

CITATION: *Sullivan and Jackson v Olympic Pool Consultants Pty Ltd* [2003] NTMC 053

PARTIES: Richard Sullivan
Sue Jackson

v

Olympic Pool Consultants (Pty Ltd)

TITLE OF COURT: Local Court

JURISDICTION: Civil

FILE NO(s): 20213296

DELIVERED ON: 24 October 2003

DELIVERED AT: Darwin

HEARING DATE(s): 23, 24, 25, 26, 27 June 2003

DECISION OF: Jenny Blokland SM

CATCHWORDS:

CONTRACT – Repudiation – conduct evincing intention not to comply with contractual obligations -

Hudson Crushed Metals Pty Ltd v Henry [1985] 1 Qd R 202 – Shevill v Builders Licensing Board (1982) 149 CLR 620.

REPRESENTATION:

Counsel:

Plaintiff: Mr Currie
Defendant: Mr Brian Smith as authorised by the Defendant Company and with leave of the Court.

Solicitors:

Plaintiff: Morgan Buckley
Defendant: Self

Judgment category classification: B
Judgment ID number: [2003] NTMC 053
Number of paragraphs: 47

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20213296

BETWEEN:

RICHARD SULLIVAN

AND

SUE JACKSON

Plaintiffs

AND:

**OLYMPIC POOL CONSULTANTS
(PTY LTD)**

Defendant

TITLE OF COURT: Local Court

JURISDICTION: Civil

FILE NO(s): 20213296

REASONS FOR DECISION

(Delivered 24 October 2003)

Ms Jenny Blokland SM:

Introduction and Background

1. This matter involves a claim sourced in contract, incorporating relevant parts of the *Consumer Affairs and Trading Act (NT)* as it bears on an agreement, (part in writing and part oral), between the parties. The plaintiffs' allegation is the defendant company failed to comply with its contractual obligations when it partially constructed a kidney shaped pool

on the plaintiffs' property. There is a dispute about whether the alleged breaches justified the termination of the agreement and whether the problems identified by the plaintiffs could be reasonably rectified by the defendant company. The defendant company for its part holds the plaintiff liable, arguing it was not given a reasonable opportunity to rectify any problems, that the plaintiffs failed to mitigate and the defendant counter claims.

2. The events giving rise to this dispute occurred a number of years ago, primarily in October and November 1999. The statement of claim alleges a quote on 25 October 1999, a written agreement of 29 October 1999 and conversations between representatives of the defendant and the plaintiff, Mr Richard Sullivan, (also on 29 October 1999) comprised the original agreement containing the following express terms:

- the contract price would be paid by instalments of:
- 10% on acceptance
- 60% on placing contract shell
- 25% on installation of filtration; and
- 5% on practical completion
- the estimated construction period would be thirty days from acceptance by both parties and upon completion of plans and issuance of required permits
- the pool would be a 16 linear metre concrete pool with internal dimensions: maximum approximate width, 4 metres; minimum approximate width, 2 metres; maximum approximate length 6 metres; maximum approximate depth 1.8 metres; minimum approximate depth .9 metres.

- Optional features included in the contract price were light and transformer; brick top; pebble outside wall; slate seats; spa with turbo controls, 4 jets and foot bubble jets; filtration to consist of a 1500-watt pump and motor, a 24” fibreglass sand filter and a 100-watt spa blower.
 - The defendant company would be permitted a 1% variance on all designated surface dimensions and a 5% variance in water depth.
3. The plaintiffs’ pleadings also allege breach of implied terms of due care and skill in the design and construction of the pool and that the pool would be reasonably fit for the purpose for which they were supplied. The plaintiffs plead *s 66(1) Consumer Affairs and Fair Trading Act*.
 4. The contract price was agreed at \$14,400. It is alleged that on or about 29 October 1999, the plaintiffs paid the defendant company two progress payments totalling \$10,080.
 5. The alleged breaches of the agreement are that the defendant company:
 - failed to provide any or any proper design for the construction of the pool
 - failed to construct the walls of the pool to adequate thickness
 - failed to construct the walls of the pool plumb
 - failed to achieve a shaping of the pool that was consistent
 - failed to ensure the dimensions of the pool did not exceed the tolerance specified in the contract; the variance on width is alleged to be 7% narrower than agreed.
 - Failed to properly compact the walls of the pool during construction such that the walls of the pool contain porous holes, honeycombed appearance and significant depressions

- Failed to ensure the steel fibre reinforcement did not protrude through the walls of the Pool, leaving the reinforcement susceptible to corrosion reducing the flexural strength of the concrete
 - Constructed or allowed the coping of the pool to be constructed such that it was uneven in both width and horizontal levels
 - Failed to install the skimmer box in the correct location facing the pool returns (spa jets)
 - Failed to install the skimmer box so that it was aligned to the horizontal face of the pool wall and parallel to the vertical face of the Pool wall
 - Failed to install a pump of the correct size for the number of jets (4) installed
 - Failed to install a spa blower which was fit for its purpose
6. Generally it is alleged the defendant company failed to carry out and complete the construction of the pool in a proper and workmanlike manner, thus being in breach of an implied term to do so.
7. It is further alleged by the plaintiffs that the defendant company failed to complete the pool within the period set out in the contract, within a reasonable period or at all. It is alleged the defendant company wrongfully terminated the Agreement evincing an intention not to be bound by the agreement amounting to a repudiation of the Agreement being accepted by the plaintiffs. In particular it is alleged the defendant company ceased carrying out the work on or about July 2000 and removed materials and equipment from the property on or about 25 October 2000.
8. By way of defence, the defendant company denies the construction of the contract as being sourced in the material alleged by the plaintiff but agrees pursuant to a first contract, that it agreed to construct a pool for the

plaintiffs in consideration of \$14,400.00. The defendant alleges the quote and written agreement comprise what it regards as the *first contract*. The defendant alleges that the minimum and maximum figures in the contract were contingent on the term of the contract that the pool be 16 lineal metres in perimeter. The defendant agrees it received the instalment payments from the plaintiff but the payments were late and not in accordance with the contract. The various failures in compliance with the agreement by the plaintiff are denied by the defendant.

9. The defendant alleges the plaintiff varied the contract, firstly, through discussions with a representative of the defendant where it is alleged the plaintiff Sue Jackson varied the length and width of the pool. It is alleged this alteration caused consequential alterations to the pool. A second varied contract is also alleged by the defendant concerning a request by the plaintiffs to change the type of brick used for the coping, namely a bull nosed brick. It is also alleged by the defendants that the plaintiffs changed the coping design leading to extra cost. The defendant claims the plaintiffs repudiated the second varied contract by failing to pay the amount outstanding for the pool after the defendant straightened the plumbing and slab, by telling a plasterer employed by the defendant to leave and by prohibiting the defendant from further visiting the site. The defendant states it accepted the repudiation and collected the pool equipment. It alleges that many of the plaintiffs' complaints are a result of either the fact that the pool was still being constructed or that the contract was repudiated by the plaintiff. It is alleged by the defendant that any loss occasioned by the plaintiffs is as a consequence of the plaintiffs failing to mitigate their losses.
10. The defendant also makes a counter-claim alleging that as the filtration had been installed, it became entitled to 25% of the contract sum. Further, that on retrieval of the filtration equipment, as a result of mistreatment, the equipment was valueless.

11. Regrettably, at the hearing before me, very few facts were agreed, despite this matter having, (as I came to be made aware throughout the hearing), a lengthy background in attempts to resolve the matter. (That is evident by the fact that the pool shell still sits in the premises some four years later).
12. Throughout the pleadings it is evident that the defendant has previously had solicitors acting for it. Despite a number of suggestions by Mr Brian Smith that there could be solicitors or a barrister interested in appearing on certain days of the hearing, no practitioner did appear for the defendant company at any stage. Although not an ideal situation in these circumstances, I granted Mr Smith leave to appear for the defendant company (over objection). I reiterate that I believed this course to be more in the interests of justice than there being no representation for the defendant at the hearing. Mr Smith proved himself to be more adept in the court room than the vast majority of unrepresented people I have observed, for example, having read the transcript of proceedings he is clearly able to get his point across during cross examination of various witnesses. I did have to tell him on a number of occasions not to make assertions of unproven facts to witnesses. Some leeway was given in some procedural rulings in his favour due to his possible disadvantage. In my view any disadvantage was substantially ameliorated by Mr Smith advising the Court from time to time about the arguments his non-appearing lawyers had told him to tell the Court. For example, over objection he was successfully granted an order under the *Local Court Rules* to allow a potential expert access (at a late stage) to the plaintiff's property to assess the pool shell in situ. He was also permitted to call that expert notwithstanding his company did not comply with earlier orders on the timing of service of expert reports. Whenever he was advised he had not complied with such orders, he advised the court his lawyers hadn't taken the appropriate steps. I allowed him also to recall himself after he had been cross-examined for some time due to him forgetting to address some topics. He was also allowed to recall his expert witness Mr Radcliffe.

The Lay Evidence Before the Court

13. Mr Richard Sullivan gave evidence that he lives at 2179 Shrike Road, Humpty Doo, the site of the pool being constructed; that in 1999 he and Ms Jackson decided to put in a Plunge-pool spa; he contacted the defendant through the Yellow Pages; Rocky Smith, on behalf of the defendant visited the plaintiffs; they were advised if they purchase in October of 1999 they may be eligible for a discount through a competition; they were shown glossy magazines of the defendant's product; they advised Mr Rocky Smith they wanted a 16 lineal metre pool, with a *bull nosed* higher lip on the inside of the pool with Pebbletex underneath; that there was to be another *bull nose* facing the outside on the top; the plaintiffs received a computer image of the shape, dimensions and position and a covering letter with a quote: (Ex P1) The contract was also tendered through Mr Sullivan: (Ex P4).
14. During the relevant time, Mr Sullivan gave evidence he left his home to travel interstate for business and returned on or about 29 October; he returned to the partially completed pool shell and (in his words) "*I hit the roof when I saw It. I wasn't impressed.*" He said the concrete finish was *disgusting, appalling*; he was most concerned about the skimmer box not being flush with the wall and not positioned in accordance with the agreement, the light was in the wrong position; the walls were lop-sided and there were steel fibres everywhere; the coping was of various heights around the pool; the slab for the filter had a piece of wood still set in the cement that couldn't be pulled out; Mr Sullivan says he contacted either Brian or Rocky Smith (Mr Brian Smith appeared for the company – it is common ground his son is Rocky Smith) and complained; Mr Sullivan said he was told words to the effect of *let us finish it with the pebbles, once its finished it will look like a million dollars*; Mr Sullivan says he was also told the skimmer box could be fixed with pebbles; Mr Sullivan's evidence was the filter arrangement was a *mess* with three pipes coming out of the ground at different intervals; the pipe that the blower was coming out of was at an

angle; the blower had a two inch nail thread on it but it was trimmed back with a Stanley knife or pocket knife jamming the pipe and a tech screw was put through the side of it; the air intake of the blower was two pieces of pipe stuck together; Mr Sullivan said he rang Brian Smith who said he would have someone out straight away to fix it; that numerous people came and made attempts to fix it over a few months; that one person attempted to fix the pipes that had all come out of square; the concrete that all of this was sitting on was made of the fibre mesh and that Mr Smith had said he would *Pebbletex* it; there were five attempts made to rectify that particular problem and on the last occasion the concrete had been smashed out from under the pump with the tiles split underneath; the pump had rust on it and a broken clamp or knob on the pool filter; numerous discussions took place between Mr Smith and Mr Sullivan; there was a request from Mr Sullivan to Mr Smith to have a contractor called Mick from Queensland to repair the work; Mr Sullivan said that Mr Smith told him he would ask Mick but that Mr Smith then advised Mick no longer worked for Mr Smith; Mr Sullivan said Mr Smith agreed with him that if Mr Smith were to supply another contractor to repair the work, Mr Sullivan could view the *last three jobs* they'd done; Mr Sullivan requested Mr Chris Dott be engaged to do the rectification work but he was rejected by Mr Smith as too dear.

15. Mr Sullivan gave evidence that after a few months, the Department of Consumer Affairs became involved; a process commenced where three persons were chosen to come and look at the pool and advise on rectifying the pool; each made rather negative comments about either the pool or the defendant company. [I note here that I received the notes of the names of the persons and their business cards and comments, not to use their comments assertively but to assist in ascertaining whether the plaintiffs had acted reasonably in relation to their (later) decision to terminate the contract with the defendant. Counsel for the plaintiffs agreed the material could not be

used for a hearsay purpose and I confirm I have not done so. It is relevant however to the belief of the plaintiffs.

16. Mr Sullivan gave evidence that the bull nose pavers he had specifically requested were not with the other materials; Mr Sullivan said Mr Smith had told him they would need to pay more as that was not what the plaintiffs had ordered; Mr Sullivan did not see these further discussions as indicating a need to vary the contract, he said he was only repeating what he saw in the glossy brochures with Rocky Smith and what he had picked out with Rocky Smith at the initial meeting; the pavers were simply not what he had chosen.
17. Mr Sullivan identified a document (Ex P7) being a letter written on behalf of both plaintiffs dated 17 April 2000 to the defendant reading:

“Acting on advice from Consumer Affairs NT, I hereby place our contract on hold as from 17/4/2000 until further notice. Any correspondence between yourself and us is to be sent by registered mail. Under the *Trespass Act*, I prohibit you and any of your associates from entering 2179 Shrike Lane Humpty Doo. Regards Richard and Sue Sullivan.”

Although not going to the substance of the matter, all lay witnesses give some description of the involvement of *Consumer Affairs* over a period of time; Mr Sullivan states *Consumer Affairs* provided reports and made attempts to resolve the issue that were not successful; Mr Sullivan himself arranged for reports to be done and was present when a Mr Shane Elliott from *Ultimate Swimming Pools* did some core testing by drilling the concrete; Mr Sullivan states he was present when further studies were made of the pool; Mr Sullivan confirmed that he seeks to be paid back the money he paid to the defendant and seeks to recover the cost of removing the current structure as he will most probably build a similar structure.

18. In cross examination Mr Smith suggested to Mr Sullivan that he was exaggerating in relation to how much the skimmer box was askew; this was not acknowledged by Mr Sullivan; he was asked whether he'd ever seen

DRAMIX before, (the form of spray concrete). Mr Sullivan said he had seen the Wildman River pool after it had been sprayed although it is unclear from his evidence whether he was aware if it had been sprayed with DRAMIX or whether it was just a rough cut pool; Mr Sullivan agreed his pool was still (at the time of hearing) in a *rough cut* state; he was asked why he stopped the pool from being plastered and he answered it was because it did not meet contractual requirements; he was asked whether he recalled the specifications were *approximate* under the contract schedule, (Mr Sullivan did not appear to be familiar with the contract schedule); Mr Sullivan disagreed with a proposition put to him that the pipe work was originally level; there was some suggestion put to Mr Sullivan, (although no evidence on the point), that Mr Sullivan's children may have swung on the pipes, a point Mr Sullivan strongly rejected; Mr Sullivan was asked about alleged damage to materials left at the site – he said the pebbles were covered with shade cloth and certain other materials were placed under the verandah where it stayed for *two and a half years*. It was suggested this was an exaggeration to which Mr Sullivan said he would have to check. Mr Sullivan was also questioned on why he allowed the pool shell to be drilled, thus allowing the pool to be damaged. Mr Sullivan said he did that on advice and he didn't think it was fit to be finished; he was asked if he told the engineer (Mr Jorge Arao-Arao) that the contract specified DRAMIX as the concrete compound to which Mr Sullivan replied *yes*.

19. Ms Susan Jackson gave evidence that confirmed she and Mr Sullivan had their first dealings with the defendant company through Rocky Smith in October 1999; she said they discussed the shape after looking through the brochures and they decided on a plunge pool with a spa at one end and agreed on 16 linear metres; her evidence was that she chose bricks with a bull nose into the water edge so that they wouldn't get scratched on the way into the pool; they were advised in fairly colourful terms that the

construction would take 30 days *from dig to dive* and she had hoped it would be complete for her son's birthday.

20. Ms Jackson also said she received the quote (Ex P1); she said she went and signed the contract; she didn't remember the schedule produced in these proceedings but agrees she signed it; Ms Jackson told the court she made the first two payments totalling \$10,000; she gave the first cheque to Mr Smith of \$1440 when contractors came to dig the hole a few days after November 1st 1999; she said Mr Brian Smith had come to the site to mark out the location; he used her ordinary garden hose and put it in the rough shape of the pool in the contract; Ms Jackson made an adjustment making the shape more like a tear shape; she said the skimmer box was to be looking from the spa end of the pool, on the back to the right hand side and that Mr Smith asked her which way the wind came from; that she told him she wasn't sure which way the wind blew and that Mr Smith told her the wind would come from a particular direction and would blow the leaves over to one side and he then marked with spray paint where the skimmer box would be; she told the court that in a few days the hole was dug and about a week later the cement went in; at the next weekend Mr Sullivan returned home and was very unhappy about all the different widths and thicknesses; she said Mr Smith had told her it was a rough cement at that time; she observed the top coping appeared to be different thicknesses; she also thought the step to be very deep for small children; the skimmer box was all out at an angle; as the skimmer box was cemented in, she thought nothing could be done to fix it.
21. Ms Jackson told the court that given the big list of complaints and problems she was aware of, she spoke to one of the defendant company's workers who she knew as Mick; she was hoping to engage him to correct and finish the work as she had seen examples of his work; that on 24 November a man called Peter came to see her to fix the pool and she told him that she already had engaged Mick; she said Peter became quite threatening and saying *did she want her pool finished?* She gave evidence that he said if he didn't fix it

today *who knows* when they'd have time to fix it; Ms Jackson spoke to Mrs Smith and was told to pass onto Peter that Mr Smith would contact him; Peter told Ms Jackson that Mick no longer worked for the defendant; Peter promptly packed up his things and left the property; Mr Smith phoned Ms Jackson and said he would need to get a quote from Mick if that's who she wanted; that Mr Smith told Ms Jackson he had other people who could do the Pebbletex and that he himself could do it; Ms Jackson told the court she was contacted by Rocky Smith at this time; Ms Jackson told Rocky if Peter wanted the job, she and Mr Sullivan would need to see examples of his work; she said either Rocky Smith or Brian Smith told her that Mick had *botched up* a pool and that his quote would be high. Ms Jackson said a Mr Alan McLean was another contractor Brian Smith sent out to do some tiling and brick work; that Mr McLean just walked around the pool, she told him of some of the troubles and he left his card and left; Ms Jackson said Brian Smith spoke to her about Mr McLean and said his quote would be higher but that he did a good job.

22. At around this time, Ms Jackson says Mr Smith mentioned that the third payment was due because the filtration system had been put in; Ms Jackson said she explained they weren't happy with the filtration system; Ms Jackson explained she was not going to pay more money because by that stage her husband was already seeing Consumer Affairs for mediation with the defendant; there had been an attempt to correct the filtration but not to the appropriate standard and they were not happy with the contractor who was going to correct the shell. Ms Jackson said Mr Chris Dott, another contractor attended on behalf of Mr Smith; Mr Dott told Ms Jackson he'd finish the top of the pool in slate so it would cover a lot of the roughness and help make the sides thicker and more even; Ms Jackson viewed some of his work in Howard Springs and was very pleased with his work; Ms Jackson said she told Brian Smith she wanted Mr Dott to finish the work but that Mr Smith told her his quote was too high; Ms Jackson relayed there was some talk that

another team of workers may be able to complete the job but that as far as she is aware they didn't ever come to the property. In the mean time she received the letter from Mr Smith (dated 24 December and received by her on 6 January (Ex P5) seeking a date to complete the pool and alleging that a contract variation would be needed concerning certain *changes*; on advice from Consumer Affairs Ms Jackson said she sent the letter placing the contract on hold. She gave evidence that she is seeking the repayment of the money paid to the defendant and the cost of removal of the pool. She told the court she was pursuing this course because of advice that the pool shell is structurally unsound; that advice indicates varying thicknesses of the wall and the wall is not strong enough to withstand pressure; none of the contractors said they could fix the skimmer box; she said that although the contractors would guarantee any cosmetic work they did, none of the tradesmen could guarantee the structure of the pool shell.

23. Prior to cross examination of Ms Jackson, Mr Smith informed the Court that Ms Jackson had been 95% truthful. In cross examination she told the court she did not want Peter doing the work because she hadn't seen examples of his work and that in any event suddenly Mr Smith and Mr Dott were being offered; Mr Smith also put to her that the pool is still in good condition having gone through three and a half years since it was put in – Ms Jackson answered the pool had only been full once and there were rusty bits sticking out, she has banned the children from playing there because of the rough edges and she considers it dangerous; Ms Jackson also stated in cross examination she was happy for Mick or Chris to finish the pool because she had seen examples of their work – she was not happy for Peter to finish the pool because neither Mr Brian Smith nor Rocky Smith showed her examples of his work.
24. Mr Smith gave evidence on behalf of the defendant company. He told the court in evidence in chief the company was defending the action because he says the company were stopped from completing the pool; he said in

evidence the contract states the pool has to be finished in 30 days but he was stopped; he said the complaint to *Consumer Affairs* in relation to the plumbing was addressed; he said it still didn't satisfy the client; he said the ground was very soft and that is why he concreted around the blower pipe to give it some substance; he stated he was denied completing the plastering process; he said it was company policy that if payments were not made that work ceased; he indicated this was part of the contract and drew the court's attention to that; I permitted Mr Smith to give a history of his experience in pool building that is substantial; he told the court he had built over 2500 pools and in later years has been using the concrete product DRAMIX developed by BHP; he told the court DRAMIX is widely accepted; he explained the basic processes he goes through with building pools – digging and constructing the pool, rendering true, followed by the lining; he said that in this case the defendant company was stopped at stage one and attempts by him to get it back on track met with no success; he said he would have been able to do remedial work including fixing a hollow in the pool wall; problems such as the skimmer box can be fixed by the remedial worker; he admitted the skimmer box was slightly out of skew but he said that could have been remedied by Mr Peter Masuri; he said he himself supervised the delivery of all of the equipment; he said he disagreed with evidence suggesting the blower was faulty; he explained he had a skilled worker who sprayed the pools with DRAMIX and the Sikador bonding agent; he agreed the company received the \$10,000; he said all of the materials delivered were wasted, that includes the pebbles, the cement, damaged tiles and that's how he calculated the counter-claim; he said the pump was seized up; he said that after consultation with the owners and seeing the plaintiffs were *tall people* he said it would have been wrong to construct a pool two metres wide and that that was changed; he said when he first put the hose on the ground it came to 17 lineal metres and was adjusted to come back closer to the contract; he said the word *approximate* was used because with three variants it is impossible to have precise measurements;

he said in relation to the bull nose it was the plaintiff's who made a mistake and he simply fixed it by swapping the bricks; he said he tried to record the variation but his correspondence was not answered; he said he did not provide a design but Rocky Smith has a schematic drawing; he said there was no reason to comply with Australian standards concerning the walls of the pool being plumb; Mr Smith seemed to concede that the measurements were not in accordance with the contract but he suggested this was not always possible with a lineal pool – he stated that if the measurements are short he would give the money back to the client on a pro rata basis.

25. In cross examination Mr Smith did not agree that he had not measured the pool; he agreed the contract was not an industry contract; he agreed it was specific to his company. Mr Smith agreed the pool was not constructed to the Australian Standard but maintained he was not required to comply, saying the Australian standard refers to Fibrosteel and he was not using Fibrosteel; he also disagreed that the defendant company's expert report does not at any stage suggest the AS2783-92 is not applicable to the pool in question. Mr Smith agreed the pool was a free form structure as described but that it did not need to comply with the suggested Australian Standard; Mr Smith stated this type of pool does not need to comply as it complies with a design given to the defendant company by an engineering firm; Mr Smith agreed that the contract states that the defendant company's work is warranted to meet or exceed existing building codes but disagreed that referred to the Australian Standards saying it refers to the *Northern Territory Building Code*; he was unable to tell the court what obligations accrued from the *Northern Territory Building Code*; he then stated the *Northern Territory Building Code* didn't apply to swimming pools saying *its only a code of ethics*; he then told the court that he was not really required to comply with anything and that *at the moment there is no code*; he stated he still had to comply with *ethics*; he stated the defendant company had a

strong *Code of Ethics*; he completely evaded answering whether he thought his contract might suggest to people that there was a standard applicable.

26. Mr Smith conceded that the dimensions of the pool were less than six metres in length and less than four metres in width and conceded it was under the 16 lineal metres; he said the pool was *very close* to complying with the contract; he at one stage seemed to agree the pool would not get any bigger; he then suggested it may have ended up bigger if they had been allowed to complete it; he agreed nothing had been placed in writing in relation to the alleged variance concerning the skimmer box; he told the court the moving of the skimmer box was something agreed to by Ms Jackson; he didn't precisely agree that the effect of the change suggested by Ms Jackson was to take some curve out of the kidney bend and put it into the width; he was evasive over whether he agreed that the change in the bend should not have meant an overall change to the linear length; he then agreed that by narrowing the bend the lineal metreage was increased for the rest of the pool.
27. Mr Smith gave further evidence concerning how I should regard the TCM report that was received into evidence. He told the court the author of the report (the late Mr Mudgway) had died, but before he died he told Mr Smith he retracted those parts of the report that indicated an Australian Standard applied to DRAMIX; Mr Smith then agreed in cross examination that he obtained this report to show the pool was structurally sound and to show it could be rectified; he agreed TCM was an engineering company; he said he also spoke to a Mr Towns, a principal of the firm in relation to a revised report; he said Mr Towns declined to change the report because his colleague was deceased; he said the report was defective; he said he requested a corrected report and it was not forthcoming; he agreed the report was obtained two years previously; he agreed he had not sought another report from any other engineer until the commencement of the hearing; he agreed the engineer he contacted was not from Darwin and was involved in

sales and representing the product DRAMIX; he told the court that none of the local engineers understood the situation with DRAMIX; he agreed TCM did not state they stood by their report; he disagreed there was any inconsistency in maintaining that TCM effectively changed their mind and by stating that no local engineer understood; he told the court it was true that he only approached Mr Towns at TCM a couple of weeks before this hearing.

28. Mr Smith agreed the pool was not thick enough where it had been drilled; he didn't agree that rectification of the walls would mean a substantial reduction of the dimensions of the pool; Mr Smith denied that the company would not do any further work unless \$700 was paid; he denied he did not accept Chris Dott's quote; he denied he was trying to construct this pool *on the cheap*; he agreed the wall of the pool was too thin; he agreed he didn't ever tell anyone he was going to fix the problem of the walls being too thin; he said he still believed the pool to be structurally sound; he said the walls only needed to be 60 millimetres thick; he said they would have been fixed up had an opportunity been given; he agreed the pool was not the pool described in the contract; he agreed the defendant company did not have a design, only a *schematic drawing*; he said he would have fixed the skimmer box by filing away the slightly dipped side during the tiling process; he agreed he didn't cross examine the plaintiff's witness Mr Elliot on whether the blower was fit for the outside pool.
29. Mr Smith was recalled at a later stage of the proceedings after he had examined one of his experts, Mr Ratcliffe; from the bar table he told the court that a document authored by Mr Ratcliffe was given to the late engineer who subsequently changed his mind; when suggested to him that that was a lie, he said there were two documents; he agreed he had not previously given evidence indicating he had given the deceased engineer this document; he agreed the materials delivered belonged to the defendant company; when asked *I want to suggest to you that you made no attempt to*

collect those before the date in which you did, Mr Smith replied No. Would you like to know the reason why we collected it?; although not agreeing the motor he brought to court was not the motor involved, he said I believe it is the motor but I can't prove it.

30. The defendant company called Mr Peter Mauceri, an experienced building contractor who gave evidence that he went to look at the pool in question and returned with two men and as he put it, *the lady said*

“I don't want any work done”

he said he told her

“look, its nearly Christmas. We will be in a race to finish your job and if we don't do the job now, we cannot finish it by Christmas because I am going to go on holiday.”

31. The defendant company also called Mr Earnest Brown who gave evidence that he had worked for the defendant company; that he delivered slate, pebbles, pavers, sand, a filter, pump, pool – PVC pipe, slabs; none of the equipment was second hand; he had to change around some bull-nose pavers with some coping pavers after about one month; he dug some trenches, *plumbed up* and put the plumbing in; he made sure everything was straight; he said the pipes looked straight to him; he said he had to go there and change the slab over and straighten all the pipes up again.

Evaluation of the lay Evidence

32. Mr Brian Smith was very poor at giving direct answers to questions that obviously call for it; at being evasive in the face of legitimately probative questions and reckless with the credibility of the content of his answers and with some of the submissions he made to the court. Often when he was challenged directly about this he tended to explain his problems in terms of lack of legal representation. As explained above, I attempted to make some procedural allowances so the defendant company would not be

disadvantaged. In my view his lack of representation had no bearing on his credibility or the credibility of the defendant company's case.

33. Having viewed the transcript since the hearing, I note there were numerous times I had to ask him to answer the question being asked of him. He was completely evasive in relation to whether or not the defendant company accepted any professional standards such as the Australian Standards in reference to its claim in the contract that warrants its work to meet building codes; he told the court it referred to the *Northern Territory Building Code*; he could not produce any code; he then said that any such code didn't apply to swimming pools and then said it was just an *ethics* code and finally, after being pressed, said there was no such code. That is but one example. Another example was his changing evidence and submissions concerning the late Mr Mudridge's change in view on DRAMIX; he initially said he convinced the author to change his mind; when it was pointed out that this conversation must have occurred a number of years ago he said he spoke to a principal at TCM; he then suggested it was by use of a paper by Mr Ratcliffe that convinced TCM of the change in position; he then tried to suggest there was a further paper that was used. At each point he changed his explanation in the face of any challenge to his position. In fact, by the end of his case he really seemed to be saying that he accepted certain defects but would like the opportunity to compensate the plaintiffs on a *pro rata* basis. Further examples involve his attempts to explain away the lack of any design and another example involves his attempt to convey an impression that he had done some form of core sampling and had come up with measurements on the pool's thickness. A further glaring problem in the defendant's case was the failure to call Rocky Smith. At the outset the court was told he would be called. In my view he was important to the case concerning the initial discussion with the plaintiffs and various conversations with the plaintiffs about rectifying the alleged problems. He was not called and the only explanation given to the court on the last day

was that he was at the *Supercars*. In my view an inference can be drawn against the defendant company for the failure to call Rocky Smith in relation to the subject matter of the evidence he could have given.

34. I see this in direct contrast to the plaintiffs who were both straight forward with the court, made appropriate concessions and appeared to sincerely just want to finally agitate for the remedy they believed was owing to them. Neither were weakened at all in cross examination. Mr Smith even told the court he thought Ms Jackson was 95% truthful. Where the lay evidence between the parties conflicts, I prefer the plaintiffs. On every measure the quality of their evidence is far superior to that called by the defendant company.

Expert Evidence Called in the Case

35. The plaintiffs tendered a report by Mr Shane Elliott of Ultimate Spas and Pools: (*exhibit p 9*). Mr Elliott also gave evidence. The detail of his report is before the court and I will not reproduce it here save to state that Mr Elliott inspected the pool shell. He has been a pool builder himself since 1987. The dimensions he notes in his report show clearly the pool was not constructed to the dimensions contracted. His report notes a number of other defects, in particular the uneven coping, the standard of workmanship being poor, the poor placement of the skimmer box, the inappropriate pump size, the inappropriate blower and the general poor workmanship. His report indicated that provided the pool was structurally sound, it could be completed to a satisfactory standard. After the report, he was involved in drilling holes in the pool to check its thickness. The variance at different points was between 40 and 90 millimetres. He said the slope of the pool was allowable but not considered to be of good practise. He gave a number of reasons for this. He said he would attempt to finish the pool having noted a number of defects but he wouldn't offer any guarantees. Mr Elliott said any opinion ion that needed to come from an engineer. Mr Smith cross examined

him on a number of subjects including an attempt to have the witness agree that the product used by the defendant company (DRAMIX) meant that it should always be coated with a water-proof membrane. Mr Elliott readily conceded he had little experience with DRAMIX.

36. The plaintiffs called Mr Jorge Arao-Arao Junior, a very experienced structural engineer. His report was before the court (Ex P10). In formulating his report, Mr Arao-Arao had regard to a report produced by the defendant company to the Department of Consumer Affairs and subsequently to the plaintiffs and Mr Arao-Arao. Mr Smith claimed privilege on the basis that Consumer Affairs were attempting to mediate a dispute and the report was to remain confidential. Having heard submissions on the matter, I found it unlikely that such a report was produced for the sole reason of a mediation or dispute resolution and therefore attracted privilege. It is unlikely on the face of the relevant documentation and the history of the matter. Mr Smith also argued that the author of that report was now deceased (and had changed his mind), however, the report was written in 2001 and I was advised the entity TCM still exists. There are other persons who could give opinions on the matter. Indeed, Mr Smith himself advised the court he had approached Mr Towns of TCM. As the report also formed part of the basis of the opinions given by the plaintiffs' engineer, I agreed it should be admitted with weight being assessed at the appropriate time. As it turns out, not much turns on that report and I have not had regard to it in the decision making, preferring to rely on Mr Arao-Arao who was called and whose evidence can be scrutinised. The only issue this report brought into sharp focus was the credibility issue involving Mr Smith's various explanations about the circumstances of the author's change of opinion.
37. Despite Mr Smith's protestations throughout the proceedings that Australian Standards do not apply to the pool under construction, Mr Arao-Arao was certainly of the opinion that they do apply, the relevant standard in terms of structural strength (AS 2783-92); concrete compaction and strength

(AS3600); minimum vertical wall dimensions (AS2818-93); skimmer box position and orientation (AS1926.3-97). The full report is before the court and need not be repeated here, however, I will quote from the executive summary:

“The workmanship is poor, and the pool dimensions and layout are different to the design plan.

Two options exist which can rectify the non compliance with Australian Standards, one being the installation of additional concrete within the existing structure, and the other comprising replacement of the existing structure.

We believe that the only option that meets all of the project requirements is to replace the existing pool structure. This may be slightly higher in cost, but it overcomes significant shortcomings associated with trying to upgrade the existing structure and its dimensional limitations.”

Both the report of Mr Arao-Arao and his evidence go into considerable detail on the defects of the pool. He also gives sound reasons for disagreeing with some of the conclusions given by an expert called by the defendant (Mr Royce Ratcliffe). In particular he states in evidence he could only agree with Mr Radcliffe’s conclusions about the inherent strength in curved walls if the curve amounted to an arch because an arch would distribute the load equally. He also disagreed with the opinion offered that suggests because the pool shell has survived, that fact alone indicates structural soundness. He said it only meant that to date there was no visible sign of structural distress.

38. Mr Smith attempted to undermine Mr Arao-Arao’s conclusions by pointing to Mr Arao-Arao’s lack of experience with DRAMIX. Mr Arao-Arao still maintained that the structure must comply with the relevant standards applicable, alternatively, there would have to be a further standard to cover small pools that were constructed with DRAMIX. He explained this in a number of different ways and did not concede that this pool could be

regarded as sound regardless of its non-compliance with the Australian Standards.

39. The Defendant Company called Mr Colin John Wauchope who had provided a report (Ex D1).His report of December 1999 stated :

“As can be seen from the attached photos, workmanship on some pipework, skimmer box location, and concrete plinth for filter equipment, is of poor quality and rectification work will be required to bring these things up to a reasonable standard.”

He concluded:

“The pool is unfinished at this stage and considerable work will be required to finish it to a good standard.”

Mr Wauchope stated in the evidence that although the finish was rough, it was not different to other finishes of concrete pools. He agreed a plaster or other membrane could be used to finish generally. He stated that a render could be used and rectification work could bring the pool up to standard. He agreed he based his opinions on there being a sound structure. Mr Wauchope is very experienced in the construction industry but is not an engineer.

40. The defendant company also called by Royce Ratcliffe, a highly qualified engineer who is employed as a Technical Manager with BOSFA, involved in concrete product design and sales. His observations in his report (Ex d4) were not under serious challenge – he was critical of the use of a drill to sample wall thickness; his opinion was the wall could be rendered to bring the pool up to standard; he thought that by virtue of the shape of the pool it had more strength than indicated in the Australian Standard; in his view the pool could still be adequately finished.
41. Of the expert and technical evidence, Mr Arao-Arao’s report and evidence shines as being the most comprehensive and defensible. His methodology is transparent and he was prepared to defend his professional calculations in the witness box. Mr Ratcliffe simply did not apply the level of detail

concerning the study of the pool shell and associated matters when compared to the approach of Mr Arao-Arao. Given the nature of Mr Smith's arguments concerning the inapplicability of Australian Standards to pools constructed with DRAMIX, I thought Mr Ratcliffe may give evidence supportive of this position. He did not. In fact, his report assumes the application of AS 2783 in the body of his conclusions.

Conclusions

42. The combination of the credibility of the plaintiff's evidence, coupled with the report of Mr Arao-Arao lead me readily to the conclusion that the facts are indeed as described by the plaintiffs and summarised in the relevant paragraphs above. In my view there is no doubt, and I easily find on the balance that on or about 29 October 1999 the plaintiffs entered into a contract for the construction of a kidney shaped pool with the defendant in consideration of the payment of \$14,000 to be paid by instalments. In my view the various breaches of the contract justified the plaintiffs regarding the contract at an end. In my view this is a case where a number of the various breaches alone may not singularly be sufficiently serious to be regarded as amounting to a repudiation on the part of the defendant, however the court is entitled to look at the breaches as a whole in determining whether the contract had been repudiated. In my view it is clear the defendant company only intended to fulfil the contract in a manner substantially inconsistent with its obligations under it: *Hudson Crushed Metals Pty Ltd v Henry* [1985] 1 Qd R 202. In *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 625 Gibbs J stated:

“A contract may be repudiated if one party renounces his liabilities under it- if he evinces an intention no longer to be bound by the contract (*Freeth v Burr* (1875) LR 9 CP 208 at 213) or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way: *Ross T Smyth & Co Ltd v TD Baily, Son & Co* [1940] 3 All ER 60 at 72; *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327 at 352. In such a case the innocent party is entitled to accept the repudiation, thereby

discharging himself from further performance, and sue for damages: *Heyman v Darwins Pty Ltd* [1942] AC 356 at 399.”

43. I find specifically the defendant company failed to provide any or any proper design for the construction of the pool; failed to construct the walls of the pool to adequate thickness; failed to construct the walls of the pool plumb; failed to achieve a shaping of the pool that was consistent; failed to ensure the dimensions of the pool did not exceed the tolerance specified in the contract; the variance on width is 7% narrower than agreed; failed to properly compact the walls of the pool during construction such that the walls of the pool contain porous holes, honeycombed appearance and significant depressions; constructed or allowed the coping of the pool to be constructed such that it was uneven in both width and horizontal levels; failed to install the skimmer box in the correct location facing the pool returns (spa jets); failed to install the skimmer box so that it was aligned to the horizontal face of the pool wall and parallel to the vertical face of the Pool wall; failed to install a spa blower which was fit for its purpose and failed to carry out and complete the construction of the pool in a proper and workmanlike manner, thus being in breach of an implied term to do so.
44. It is alleged the defendant company failed to complete the pool within the period set out in the contract, within a reasonable period or at all. In my view, had the defendant company agreed to rectify the work in a timely fashion with trade persons acceptable to the plaintiffs, instead of the plaintiffs being given the complete *run around*, failure to complete the pool within 30 days as stipulated would not have been fatal. In my view the plaintiffs behaved reasonably in the circumstances of this case by seeking assurances about the standard of work of the proposed contractors. As mentioned above, I accept the events and attempts to secure rectification were largely as described by the plaintiffs. The plaintiffs were reasonable in their conduct, the defendant was not. The only other choice open to the plaintiffs was to continue dealing with the defendant company. Given the

history of the construction of the pool, it would be quite wrong hold them to any further obligations in relation to the defendant company.

45. I reject the defendant's allegation that the plaintiffs varied the length and width of the pool. That allegation relates to the hose incident between Mr Smith and Ms Jackson where Mr Smith invited Ms Jackson to assist with the shape. This meeting did nothing to change the dimensions or obligations under the contract. The second variation alleges the plaintiffs changed the type of brick to be used for the coping. I reject that. Both plaintiffs gave evidence that the coping was not the same as the one they chose with Rocky Smith. Rocky Smith was not called. On the facts as found by me, I reject the assertion that the plaintiffs repudiated the contract by failing to make an outstanding payment and telling a contractor not to work any further. I reject the assertion that the plaintiff's failed to mitigate their loss. They were conscientiously attempting to remedy the poor work, with little or no appropriate cooperation from the defendant company.
46. I also reject the counter-claim. There is no evidence the plaintiffs mistreated the materials. The materials belonged to the defendant. The defendant had ample time to retrieve the materials but did not. The plaintiff's were justified in these circumstances in not paying any further sums to the defendant beyond what had been paid and the counter-claim must fail.

ORDERS

1. Judgment for the plaintiff and damages.
2. The defendant is to pay the following sums:

Amount Paid to Defendant	\$ 10080.00
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*Interest * Note the Supreme Court Interest rate became linked to the Federal Court interest rate on the 18th December 2002 and that rate is 10.5%*

01/11/99 - 30/06/00 -	243 days at 6.14% =	\$ 410.00
01/07/00 - 30/06/01 -	365 days at 6.17 % =	\$ 621.93
01/07/01 - 30/06/02 -	365 days at 6.05 % =	\$ 609.84
01/07/02 - 18/12/02 -	170 days at 6.02 % =	\$ 282.20
19/12/03 - 24/10/03 -	310 days at 10.5 % =	\$ 899.00

3 Demolition Costs \$ 4,500.00

TOTAL JUDGMENT SUM \$ 17,402.97

47. I will hear the parties on costs

Dated this 24th day of October 2003.

MS JENNY BLOKLAND
STIPENDIARY MAGISTRATE