

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT Reference: BP1056/2016

CATCHWORDS

Dispute between builder and owner – consideration of items in dispute.

APPLICANT: Mr Prokash Kundu

RESPONDENT: HMN Constructions Pty Ltd (ACN 166 736 689)

WHERE HELD: Melbourne

BEFORE: Senior Member Robert Davis

HEARING TYPE: Hearing

DATE OF HEARING: 16 March 2017

DATE OF ORIGINAL ORDER: 16 March 2017

DATE OF CORRECTION ORDER AND WRITTEN REASONS 31 May 2017

CITATION Kundu v HMN Constructions Pty Ltd (Building and Property) [2017] VCAT 602

CORRECTION ORDER

Orders under s.119 of the *Victorian Civil and Administrative Tribunal Act 1998* to correct the order, dated 16 March 2017, by amending the total figures for the claim and counterclaim.

1. The respondent pay the applicant the sum of \$8,702.05.
2. The applicant pay the respondent the sum of \$12,336.00.
3. The sum payable by the respondent is set off against the sum payable by the applicant. Therefore the applicant pay the respondent \$3,633.95.

SENIOR MEMBER ROBERT DAVIS

APPEARANCES:

For the Applicant: Mr P. Kundu, in person

For the Respondent: Mr H. Hung, in person

Note:

These written reasons consist of an edited transcription of reasons given orally at the conclusion of the hearing.

REASONS

APPLICATION

- 1 The applicant undertook a development at 55 Blair Street, Coburg. The development was two Units adjacent to each other. Unit 1 was for the applicant's own use and Unit 2 was for sale. The respondent was the builder in relation to those Units and there are contract documents which are confusing. There is the normal HIA contract, then there is another document that is headed 'Quotation' which seems to have been prepared by the applicant but is signed by both parties which, to some extent, modifies the contract. Then there is a further document, a quotation, which was prepared by the respondent which has also been signed by both parties. The contract is somewhat confusing because at times the documents do not fit well together. However, the situation is that the parties have a claim and counterclaim against each other. I will deal with the applicant's claim first.

Applicant's Claim and Heating and Cooling System

- 2 The applicant claims the sum of \$6,000 for two gas heaters that were not installed. The applicant states that it was agreed that the heaters would not have to be installed by the respondent, but that the respondent would credit the applicant \$3,000 per heater: making a total of \$6,000.
- 3 There is a curious document on "page [15]" of the quotation, which is the document prepared by the applicant, which says, "\$625 including GST as the final price and I supply and install my own cooling system"; however "heating" was written there and it was crossed out. The respondent, Mr Hung, who is the director, says that the price of \$625,000 was a vastly reduced price and that it was one of the reasons he reduced it was that the applicant was going to be supplying the cooling system anyway and that he would supply his own heating system. There are two conflicting stories about this matter. I find it curious that the "heating" has been crossed out. That seems most peculiar. Given those circumstances, I accept what the builder has had to say about the heating and I will not allow any amount for the owner not having heating.

Water Tapping

- 4 The next item that is sought is for water tapping, which is the sum of \$1,683.45. The water tapping was done by the Council. Initially it was to be done by the builder but the owner pay for it. The contract provides in one section that the water tapping is to be done by the builder and it excludes areas outside the boundary. However, in another section of the contract, it is stated "water tapping to connect 125 mm water tapping from the same side of the road". It was necessary to dig up the road from the middle of the road almost to the kerbing of the street and it is this matter

that is in dispute. In my view, it is likely that the meaning of the contract of “the same side of the road” as long as it is on the building side of the road, then it is a matter for the respondent to pay – i.e. the builder. Therefore I will allow the applicant water tapping in the sum of \$1,683.45.

Civil Engineer

- 5 The next item is the cost of a civil engineer. That item is \$385.00. The applicant says that a civil engineer became necessary because the builder took too much soil out of the lot. The builder says that the civil engineer was there to give advice on the storm water drainage. I find it difficult to know what the situation was, except that it is normal practice for owners to pay for the civil engineer. I am not satisfied that the applicant has discharged the onus of proof in relation to the civil engineer item and therefore I will not allow that.

Tiles

- 6 The next item claimed is for tiles. The building owner has said that the contract allowed for tiles for \$40 per square metre and the owner chose tiles at \$24.70 per square metre and there were 32m² of tiles. He therefore says that he is entitled to a return of \$489.60 because the tiles were a prime cost item. When I asked Mr Hung how much he actually paid for the tiles, he said that he could not remember and did not have any documents. Thus I accept what the owner has to say and I will allow the owner the sum of \$489.60 for the tiles.

Landscaping

- 7 The next item is landscaping. I was shown a plan which clearly shows trees on the landscaping. The contract requires the builder to do the landscaping according to the plans. While the plan was not satisfactory because the copy I had was not stamped, I accept the applicant’s evidence that it was a true copy of the original which was stamped and that was part of the contract and the respondent never denied such a matter. Mr Kundu has said that when the builder left the premises the landscaping was only the dirt in the garden and he had to install the trees and the cost of those trees was \$1,990.00. I accept that evidence and I will allow the owner for the landscaping in the sum of \$1,990.00.

Water Tank/Topsoil/Nature Strip/Bond/Crossover

- 8 The next item that the applicant complains about is a mixed item of a bond which is \$4,495.00 and other items such as water tank, topsoil and nature strip, which comes to \$655.00. I will deal with the bond item separately. What is said is that Mr Kundu says that he had to pay the bond of \$4,495.00 to the local Council because there was a crossover. The respondent says that this was to do with the subdivision dividing the two Units and nothing to do with him. He therefore said that he should not have to pay anything. I have been shown an invoice which shows that there is a sum of \$140 for subdivision plan certificate fee and that is to do with the subdivision.

However the invoice also says “outstanding works” and that has the sum of \$4,220.00. I therefore assume that that figure relates to the crossover and while the applicant has given a different figure I will allow a figure for the crossover of \$4,220.00.

Disallowed items

- 9 The other items that the applicant claimed are shown in some invoices but I find them very unsatisfactory. There is an invoice about water tank which is not dated and I do not know what work was done and also I am not satisfied in relation to the other matters which the applicant has claimed. That is, topsoil and nature strip and therefore I will not allow any other items in that claim.

Claimed Defects

- 10 The applicant says there were defects in the builder’s claim. He says those defects were leaking shower screens, jammed door handles, ceiling lights, loose toilet seat, scratched toilet seat etcetera. He estimated the costs at \$2,000.00. The builder claims he rectified items that were complained of, some of which were the items mentioned here. He also said that he was not given the chance to rectify these items. I cannot be satisfied on the evidence that that is a proper claim. Therefore I will not allow that claim.

Drainage Fee Paid to Council

- 11 The next matter that the owner claims is the sum of \$319.00 which is a drainage fee paid to the Moreland City Council. In my view this is a fee which should be subsumed in the contract which the applicant had to pay. Therefore I will allow the drainage fee.

Claim and Counterclaim for Carpet

- 12 There is a dispute about the carpet over which there is a claim and counterclaim. It is clear that the applicant chose carpet different from what was originally in the contract. The carpet in the contract is described as “ACC Certified Residential Heavy Duty Cut Pile Twist Carpet Wool – produced by Godfrey Hirst.” In fact, the applicant decided he did not want that carpet and chose carpet for Unit 1 of a Palato type carpet and for Unit 2 he chose Paras light type carpet. The builder says that there was total extra cost of \$3,540.00. He has already taken into account the \$1,350.00 because he said that was the extra cost and that has already been paid. Therefore I will allow the builder the sum of \$3,540.00 for the carpet. I will not allow the owner any amount for the carpet but will allow the builder the sum of \$3,540.00.

Rock Footing

- 13 The next item that the builder claims is for rock footing. This is an item that was excluded specifically from the contract. The cost of the variation was \$10,593.00. The applicant says that he went to Consumer Affairs (CA) and CA talked to Mr Hung, the builder, who agreed the price should be reduced by half. The applicant says that under those circumstances he should only

have to pay half. On the other hand, Mr Hung says that he reduced the price solely because he did not want to go to VCAT and it was a way of settling the whole disputes between the applicant and the respondent. The builder said he did not expect, once he had agreed to that, for these proceedings to be issued. He said that once these proceedings were issued, then Mr Kundu was liable to pay the whole amount of money. In my view, there was not consideration moving from the applicant to the respondent for the respondent to reduce that some of money. Given that set of circumstances, I will allow the builder the sum of \$5,296.00 for the rocks.

Front Fence and Letterbox

- 14 The next item is the front fence and letterbox. The contract says that the builder should provide the boundary fence. In my view, that does not include the front fence. I was shown an email written by the respondent which was on the applicant's mobile telephone where the respondent stated that after he had done the work for the fence he would not be charging. He used the word "complimentary". There was no mention of a letter box. The respondent builder says that the applicant asked for the fence and letterbox. The applicant says that there was a photo no. 10 which seemed to be part of the contract which showed his friend's two Units that were built by the same builder. That has the fence and letter box but it also shows boundary fence so I am not sure that take us any further. Given those circumstances, in my view, the respondent should be entitled to the sum of \$3,500.00 for the letter box as that was not part of the original contract.

Builder's Margin 20% Allowed Under the Contract

- 15 The respondent also claims the sum of 20% which is the builder's margin allowed under the contract for extra tiles. There was \$9,656.00 spent on extra tiles according to the builder. On the invoice shown to me, as produced by the builder, and given to the applicant, there has been no extra amount charged for the 20% builder's fee. It appears this is something which has occurred afterwards. The question is, whether the builder's fee is included in the price that was charged. In my view, it is likely that when the builder sent out the account that he would have included that price in his fee and therefore I will not allow that amount.

The Splashback

- 16 The splashback is a somewhat of a similar situation to the margin in the sense that there was a splashback ordered which was an extra of \$2,672.00 of which the builder is claiming \$524.40 being 20%. Again, that is not shown on the invoice and I think it defies reason to think that that should be part of a claim. In my view, it is likely that that was already charged anyway. That is, it forms part of the contract.

Owner's Deduction of \$1,500

- 17 The last complaint made by the builder is the owner deducted the sum of \$1,500.00 for the bench top in Unit 2. The specifications for the bench top

in Unit 2 were for it to be the colour “Ocean Foam”. However, when it arrived, it was black. Mr Kundu says that he complained about the matter and the builder then contacted the supplier and the supplier agreed that \$1,500.00 should be refunded. Clearly, therefore, Mr Kundu did not insist upon the bench top being changed. In my view, there is consideration due from the applicant to the respondent in this matter. The consideration being that he did not insist upon his right to have the bench top changed. He accepted \$1,500.00 in lieu thereof. Therefore I will not allow that amount.

Totals of Amounts Claimed

Applicant's (Owner's) Entitlements

18 I will now calculate the totals of amounts claimed. The owner is entitled to:

- \$1,683.45 for the water tapping
 - \$ 489.60 for the tiles
 - \$1,990.00 for the landscaping
 - \$ 4,220.00 for the bond for the crossover
 - \$ 319.00 for the drainage
- \$ 8,702.05** total sum owed

Respondent's (Builder's) Entitlements

19 The builder is entitled to:

- \$ 3,540.00 for the carpet
 - \$ 5,296.00 for the rock
 - \$ 3,500.00 for the letterbox and fence
- \$12,336.00** total sum owed

20 There will be an order that the applicant pay the respondent that sum and one sum will be set off against the other. I will make those orders accordingly.

Robert Davis
Senior Member