

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST

VCAT REFERENCE NO. BP1041/2018

CATCHWORDS

Domestic building work – claim by developer for refund of monies allegedly overpaid to plumber – terms of subcontract – extra work carried out by plumber – no refund due

FIRST APPLICANT	G & L Developments Pty Ltd
SECOND APPLICANT	Kuldeep Dhunna
THIRD APPLICANT	Narinder Dhunna
FIRST RESPONDENT	Leslie Francis George Boorer (ABN:11 563 107 295) t/as L & L Boorer Plumbing Service
SECOND RESPONDENT	Linda Janice Boorer (ABN:11 563 107 295) t/as L & L Boorer Plumbing Service
THIRD RESPONDENT	Swaran Bhogal t/as Bhogal Construction Management
FOURTH RESPONDENT	Jagvinder Singh Bhogal
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	30 November 2018
DATE OF ORDER	16 January 2019
CITATION	G & L Developments Pty Ltd v Boorer (Building and Property) [2019] VCAT 30

ORDER

The proceeding is dismissed.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the First Applicant	Mr L. Dhunna in person
For the Second Applicant	Mr K. Dhunna in person
For the Third Applicant	Ms N. Dhunna in person
For the First Respondent	Mr L. Boorer in person
For the Second Respondent	Ms L. Boorer in person
For the Third Respondent	In person
For the Fourth Respondent:	In person

REASONS

SUMMARY

1. This proceeding commenced as a claim for a refund of monies allegedly overpaid by a developer (the first applicant) to a plumber (the business operated by the first and second respondents). The development project was the construction of three townhouses in Oakleigh East. The plumber was engaged to carry out the above-ground plumbing work, excluding the roof plumbing.
2. Throughout the interlocutory stages of the proceeding it became apparent that throughout the project instructions had been given by and to a number of other people, and as a result, orders were made joining the second and third applicants and the third and fourth respondents to the proceeding.
3. The matter came before me for hearing on 30 November 2018 and each of the parties gave evidence. I reserved my decision at the conclusion of the day. For the reasons set out below, the claims are dismissed.

BACKGROUND

4. In 2016, the second and third applicants (“Mr and Mrs Dhunna”), together with their son Lovejot Dhunna (“Lovejot”), undertook a development project, constructing three townhouses in Oakleigh East. The applicants were represented at the hearing by Lovejot, who appears to have had the day to day control of the project. They set up the first applicant company, he said, on the advice of their accountant.
5. On or about 15 March 2016, Mr and Mrs Dhunna signed a contract with the third respondent, Swaran Bhogal trading as Bhogal Construction Management (“Swaran”). They provided me with a copy of the contract, which is an HIA standard form Cost Plus contract, to which is attached a separate agreement for Swaran to project manage the project. Under the HIA contract, Swaran is described as the “project manager and co-ordinator” and is paid a fee of \$38,000, while under the separate agreement, Swaran is to obtain warranty insurance and required permits, with the owners engaging and paying directly to suppliers, subcontractors and tradespersons engaged on the project. The claim against Swaran is that he did not adequately manage the project, when he told the applicants to pay the plumber’s invoices in full.
6. The fourth respondent, Jagvinder Bhogal (“Jagvinder”), is the son of Swaran Bhogal and was named on the original building permit application as the builder. He was joined to the proceeding on 17 October 2018, at the request of the applicants. At the hearing, Jagvinder gave evidence that he had been wrongly named on the building permit application and the building surveyor had since amended the permit to remove his name. Further, there was no contract, warranty insurance or payments in his name

and he carried out no work at the construction site. At the conclusion of his evidence, Lovejot advised that the applicants had no claim against Jagvinder and accordingly I dismiss the proceeding as against him.

7. The real issues in the claim involve the first and second respondents, Mr and Mrs Boorer, who trade as L & L Boorer Plumbing Service (“Boorer”). That business was employed to carry out the above-ground plumbing work, excluding the roof plumbing. The applicants allege that Boorer overcharged for the work it carried out. In the original application form, the amount allegedly overcharged was stated to be \$9080, being the difference between the amount they actually paid (\$40,790) and the original quoted price (\$31,328) plus the Tribunal’s fees. They say they should be entitled to recover this amount from either Boorer or Swaran.
8. For the reasons set out below, I am not satisfied that there was any amount of overcharging by Boorer and accordingly the claim against both Boorer and Swaran is dismissed. Further, as Boorer was entitled to be paid for its extra work, Swaran cannot be found to have failed in his role as project manager when he recommended those payments be made.

THE SUBCONTRACT FOR THE ABOVE-GROUND PLUMBING WORKS

9. The evidence of Lovejot was that he was handling the project with Swaran. In or about March 2016, the townhouses were at frame stage, with the under-ground plumbing already having been completed by another plumber. Swaran obtained a quote from Boorer for the above-ground plumbing works, excluding the roof plumbing. The date of the written quotation was 7 March 2016 and was for the amount of \$31,328 GST inclusive. There was a note at the bottom of the quotation stating “Please Note: This quotation may be subject to revision if not accepted and work commenced within 90 days”.
10. The progress of the works was delayed, and the above-ground plumbing was not ready to be commenced until the following year. Swaran obtained a revised quotation from Boorer dated 23 May 2017, for the same scope of work, but the price had increased to \$36,212 GST inclusive.
11. Lovejot’s evidence was that in the meantime, he had obtained a quote from another plumber for the above-ground work, in the amount of \$18,000. When Swaran told him that he had the quote from Boorer for \$36,212, Lovejot said that they should use the \$18,000 quote. Lovejot’s evidence was that Swaran told him he would cease acting for the applicants if they did not use the plumber he recommended, being Boorer. Lovejot said that he felt he had no choice and agreed to engage Boorer.
12. Swaran denied any knowledge of the \$18,000 quote, or having made any threat to walk off the job. He said he had told the applicants that he had never had problems with Boorer from previous jobs, but did not insist that

they be engaged. He said that he was satisfied that Boorer's quotation was reasonable, as it was consistent with the estimate he had included in the building contract in 2016.

13. Swaran's evidence was that he left the revised quotation in the applicants' mailbox on 23 May 2017 and on the following day he physically showed it to Lovejot. Lovejot signed the revised quotation that day, to confirm the applicants' acceptance.
14. Mr Boorer ("Les")'s evidence was that he never dealt directly with the applicants or Lovejot. He provided both the original and revised quotations directly to Swaran, and received confirmation from Swaran that the increased price had been accepted.
15. I am satisfied that the applicants engaged Boorer to carry out the works set out in the revised quotation, for the sum of \$36,212 GST inclusive, based on the following factors:
 - a. Lovejot's evidence that he had agreed to engage Boorer in 2017, even if reluctantly,
 - b. Swaran's evidence, which I accept, that Lovejot signed the revised quotation on 24 May 2017,
 - c. the failure by the applicants to produce the alleged quotation for \$18,000, so that it was not possible for me to compare it to the scope of work in Boorer's revised quotation, and
 - d. the fact that the applicants paid every invoice rendered by Boorer without complaint until the extra works were mentioned.
16. On the basis of the finding that the agreed contract price was \$36,212, the maximum of the applicants' claim must be \$4578 (plus fees), being the difference between the agreed contract price and what was actually paid.
17. The scope of work set out in the quotation was as follows:
 - Water lead-in
 - Hot & cold water
 - Gas piping
 - Waste piping
 - Fit-off of taps & fixtures
 - Downpipes – colourbond

- Rain heads
- Aboveground storage drain
- P.I.B Certificate
- Labour and material

18. Further, in his evidence, Les agreed that the scope of work also included roof flashings, which he had included in his 2016 quotation but had inadvertently omitted from the revised quotation. Nevertheless, he agreed that that was part of the work to be carried out for the agreed price.

THE COMMENCEMENT OF THE WORK

19. Les said that he commenced work onsite on 25 May 2017, which was confirmed by Swaran. There was a dispute about the date, with Lovejot saying he thought work had started on 22 May. The significance of the date was that the revised quotation was dated 23 May 2017 and accordingly the applicants could not have accepted it before work commenced, if in fact Boorer had commenced on 22 May.

20. Lovejot submitted that Les had conceded at the directions hearing on 6 September 2018 that the commencement date was 22 May, and produced a transcript of that hearing. I read the portions of the transcript pointed out to me by Lovejot, and then heard evidence from Les, who agreed that he had been on site on 22 May, when he met Swaran to talk about the need to revise the quotation. He said that he then prepared the revised quotation and handed it to Swaran on 23 May and physically started work on site on 25 May. I accept Les' evidence and am not satisfied that it contradicts anything he said during the directions hearing. He was asked in the directions hearing when he started work. His answer of 22 May could equally have meant when he met Swaran on site to review the job, as when he physically commenced on the tools.

21. Swaran said that he left the invoice for the deposit in the applicants' mailbox on 24 May 2017. On 26 May he left the weekly summary and deposit invoice in the mailbox. His usual practice was to leave the various subcontractor invoices, with a summary, in the applicants' mailbox each Friday, who would then arrange to pay them. This is consistent with Schedule 3 on page 12 of the building contract, which sets out the progress payment stages agreed by the parties, as follows:

DEPOSITS/PROGRESS PAYMENTS:
PAID AS PER PROGRESS, BILLS FORWARDED TO OWNERS; – ALL PROGRESS
CLAIMS PAID WEEKLY OR CLAIMS PUT FORWARD BY THE BUILDER.

22. Swaran said that the applicants paid every invoice as presented to them, without complaint, until receiving an invoice from Boorer which mentioned

extra works. Lovejot asked Swaran about the extras and Swaran said that he explained these were works which were not part of the scope of work. He agreed that he had told Lovejot not to argue with the plumber at that point, as they needed him to complete the work and provide compliance certificates. Swaran said that he would discuss the amounts with Boorer at the end of the job, if it appeared there was something to be questioned.

23. Swaran said that Lovejot made no further complaints until 60 days after the occupancy permit had been issued, at which time he asked to renegotiate the amounts paid to various subcontractors, including the plumber. Swaran suggested that the applicants should approach each subcontractor directly, but instead they referred the disputes to Domestic Building Dispute Resolution Victoria.

THE CLAIMS FOR EXTRA WORKS

24. Boorer's evidence was that Les carried out the scope of work as agreed, and was present on site regularly from May until November 2017. They sent regular invoices to Swaran, in accordance with the agreed price of \$36,212, which were paid. They were then either asked or required (as a result of the failures of other subcontractors) to carry out extra works, which had not been allowed for in the revised quotation, and rendered invoices for these extra works.
25. The extra works were described and claimed in the following invoices:

<i>Invoice date</i>	<i>Work done</i>	<i>Amount excl. GST</i>
13.7.17	Installation of a Wakaflex flashings on units 1, 2 & 3, labour and material	\$4441.82
18.8.17	Dressing down of Wakaflex flashings on roof tiles on units 1, 2 & 3, labour	\$560
3.9.17	Completion of back roof flashing on unit 3, front veranda roof, flashing on unit 3, box gutter in garage flashing on unit 1; labour and material	\$220
	Thursday 31/8 reposition gas piping for new gas meter locations on unit 1 & 3, reposition toilet waste in ground floor bathroom on unit 3; labour and material	\$660
3.11.17	Connection of condensate drain from the electrician's wall air-conditioning unit to basin waste in ground floor powder room;	\$90

	labour and material	
	Supply extra shutoff valves and Y-strainers on tank water pumps as to comply with pump warranty as discussed with Lovejot; labour and material	\$90.91
19.12.17	Disconnect 25mm poly hose and drain 2000 litres of water, reposition storm water storage tank, reconnect 25mm poly hose, reconnect 90mm supply and drain piping to tank; labour and material	\$190

26. In his evidence, Les explained how each of these items was extra work, and was not included in the original scope of works. The Wakaflex flashing is part of the roof plumbing works, which were carried out by others. However they did not complete the job and accordingly Boorer did so. The gas meter had to be relocated upon the order of the energy authority. The toilet waste had been installed in the wrong location by the previous plumber and Boorer was asked to relocate it. The electrician asked Boorer to move the air conditioning drain. The water pumps and tanks were an extra to the contract, and had to be removed and replaced due to a fault in the slab which had been poured by others.
27. I accept his evidence in respect of the extra works carried out. As these were not part of the scope of work contained in the revised quotation, and were carried out for the benefit of the applicants, I am satisfied that Boorer is entitled to be paid for the extra works.
28. Boorer provided me with copies of Les' diary, together with a calculation prepared by Mrs Boorer which established that he had worked at least 57 days on the project. At his hourly rate of \$60/hour he could demonstrate that he had earned at least \$27,192.55 excluding GST. Further, he provided invoices which supported the purchase of materials totalling \$9889.55 excluding GST. I am satisfied that the sum of these amounts, plus GST, is \$40,790, which is the total amount actually invoiced and paid by the applicants. Accordingly I am satisfied that Boorer actually carried out the works and incurred the expenses for which they have been paid.

CONCLUSION

29. As a result of the above findings, the claim for reimbursement of part of the plumbing costs are dismissed.
30. Lastly, I note that many other complaints were raised by the applicants against Swaran during the referral to DBDRV. These issues are not part of

this proceeding. I recommended to the applicants that if they wish to pursue these issues, they should commence one proceeding at the Tribunal, listing all complaints and all relevant parties, rather than bringing separate applications against individual subcontractors and Swaran.

FINDING REGARDING REIMBURSEMENT OF FILING FEE

31. Having regard to section 115B(1) of the *Victorian Civil and Administrative Tribunal Act 1998* and being satisfied that the applicants have not substantially succeeded in their claim, the Tribunal orders that the application for the reimbursement of the filing fee is dismissed.

ORDERS

The proceeding is dismissed.

SENIOR MEMBER S. KIRTON