VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D611/2011

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building contract – Domestic Building Contracts Act 1995 s.30 - foundation data – builder to obtain before entering contract – consequences of failure – provisional sum figure – must be reasonable estimate – details as to calculation to be provided – consequences of failure – s.33– variable price – warning to be placed next to price – consequence of failure – builder threatening to walk off site if variation not signed – threatened conduct not justified by contract - owner signing variation and paying for it – signature and payment not voluntary in the circumstances

APPLICANTS	Katey Wilson, Anthony Fehring
RESPONDENT	Lazaway Pools & Spas Pty Ltd (ACN 007 171 520)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	9 September 2011
DATE OF ORDER	21 September 2011
CITATION	Wilson and Anor v Lazaway Pools & Spas Pty Ltd (ACN 007 171 520) Domestic Building) [2011] VCAT 1827

ORDER

1. Order that Anthony Fehring be joined as an Applicant to this proceeding.
2. Order the Respondent to pay to the Applicants the sum of $8,027.87.
3. Order the Respondent to complete construction of the subject swimming pool in accordance with the contract and the Domestic Building Contracts Act 1995.
4. Liberty to the Applicants to apply for further orders in default of compliance with paragraph 3 of this order.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr A. Fehring in person
For the Respondent	Mr J. White, Manager in person

REASONS

Background

1 The applicants ("the Owners") are the owners of a dwelling house at Montrose. The respondent ("the Builder") is and was at all material times carrying on business constructing swimming pools.

2 This proceeding concerns a dispute that has arisen between the Owners and the Builder in regard to money the Builder has required the Owners to pay over and above the contract price due to the fact that the sides of the excavation for the pool fell in and the Builder had to carry out additional work as a result. The Owners have paid this money, which they say was paid under "duress" and now take these proceedings to recover it from the Builder.

The hearing

3 The matter came before me for hearing as a small claim on 9 September. The Owners represented themselves and the Builder was represented by its Manager, Mr White, and by its Director, Mr Wright, who is a registered builder. I also heard evidence from its site foreman. There were some legal issues raised and I informed the parties that I would provide a written decision.

The Contract

4 The parties executed a written contract dated 22 February 2011 ("the Contract") whereby the Builder agreed to construct a swimming pool for the Owners in the rear yard of their house for a price of $35,250.00.

5 On page 8 of the Contract the "prime costs" included in the contract price were:

> "Tiles at $24.00 per square metre" and
>
> "Excavation - using 3.5 tonne excavator,
>
> 10 cubic metres tip truck and Bobcat $3,500.00"

6 The note on that page says:

> "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 amounts. If the prime cost is less than 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 cost".

7 Items such as excavation are not prime cost items. If anything, they are provisional sums. There is a blank clause on that page of the printed form for provisional sums to be specified for excavation of rock, shoring, formwork and cartage of spoil and tipping fees but that part of the form has been crossed out.

8 On page 11 of the Contract under the heading "Special Conditions" are the words (inter alia):

> "Out of ground form work if required $150.00 per linear metre to be determined on site at time
>
> Below ground shoring if required $150.00 per linear metre to be determined on site at time".

The circumstances in which these might be required, or upon which the determination will be made in each case, are not stated. Pricing such as this is usually found in connection with prime cost or provisional sum provisions.

9 By clause 3(g) and clause 3(t), the following items were excluded from the works:

(a) Shoring up of wet or unstable soil or reinstatement of any cave-in of the pool excavation;

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

Price variation - Statutory requirements

10 The effect of these clauses is to allow the contract price to vary to reflect extra claims should the extra work be required. The Owners rely upon s.33(2) of *Domestic Building Contracts Act* 1995 ("the Act"), which is in the following terms:

> "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 must 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 that 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."

11 Since there is no warning as required by s.33(2) of the 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.

Calculation of the prime cost and provisional sums

12 By clause 6 of the Contract it was provided that:

> "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 of 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. The Builder must provide the building owner with a copy of any receipts verifying the exact cost of the prime cost items and provisional sums as soon as practicable after receiving the receipts. Should the incident covered by the provisional sums not eventuate or vary from the estimates then either a refund or an extra payment will result" (sic.).

This clause echoes similar provisions to be found in sections 20-23 of the Act.

13 Notwithstanding this clause and the requirements of the Act, no details or breakdown of the excavation figure, which is set out as a "prime cost" item, 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. Mr Wright said that the cost of soil disposal is variable and can sometimes cost more than anticipated. A per cubic meter figure should therefore have been specified as a provisional sum.

14 It is not possible to see whether an extra claim is justified because it is not known how the figure of $3,500 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.

Required procedure for variations

15 Provision for variations to the Contract is made in Clause 13. Variations initiated by the Builder are dealt with in Clause 13.1. That provides as follows:

> (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 affect 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 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) …
>
> (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 reasonably have been foreseen by the Builder at the time 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".

Suspension of work

16 By clause 25, if the Owners should fail to pay the Builder in accordance with the terms of the Contract then the Builder may suspend building work by issuing a notice of suspension setting out certain matters. If such a notice were to be issued then the building work would be suspended and the Builder would not have to carry out any further domestic building work until 10 business days after the payment should have been made. There is no other provision in the Contract entitling the Builder to suspend work.

No soil report

17 At the time the Contract was signed, the Builder had not obtained any soil report or any information at all concerning the nature of the ground in which the excavation was to be made and in which the pool was to be constructed.

18 The quotation and the Contract were prepared by a salesman, a Mr French, who is not an engineer or a Builder, but has had a number of years experience selling swimming pools to members of the public. It was

suggested to me by the manager of the Builder, Mr White and also by the registered builder Mr Wright, that Mr French was an expert in this regard.

19 The manner in which the form of contract has been completed would not suggest any general expertise in building matters or even in completing forms of contract. There is no evidence that he has any relevant expertise apart from experience at selling swimming pools. There is also no evidence as to how he arrived at the figure of $3,500.00 although it would seem from questions put to Mr Wright that it was a figure that related to the size of the pool. Importantly, in arriving at this figure, there was no consideration given to the nature of the soil in which the excavation was to be constructed.

The consequences under the Act

20 Section 30 of the Act provides as follows:

> "Builder must obtain information concerning foundations
>
> (1). This section applies if proposed domestic building work under a major domestic building Contract will require the construction or alteration of the footings of a building, or may adversely affect the footings of a building.
>
> (2). Before entering into the Contract, the Builder must obtain foundations data in relation to the building site on which the work is to be carried out.
>
> 50 penalty units.
>
> (3). In this section ***foundations data*** means—
>
> (a) the information concerning the building site that a Builder exercising reasonable care and skill would need to prepare—
>
> (i) a proper footings design for the site; and
>
> (ii) an adequate estimate of the cost of constructing those footings; and
>
> (b) any reports, surveys, test results, plans, specifications, computations or other information required by the regulations for the purposes of this section.
>
> (4) In deciding whether he, she or it has obtained all the information required by subsection (2), a Builder must have regard to—
>
> (a) the relevant standards published by Standards Australia[9]; and
>
> (b) the need for a drainage plan or engineer's drawings and computations; and
>
> (c) the need for information on the fall of the land on the site.
>
> (5) It is not necessary for a Builder to commission the preparation of foundations data under this section to the extent that such

data already exists and it is reasonable for the Builder to rely on that data.

(6) A Builder must give a copy of any foundations data obtained by the Builder to the building owner (unless the building owner supplied the data to the Builder) on payment by the building owner of the amount owing in relation to the obtaining of that data by the Builder.

10 penalty units.

(7) After entering into a major domestic building Contract, a Builder cannot seek from the building owner an amount of money not already provided for in the Contract if the additional amount could reasonably have been ascertained had the Builder obtained all the foundations data required by this section.

(8) Nothing in this section prevents a Builder from exercising any right given by this Act to the Builder to claim an amount of money not already provided for in the Contract if the need for the additional amount could not reasonably have been ascertained from the foundations data required by this section.

21 In the case of *Lazaway Pools v Calderera* [1997] VDBT 67, the predecessor to this tribunal, the Domestic Building Tribunal, determined that for the purpose of this legislation, a swimming pool was a building. In arriving at that conclusion the learned Tribunal member considered a number of authorities as well as the definitions set out in the Act and it was not put to me on behalf of the Builder in this case that that conclusion was erroneous.

22 I am not bound by the decision referred to but it is strongly persuasive. It appears to be a well reasoned decision by a highly qualified and experienced building member and I see no reason to take a different view.

Does s.30 apply?

23 Mr White submitted that s.30 of the Act has no application because, he said, a swimming pool has no footings.

24 The term "footings" is not defined in the Act. Generally, it means that part of a building that rests upon the foundation, that is, the ground upon which the structure is erected. The footing supports the structure and transfers the load of the structure onto that ground. From the Contract and the photographs it is apparent that the swimming pool in this case is a concrete shell lining a hole in the ground that receives and retains water. It seems to me that the concrete slab which forms the floor of the swimming pool and supports the rest of the structure above is a footing for these purposes and so I do not accept Mr White's submission.

Soil report obtained

25 On 10 March 2011 that is, 18 days after the Contract was signed, the Builder obtained a soil report. A copy of this report has been tendered. It

shows that two bore logs were dug by means of a hand auger in the soil where the pool was to be excavated. It is interesting to note in paragraph 12.5 of the soil report that the author of the report assumes that it is provided for the purpose of determining costs associated with footing construction.

26 The profiles of the two bore logs are set out in the report. They show fill down to a depth of 1,800 mm in one hole and down to a depth of 1,100 mm in the other hole.

Excavation

27 Excavation commenced on 16 June 2011. When the excavating Contractor and the site foreman arrived on site they both informed the Owners that it was a filled site. Excavation proceeded that day and into the following day which was a Friday. Halfway through the second day the excavator operator left the site. Thereafter the sides of the excavation started to cave in.

The claim for extra money

28 According to the evidence of Mr Wright, in order to construct the pool, the Builder intended to spray concrete against the sides and floor of the excavation in order to create the sides and floor of the pool. By constructing it in this way, the cost of formwork is avoided. The floor and sides of the excavation take the place the formwork. However in order for that to be practicable, the soil in which the hole is excavated needs to be stable. That requirement was known to the Builder at the time the Contract was entered into.

29 This method of construction could not be used for this pool because the sides had fallen in. In order to cope with this problem the Builder erected internal and external formwork and cast the walls of the pool. Its workmen also shored up the walls of the excavation with shotcrete, which is sprayed concrete, and gravel. Extra money was spent in removing the material that had fallen into the hole from the collapsed sides.

The additional claims

30 For all of these items the Builder claimed a variation and a provisional sum adjustment. The claims are worded as follows:

Variation 31283 "Extra costs due to site conditions and soil type (fill)" 23 linear metres of below ground boxing due to cave in charged at $150 per linear metre as per special conditions on page 11 of the Contract	$3,450
Shoring, labour and material due to cave-in and soil type (fill)	$1,200

Supply labour and plant to dig out soil caused by cave-in	$1,250
For works to be continued this variation is required to be signed and payment made at completion of steel forming process	$5,900
Provisional sum PS1041 "As per page 8 of your Contract, adjustment to provision sum is calculated as follows: "Actual excavation cost"	$4,502.30
Plus 25% Builder's margin	$1,125.57
Sub-total	$5,627.87
Less Contract allowance	$3,500.00
Adjustment to allowance	$2,127.87"
Payment is due within 2 business days as per Contract."	

31 The variation is dated 23 June 2011 and the claim for the provisional sum is dated 22 June 2011.

32 According to the evidence of the Owners they were informed that unless they signed these documents work would cease. At that time, the excavation was unstable and it was within half a metre of their garage wall.

33 Mr Fehring told the Builder's supervisor that he required to know the basis of the additional costs and that he would not sign it unless he was satisfied with the explanation. The supervisor thereupon called the workmen from the excavation and went to leave the site. During this altercation Miss Wilson became visibly upset. After some further discussion Mr Fehring agreed to sign the variation claim and the provisional sum claim.

34 After the giving of this evidence the proceeding was stood down to enable the supervisor to be called but his evidence was generally in accordance with that of Mr Fehring. He said that he did not threaten the Owners but that if they had not signed the documents he and the Builder's workmen would have left the site.

35 In order for construction to proceed the Owners have now been required to pay the total of these two amounts which total $8,027.87.

36 The Builder has since recalculated the two claims at $7,581.88 and $1,862.50 respectively, a total of $9,444.38.

Was the Builder entitled to the claims?

37 I am not satisfied that either the signing of these documents or the payment of these sums to the Builder by the Owners was voluntary. It is clear from the evidence that the Builder threatened to walk off the site unless the

documents were signed, leaving the Owners with a deep, unstable and potentially dangerous excavation only half a metre from their garage wall that was, to the knowledge of the Builder as well as the Owners, collapsing into the hole. The Owners have young children. They had no practical choice but to sign the documents or the Builder would have walked off the job.

38 It should be noted that the Builder did not threaten to suspend work. The threat was to immediately walk off the job without any notice of suspension under the Contract. Generally, if an owner refuses to sign a variation, the Builder's remedy is to proceed with construction in accordance with the contract without the variation. The Builder was not entitled to walk off the job. By threatening to do so it was in breach of the Contract. Its proper course was to continue with construction and, if it were entitled to claim extra by reason of a provisional sum or prime cost item being exceeded, to claim it in accordance with the Contract.

Why were the costs incurred?

39 From the foundation data tendered by the Builder and the fact that the documentation produced by the Builder indicates that the reason for the cave-in was that the soil in which the excavation was done was fill, it is clear that the extra cost arose because of the nature of the soil. Instead of being stable soil that would have been suitable for the contemplated method of construction it was unstable.

40 Since the soil is identified as fill in the soil report that was obtained after the Contract was signed, it is equally clear that the fact that the excavation was to be carried out in fill could readily have been ascertained by the Builder had it complied with the requirements of the Act and obtained its foundation data.

41 Both the variation and the provisional sum claim relate to the excavation. They arise because of the unstable nature of the soil which required additional work relating to the excavation and the use of form work when this was not contemplated.

The variation

42 The variation purports to be a Builder's variation. By Clause 13.1(c)(ii) of the Contract, the Builder cannot recover any money from the Owners with respect to the variation unless it can establish that the variation is made necessary by circumstances that could not reasonably have been foreseen by the Builder at the time the Contract was entered into. That requirement of the Contract has not been met because the Builder has not established that the variation was made necessary by circumstances that could not have been reasonably been foreseen by it at the time the Contract was entered into.

43 Had it complied with the obligations imposed upon it by the Act to obtain foundation data it would have known that the soil was fill and that could

have been dealt with by the terms of the Contract. A method of construction suitable for that soil could have been decided upon and a price quoted that would have reflected what the true cost to the Owners would be. The Owners might have accepted that price, found an alternate contractor or they might have decided not to proceed with the construction of a pool at all. They have been denied that opportunity.

44 There is the added problem for the Builder that the warning required by s.33 does not appear on page 6 of the Contract adjacent to the contract price. provision for the extra cost for shoring and so the Contract price cannot be increased by reason of the operation of the section.

Conclusion

45. The Builder's claim for this extra money fails for three reasons:

(a) In breach of s. 30 of the Act, the Builder failed to obtain foundation data prior to entering into the Contract. If it had obtained that data the need to carry out the additional work and supply the additional material the Builder now seeks to charge for could reasonably have been ascertained. Consequently, by operation of s 30(7), the Builder cannot now seek from the Owners the additional amount with respect to that work and materials.

(b) The contract price was variable because of the provisions for extra payment for excavation and the other amounts the Builder claims. In breach of s.33(2) of the Act, no warning that the contract price is subject to change was placed next to the price in the Contract. That section provides that 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.

(c) In addition, the amount sought as a variation is not recoverable as a variation because the Builder has neither complied with the requirements of Clause 13.1 nor established that the variation is made necessary by circumstances that could not reasonably have been foreseen by the Builder at the time the Contract was entered into. No exceptional circumstances have been established or suggested to satisfy me that the Builder would suffer a significant or exceptional hardship by this consequence or that it would not be unfair to the Owners for the Builder to receive the money.

46. The Owners are not obliged to pay for either the variation or the prime cost claim. Accordingly the claim is made out and there shall be an order that the Builder refund to the Owners the sum of $8,027.87. Because of the conduct of the Builder there will also be an order that it complete construction of the pool.

SENIOR MEMBER R. WALKER