtained a quotation of $7,260.00 for the provision of a skimmer box. I accept Mr Pettigrew's evidence that that is fair and reasonable in the circumstances, given that it must now be installed after the pool has been completed.

Poor piping

80. In regard to the piping of the pool and spa:

    (a) The Spa and pool were wrongly connected in that the pipes entered the pool from the spa at the same level. I accept the evidence of Mr Pettigrew and Mr Woltering that this is defective construction. Even Mr Rogers' evidence appears to confirm that a difference in level is required. The piping had to be altered at a cost of $1,219.80, of which $650.00 was paid to Ultimate Pools and $569.80 was paid to Hocoka..

    (b) The length of piping between the pool and the pump was excessive and needed to be completed and rerouted at a cost of $1,560.00. I accept the expert evidence that the extra length would have put an unnecessary load on the pump. I do not accept Mr Roger's evidence that Mr Rippingale instructed him to run the pipes in this way. Mr Rippingale denies having done so and the piping has now been laid in that way which, according to the expert evidence is correct.

The absence of an air loop

81. An air loop was required as an anti-siphon loop in order to protect the blower from a backflow of water. Mr Pettigrew said he could see none when he was on site and that one ought to have been installed. Mr Woltering said that none had been installed. Ultimate installed one at a cost of $350.00.

82. I do not accept Mr Roger's evidence that there was one below the deck. In any case, Mr Woltering said that a blower loop below the deck would not have worked. No blower loop was apparent in the photographs except for the one that was later installed by Ultimate.

No aerator grid

83. The quote included an aerator grid in the spa whereas two aerators have been supplied instead. I accept the evidence that this is both a cheaper and a lesser option. Mr Woltering said that the grid would have cost about $100 extra. However the Contract provided for Aerators and that is what was supplied.

The stack stone wall

84. The wall behind the stack stone was defectively constructed by the Builder and uneven. The stack stone was then poorly installed and was coming off and

according to the evidence of Mr Kader it all had to be removed. The wall was straightened by Mr Steele at a cost of $2,502.50. The stack stone was replaced by Hocoka at a cost of $5,044.60 and rectification to tiling in the Balance Tank cost $1,350.00. The total cost was therefore $8,897.10. The replacement stone cost the Owners a further $2,332.00.

Leaking pipe penetrations

85. There are also photographs showing obvious water leakage around some of the pipe penetrations which Mr Pettigrew said showed inadequate sealing.

86. I accept that there are leaks around the pipe penetrations shown in the photographs, that these are defects and that they must be rectified. Mr Pettigrew estimated the cost of rectifying that at $2,000.00.

Installation of the heater

87. I accept Mr Rippingale's evidence that he did not direct where the heater was to go and that it was the Builder that chose to run the pipes to the spot where it was later installed and laid the foundation for the installation of the heater in that location. The plumber who laid the gas line blamed the Builder for the choice of location.

88. The heater is presently disconnected and will have to be installed in a different location because, as both experts agreed, the regulations do not permit it to be located beneath a timber deck. Mr Pettigrew estimated the cost of relocating the Heater at $1,200.00.

Solar heating

89. The solar heating was not installed. The Owners are entitled to the reasonable cost of installing it now for which Ultimate has quoted $4,720.00. Mr Permewan dos not comment on the reasonableness of this price, save to say that he says that the Owners should be entitled to the full cost of the solar heating. Since solar heating was included in the Contract, that is certainly the case. However Ultimate's price compares favourably with the Builder's price for Solar Heating, which was $5,950.00.

The Balance Tank

90. The Balance Tank is intended to collect the water that falls over the negative edge. An outlet in the tank then allows the water to pass back to the pump. According to Mr Woltering, when he first inspected the pool he found that between half to two thirds of the water passing over the negative edge was being lost because it landed either on top of, or beyond, the external wall of the Balance Tank.

91. According to Mr Pettigrew, for the water coming over the negative edge to reliably fall into the Balance Tank, the angle between external edge of the negative edge and the line to the top of the external wall of the Balance Tank must be at least 30 degrees. He said that 30 degrees is the minimum and the wider the angle the better. That angle is determined primarily by the width of the

tank and also by the height of the external wall. In this case the angle was less than the minimum 30 degrees.

92. Mr Sowden suggested that the problem arose because the Owners' Contractor, Mr Kader, had built the stack stone wall too high. He said that it was the height of the stack stone wall that determined the outside edge and so raising that height would reduce the angle. However Mr Kader said that he had built it to the same height as the previous Contractor engaged by the Builder. I accept his evidence.

93. The problem was exacerbated in the case of this pool because the property is dependant on tank water and so water lost is difficult to replace. In order to prevent excessive use of water as well as address the uneven height of the wall the Owners have raised the external wall of the Balance Tank which has brought the angle to the minimum of 30 degrees. That was the cheapest option but it has made the Balance Tank deeper and, as a result of this increased depth, it is now required by the regulations to be fenced.

94. Other problems were raised with the Balance Tank. The overflow pipe was too close to the bottom of the tank but that has now been rectified. The external wall was also not level but that was addressed when the height of the wall was raised at a cost of $853.60. However the primary problem is that the angle was insufficient and so water that should fall into the Balance Tank misses it and is wasted. A video was tendered showing this occurring.

95. The drawing attached to the quotation shows a width of 800 mm for the Balance Tank. This drawing did not find its way into the Contract but it is the same as the dimension appearing on the Engineer's drawings. There was some discussion during the hearing concerning the interpretation of the engineer's drawing, that is, whether it shows part of the dimension of the stack stone wall as being included in the width of 800 mm. A similar doubt exists as to the drawing attached to the Quotation. However the quotation drawing was pre-contractual and the Engineer's drawing was prepared at the instigation of the Builder after the Contract was entered into and so neither of them forms part of the Contract. The dimensions of the Balance Tank are not given in the contract drawing, which is nothing more than a sketch. On that basis, the Builder would be required to follow good building practice and build it to a sufficient width in the circumstances.

96. Mr Pettigrew said that the tank as constructed does not achieve the required 30 degree angle. It is clear that the wall which was to be covered with stack stone was out of plumb and had to be extensively rendered to straighten it. That might have contributed to the loss of width but the width as constructed is only 670 mm which is quite insufficient.

97. The only adequate solution to the problem is to reconstruct the Balance Tank as it ought to have been constructed. That would include the height of the external wall, which will have to be reduced to avoid the necessity to fence the Balance Tank which was never agreed or contemplated. Rebuilding the whole of the Balance Tank in accordance with good building practice and to a sufficient width in the circumstances would give the Owners what they ought to have received.

98. Mr Pettigrew estimated that it would cost $8,000.00 to reconstruct the Balance Tank, a figure he justified in cross-examination. I accept his evidence in this regard.

Suspected leak in the negative edge wall of the pool.

99. Mr Pettigrew expressed some concern that the pool appears to be leaking on the side of the negative edge. There are what appear to be damp patches in the stack stone below areas that appear to be dry. There were photographs taken during construction showing cracking in that wall but Mr Pettigrew said that these were likely to be shrinkage cracks and not a defect. Some of the photographs of the negative edge show water penetrating through the grout lines and tracking down the stack stone sections. The wall has been extensively rendered in order to straighten it. Mr Pettigrew said that the apparent leaking should be investigated. Mr Mladicheck said that the water appears to be coming from the top of the wall where the grout lines are allowing water through and I accept that some water penetration is coming from that source.

100. I accept Mr Pettigrew's evidence that the negative edge wall warrants further investigation but until that has been done and a defect demonstrated I cannot find that the wall is leaking. If further investigation should find a defect in the wall that might be the subject of s separate claim.

The Filters

101. The Builder was required under the Contract to install a Hurlcon GX 600 filter. Instead it installed two smaller ZX 200 filters. Mr Roger's evidence on this issue was unsatisfactory. According to Mr Pettigrew that meant that the filter area was reduced by one third. He said that the two smaller filters would do the job of filtering but would require more frequent cleaning. He said they would need to be cleaned one and a half times as often and there were two to clean instead of one.

102. The Owners are entitled to what was in the Contract. Mr Pettigrew said that to replace the two smaller filters with the filter required by the Contract would cost $2,450.00 and the Owners have obtained a quotation for that amount.

The salt chlorinator

103. The Quotation provided for a Hurlcon VX 9T self cleaning chlorinator coupled with a Rola Chem automatic PH Control. Mr Gibson submitted that that should have been installed. However the Contract required the Builder to install a Hurlcon / Rolachem RC7T Automatic Sanitiser which the Builder has installed. For the reasons given, the application to rectify the Contract succeeded only in regard to the controller. This part of the claim therefore fails.

One blower missing

104. The Contract required the Builder to install 8 Venturi jets with two 1000 watt blowers and two 50 mm Aerators. Only one blower was installed. Mr Permewan said that to install the other blower would cost $700.00.

Other losses

105. Other losses proved are:

    (a) The amount charged by Hocoka for the tiling the spillway, which $2,420.00.

    (b) The cost of extending the Building Permit due to the delay, which was $165.00. I do not accept Mr Rogers' evidence that the delay was due to late payments by the Owners.

    (c) The charge by Ultimate of $1,040.00 for completing the plumbing, filling and testing the pool.

    (d) Cost of removing rubble and debris from the site, which was $150.00.

Colour of the pool and spa tiling

106. The major defect relates to the pool tiling. The tiles in the spa contain one square of tiles of a different shade but this has been accepted by the Owners. As to the pool, Mr Pettigrew said that, despite the retiling work that has been done, the matching of the tiles is still not acceptable. Mr Woltering said that the tiles were not matched as well as they should have been.

107. It is quite apparent from the photographs that the tiles in the pool are very patchy in terms of colour difference. According to the evidence the tiles come in square sheets, glued to a substrate and are laid in sheets. The complaints by the Owners in this regard are justified. I accept Mr Pettigrew's evidence that the colour matching of the tiles is not to an acceptable standard and that accordingly, the workmanship was not done in a proper and workmanlike manner. The only issue here is whether I award damages equivalent to the cost of re-tiling the pool, damages for the cost of repairing it or whether I award compensation for the difference.

108. In Mr Pettigrew's first report he said that it was not realistic to expect the whole pool to be retiled and that compensation should be awarded. In his later report he estimated that the cost of retiling the pool would be $20,000. As an alternative, Mr Pettigrew said that if one were to repair the tiling by removing the non-matching sections and replacing them, the likely cost would be $8,000.00. He said that this would be a difficult process with no guarantee of success and did not appear to be something that he would recommend.

109. It is unclear from Mr Rippingale's evidence whether he proposes to retile the pool, adopt the less expensive approach of repairing it or simply put up with it.

The calculation of damages

110. The claim in respect to the tiling is for damages. As to the manner in which damages should be assessed, Mr Gibson referred me to passages in the cases of *Bellgrove v. Eldridge*(1954) 90 CLR 613 at p.617, *Alucraft Pty Ltd (In liquidation) v. Grocon Ltd* (No.2) [1996] 2 VR 386 at p. 390 and *McKay & anor v. Hudson & ors* [2001] WASCA 387. To those authorities might be added the recent Court of Appeal decision of *Tabcorp Holdings v. Bowen* [2009] 253 ALR

111. 1 considered the relevant principles in a recent case of *Clarendon Homes Pty Ltd v. Zalega* [2010] VCAT 1202. After reviewing the various authorities I concluded (at para 165):

> "I think the following principles concerning the assessment of damages for the breach by a builder of a domestic building contract can be spelled out from the cases referred to:
>
> (a) Where the work and materials are not in conformity with the contract, the prima facie measure of damages is the amount required to rectify the defects complained of and so give to the owner the equivalent of a building which is substantially in accordance with the contract *(Bellgrove);*
>
> (b) The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt *(Bellgrove);*
>
> (c) Reasonableness is a question of fact *(Bellgrove)* and the onus of proving unreasonableness so as to displace the prima facie measure is upon the builder. It is the builder who is seeking to displace the prima facie position *(Tabcorp per Rares J.)*;
>
> (d) In considering whether it would be unreasonable to award the cost of rectification, the tribunal should consider all the circumstances of the case before it. The nature and significance of the breach should be looked at in terms of the bargain the parties had and the relative importance of the breach within the context of the contract as a whole."

112. In the present case it was acknowledged that there are commonly colour variations in pool tiles and that the present appearance of the tiles is due to the tiler not removing non-matching sheets of tiles or failing to mix the tiles in order to avoid a patchy appearance. The result is tiling that is more patchy than it should be but from the photographs it does not seem that it stands out too much. It is noticeable but not strikingly so.

113. The prima facie position must be that the tiles should all be replaced but given the limited extent of the problem I find that that is not reasonable in the circumstances. I am more inclined to agree with what Mr Permewan said in his first report, that it is "…not realistic to expect the entire pool to be re-tiled at this point of time" and that the Owners should instead receive compensation. Bearing in mind that the defects, although tolerable, have resulted in a lesser finish I fix the compensation at $5,000.00.

The figures

114. It is not disputed that the Owners are to be reimbursed the saving to the Builder in not having to purchase the stack stone. That figure was $1,183.63. The compensation to the Owners is therefore

Purchase original stack stone	$1,183.63
Pool controller	$3,232.00

Skimmer box	$7,260.00
Level Balance tank and wall	$ 853.60
Connection between Spa and pool	$1,219.80
Complete and re-route piping	$1,560.00
Install air loop	$ 350.00.
Stack stone wall	$8,897.10
Replacement stone	$2,332.00.
Leaking pipe penetrations	$2,000.00
Relocate Heater	$1,200.00
Install solar heating	$4,720.00
Reconstruct Balance Tank	$8,000.00
Replace the two smaller filters	$2,450.00
Install second blower	$ 700.00
Tile spillway	$2,420.00
Extend Building Permit	$ 165.00
Complete fill and test pool.	$1,040.00
Removing rubbish from site	$ 150.00
Defective tiling	$5,000.00
Total	$54,733.13
Less: unpaid balance of contract price	$11,585.00
Balance due to the Owners	$43,148.13

Order

115. There will be an order that the Builder pays to the owners $43,148.13. The Builder's claim is dismissed.

SENIOR MEMBER R. WALKER