

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. **BP979/2016**

CATCHWORDS

Builder's claim for undocumented variations; section 38 *Domestic Building Contracts Act 1995*; whether there were exceptional circumstances or builder would suffer significant or exceptional hardship.

APPLICANT	Giblin Family Homes Pty Ltd (ACN 073 091 120)
FIRST RESPONDENT	Mr Peter Hubbard
SECOND RESPONDENT	Mrs Jan Hubbard
WHERE HELD	Warrnambool
BEFORE	R Buchanan, Member
HEARING TYPE	Hearing
DATE OF HEARING	22 September 2016
DATE OF ORDER	22 September 2016
DATE OF REASONS	16 November 2016
CITATION	Giblin Family Homes Pty Ltd v Hubbard (Building and Property) [2016] VCAT 1916

ORDER

The respondents must pay \$5,715.00 to the applicant and must reimburse to the applicant the Tribunal fee of \$292.70 paid by the applicant, making a total payable under this Order of \$6,007.70.

R Buchanan
Member

APPEARANCES:

For Applicant

Mr S Giblin, director

For Respondents

Mr P Hubbard and Mrs J Hubbard, in person

REASONS

[The following is a transcript of reasons for decision which I delivered orally at the end of the hearing in this proceeding. The transcript has been edited for clarity and ease of reading.]

- 1 I am now going to hand down my decision in the matter of Giblin Family Homes Pty Ltd and Peter and Jan Hubbard. Stephen Giblin, a director of the applicant, Giblin Family Homes Pty Ltd (“the builder”), appeared and gave evidence on its behalf and Mr Hubbard and Mrs Hubbard both appeared and also gave evidence.
- 2 The case concerns a building renovation on a domestic home. The date of the contract was 12 March 2015 and the contract sum was \$108,543. All of that has been paid. Subsequently the builder presented an invoice for variations and, of that, the owners have paid part and a balance of \$10,511 remains outstanding, for which the builder has brought the present proceeding.
- 3 The evidence given by Mr Giblin went through how the claim was made up and it effectively consisted of ten variations. The variations were not documented, as is required by section 38 of the *Domestic Building Contracts Act 1995* (“the Act”). Some were small and two in particular were large. I will deal first of all with the small ones.

Small variations

- 4 Some of these small variations I reject, for the reason that in my view they are part of the contract works, part of the contract price:
 - The claim in relation to extra work to install the cistern. It is clear that this is work that should be allowed for in the contract. If the plumber chooses to rough in, or the builder chooses to allow the plumber to rough in, before the cistern unit is to hand, they do so at their peril.
 - The rangehood was harder to install than had been allowed for by the builder, but again, this is something that an allowance should cover – a builder should make an allowance for possible variations in the type of rangehood that can be provided.
 - Plaster work on the ceiling of the ensuite in the bathroom. Again, this seems to me to be something that is work that would need to be contemplated by the builder. While it might be that things have proved to be harder to do than expected by the builder, normally a builder will include a margin to cover these unforeseen eventualities.
- 5 The evidence given by Mr Hubbard was consistent with the view I have formed about these small extras. He said that he had known nothing about them - and the builder made no claim that the variations had been requested by the owners or anything of that nature.

- 6 Other, small variations fall foul, in my view, of the *Domestic Building Contracts Act 1995*, as I explained at the end of the hearing. Although the variations were agreed between the builder and the Hubbards, section 38 of the Act is quite clear; it says that if variations are not documented, their cost may not be recovered unless certain conditions are fulfilled. I am of the view that four of the claimed variations are caught by the provisions of the Act which require that variations should be in writing. The removal of the kitchen is undocumented. The brick pier is also undocumented. The steelwork is also undocumented, as is the concrete floor. None of these seems to me to be a variation that could fit within the exceptions set out at section 38 of the Act, so as to allow the builder to recover these undocumented variations. There are, in my view, no exceptional circumstances which would justify the Tribunal in making an order for their payment. Nor do I believe that they are of sufficiently large amounts that their non-payment would constitute significant or exceptional hardship to the builder and I'm of the view that it would not be appropriate for the Tribunal to make an order for these amounts to be paid.
- 7 In relation to the variation claimed for the planning fee, it has been made clear by the receipt that was handed to me by the owners that, despite Mr Giblin's no doubt honest belief, the planning fee was not paid by the builder, but was in fact paid by the owners.

Large variations: cabinets

- 8 This brings me to the two large variations. One for cabinet work and one for electrical work. They are similar in size and very much similar in nature. The claim for extra cabinetry is \$6,614, the claim for extra electrical work is \$5,027.
- 9 In relation to the cabinet work, the evidence that was given by the cabinetmaker, Alistair Cousins, was that he was provided with a plan for cabinet works and he provided the builder with a quote for cabinet work for the kitchen, the study and also for the ensuite. There is no controversy about the ensuite. The controversy lies in relation to works for the study and works in the kitchen. The evidence given by Mr Cousins was that he had received the cabinet plan from Mr Giblin and Mr Giblin's evidence which was not disputed (in fact it was confirmed by the Hubbards' evidence) was that the plan had been prepared by somebody on their behalf and given to Mr Giblin.
- 10 The evidence by Mr Cousins was that he had walked around the relevant rooms with Mrs Hubbard and asked her about what she wanted and she identified variations that she wanted to make. He said he did not specifically say to her that this would cost more, but in his view, it was obvious that that should have been the case. One of the agreed changes made while the renovation was being done was a change which made the kitchen larger, requiring more cabinetry. I think that it is reasonable under the circumstances to infer that an owner, aware of the cabinet plan that the

owner had provided, would also be aware that the works being discussed by Mrs Hubbard went beyond the owners' cabinet plan. It should have been obvious at the time to Mrs Hubbard that, if the kitchen was now bigger, there would be more cost involved for the extra cabinets.

- 11 In relation to the cabinet work, in addition to the cabinetry on the kitchen, on the owners' plan there was no cabinetry to be supplied in the study, only a bench, but Mr Cousins and Mrs Hubbard went through the study and Mrs Hubbard requested that a cupboard, shelving and drawers be built and the cost of these variations was charged to the builder by Mr Cousins.
- 12 No evidence was given by the Hubbards about what would be the appropriate price for these extra works and I accept the evidence given by Mr Cousins, a cabinetmaker of many years' experience, that he simply charged for these extra works in the usual way that he charges and that there was no extra charge applied to any of these extra works that would take them out of the realm of what would be normal, standard, commercial charging.

Large variations: Electrical

- 13 In relation to the electrical works, evidence was given by the electrical contractor, Peter Ward. He was, like Mr Cousins, a subcontractor to the builder. The story given by Mr Ward and confirmed by Mrs Hubbard was really very similar to the story told by Mr Cousins. Mr Ward had quoted on an electrical plan supplied to him by Mr Giblin. That plan had in fact been prepared by the building designer who had designed the renovation for the owners, Phil O'Brien. Mr Ward quoted on that plan and his quote had been accepted by the builder. He'd then gone through the property with Mrs Hubbard, with the plan in hand and she had asked for variations - this, that and the other extra thing, such as the installation of air conditioners, which were nowhere referred to in the plan. And again, I think that it is clear and it should have been clear to the Hubbards, that extra work was being called for and it was being called for by them and carried out by the builder's subcontractor at the builder's expense.
- 14 Mr Ward said that his charges for the extra work were in accordance with his normal charging practice and no evidence was presented by the Hubbards to challenge the reasonableness of the charges made by Mr Ward.
- 15 In the cases of both Mr Cousins and Mr Ward, their invoices were charged to the builder, because they were subcontractors to the builder; they did not contract with the owners.

Large variations: not in writing

- 16 I will now deal with the question of what is to be done about the fact that these two large variations were not documented. As you will know from what I said earlier, variations have to be documented, unless certain

exceptional circumstances exist (section 38 of the Act). I think that these are the relevant factors that I need to consider:

- i The work was requested by the owners.
- ii It should have been apparent to the owners that the work went beyond the plans which they had provided to the builder, for which plans they are responsible and of which they must be assumed to have had a working knowledge.
- iii The builder would, in my view, suffer significant hardship if it could not recover the cost of these two larger variations. The sums, though they are not enormous, are still quite large. The two variations are equal to about 10 percent of the contract price for the renovation. This is a significant part of the profit that a builder would take from a job such as this. The sums involved are not immaterial. That, in my view, means that the hardship which would be suffered by the builder would be significant.
- iv The next consideration, I think, is critical, namely that there was no benefit derived by the builder from the variations. The builder was merely acting as a conduit. Normally, builders will allow margins on expenses they incur, but in the present case there was no claim made by the builder for a margin on the variations; this is simply a cost to the builder, there is no benefit to the builder at all. This is in fact extra cost that the builder has been put to. Because, without his approval, without the owners' going to the builder to discuss the matter specifically, as they could well have done and knowing what was involved, (they were working from their plans and making changes to their plans) yet the owners chose not to go to the builder and the builder was not party to any of their discussions with its subcontractors, Mr Cousins and Mr Ward. I think that these qualify as exceptional circumstances under section 38 of the Act, which would qualify the builder to be entitled to be paid.
- v It would not be unfair to the Hubbards for the builder to recover the money for these variations.

17 The net result of all of this is that I am of the view that two allowances should be made, for the cabinet work and the electricals. They add up to \$11,641 and I note from the Points of Claim that the amount paid by the owners after they received the invoice for the extras was \$5,726, which would leave a balance outstanding of \$5,915. I note the admission by Mr Giblin that there is some ridge capping to be fixed, perhaps three caps, he said. I think an allowance of \$200 would be adequate for the cost of repairing that and the balance would therefore be \$5,715.

Works not complete

18 The claim made by the owners in relation to works incomplete, I do not think is made out. In relation to the absent sensor light, that claim was not

pursued by the Hubbards. In relation to the claim for a mirror, the Hubbards were unable to point to anything in the contract to show it should have been provided and Mr Giblin's evidence was that it was not part of the contract. In relation to the shelving in the shed, the contract merely called for shelving. Shelving was constructed. It is plain from the evidence given by both parties that Mr Giblin was contemplating building more shelving than he ultimately did build. But I am of the view that, whether or not Mr Giblin chose to discharge his contractual obligation to build shelving by building a lot or, what seems to me to have been a reasonable amount, was a matter for him. Accordingly, the claim for incomplete works is dismissed.

- 19 That brings the matter to an end. There is one thing to deal with. Fees are paid to begin proceedings in VCAT and we normally order that the losing party pays the fee back to the successful litigant. In my view the builder has been materially successful in its claim and I will order therefore that the Hubbards reimburse to the builder the sum of \$292.70, the VCAT fee that was paid by the builder. That will make a total payable under this order of \$6,007.70.

R Buchanan
Member