



# Civil Resolution Tribunal

Date Issued: August 7, 2019

File: SC-2018-009445

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kong et al v. Maxpower Home-Tech Ltd. et al*, 2019 BCCRT 942

BETWEEN:

XIAOMING KONG and QING JIE CHEN

**APPLICANTS**

AND:

Maxpower Home-Tech LTD. and CARLOS ZHANG

**RESPONDENTS**

AND:

XIAOMING KONG and QING JIE CHEN

**RESPONDENTS BY COUNTERCLAIM**

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**REASONS FOR DECISION**

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Tribunal Member:

Micah Carmody

## **INTRODUCTION**

1. The respondent, Maxpower Home-Tech LTD. (Maxpower), replaced a boiler in the applicants' home on March 26, 2018. The applicants and respondents by counterclaim, Xioming Kong and Qing Jie Chen, say that the respondent Carlos Zhang performed the work and is a director of Maxpower. They say that the respondents did a poor job installing the boiler and refused to fix it. They seek to recover the \$2,780 they paid two other contractors to repair the boiler.
2. Maxpower does not deny that there were issues with the boiler's expansion tank, which was still under warranty, but it denies liability for anything else. It also says the applicants do not have standing to bring their claim because they were not a party to the contract. In its counterclaim, Maxpower seeks \$126 for its service call fee.
3. Carlos Zhang did not file a counterclaim but responded to the Dispute Notice by saying he is an employee of Maxpower and did not personally contract with the applicants.
4. The applicants' Dispute Notice names Maxpower as "Maxpower Home-Tech LTD" but Maxpower's Dispute Notice, all Dispute Responses, and Maxpower's invoice refer to Maxpower Home-Tech LTD. (with a period). I find the applicants' Dispute Notice contained a typo and Maxpower Home-Tech LTD. is the correct legal name. I order that the style of cause is amended accordingly.
5. The applicants are represented by Xiaoming Kong. The respondent Maxpower is represented by Hai Yang Zhang, a director. The respondent Carlos Zhang is self-represented.

## **JURISDICTION AND PROCEDURE**

6. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act*. The tribunal's mandate is to provide dispute resolution

services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

7. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, both parties in this dispute call into question the credibility of the other. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required where credibility is in issue. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. Bearing in mind the tribunal's mandate that includes proportionality and a prompt resolution of disputes, I decided to hear this dispute through written submissions.
8. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
9. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders, where permitted under section 118 of the Act:
  - a. order a party to do or stop doing something;
  - b. order a party to pay money;
  - c. order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

10. There are 3 issues in this dispute:

- a. Are either of the respondents are liable to the applicants under the contract or in negligence?
- b. If so, what is the appropriate compensation?
- c. Do the respondents owe Maxpower for the service call-out fee?

## **EVIDENCE AND ANALYSIS**

11. In a civil claim such as this, each party must prove their claims on a balance of probabilities. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain and give context to my decision.
12. On March 26, 2018, Maxpower replaced components of a gas boiler system in the applicants' home. Carlos Zhang completed the work for Maxpower.
13. In December 2018 the boiler began to make noise and "tripped for over temperature". The applicants contacted Maxpower and were told to reset the boiler. On December 9, 2018, water began to leak from the boiler and it made loud banging noises.
14. The same day, Mr. Zhang attended. The parties' descriptions of their discussion that day are vastly different. The applicants submit that Mr. Zhang refused to repair the boiler and told them it was okay to use, and then left.
15. Mr. Zhang says that he told them the expansion tank had failed, and since it was covered under Maxpower's 1-year warranty, he offered to replace it at no cost. However, he had to charge \$120 for a service call and \$205 for flushing the system. I prefer Maxpower's version of events, as it is supported by text messages exchanged between the parties. I find that the applicants then decided to have a second contractor replace the expansion tank, at a cost of \$714. That work was completed on December 11, 2018.
16. The applicants say the boiler continued to have noise and other issues, so on December 28, 2018, they hired a third contractor to redesign the piping and install a

bypass at a cost of \$2,030. Maxpower says the noise was likely to due to the second contractor failing to flush air out of the pipes, and says the additional work of the third contractor was unnecessary and unrelated to Maxpower's boiler replacement.

***Are either of the respondents liable to the applicants under the contract?***

17. The applicants claimed against both Carlos Zhang and Maxpower. Carlos Zhang says he is an employee of Maxpower. The applicants say Carlos Zhang is Haiyang Zhang, who is listed on the BC Company Summary as a director of Maxpower. I find that nothing turns on Carlos Zhang's identity. Whether he was an employee or a director, when installing the boiler, he was acting as an agent for Maxpower. Maxpower is a separate legal entity from Carlos Zhang. The warranty on the boiler is provided by Maxpower. I dismiss the applicants' contractual claim against Carlos Zhang.
18. Maxpower says that the boiler replacement contract was between Maxpower and CCK Consulting, so the applicants cannot bring a claim against Maxpower. The March 26, 2018 invoice says "CCK Consulting INC" in the customer field. The cheque that paid the invoice is from a joint bank account of two individuals, one of whom is identified in the evidence as an owner of CCK. The other individual is not identified in the evidence. Neither are a party to this dispute.
19. The applicants say that they own the home where the boiler was installed. They say the owner of CCK lived in their home and agreed to pay for the boiler replacement as a contribution to shared property expenses. Records show that CCK's address is the same address as the applicants' home. The applicants did not provide a statement from the owner of CCK. There was no evidence that CCK was acting as an agent for the applicants.
20. The applicants submit that Mr. Chen had a verbal agreement with Mr. Zhang of Maxpower to replace the boiler on March 26, 2018. Mr. Zhang did not provide a statement. He did not explain how he found and selected Maxpower, when these

conversations occurred, or how they agreed on price. In the absence of such evidence, I find that the applicants did not have a contract with Maxpower.

21. The most reliable pieces of evidence are the invoice and the cheque, which indicate that the contract for the boiler installation was between Maxpower and CCK. The common law concept of privity of contract holds that a contract cannot confer rights or impose obligations on a person who is not a party to the contract. According to privity of contract, CCK is the only party that can bring a claim against Maxpower under the contract.
22. I find that the applicants cannot bring a claim for breach of contract because they had no contract with the respondents. This holds true whether the applicants rely on the express warranty in the contract or an implied warranty under the *Sale of Goods Act*, which only applies to goods supplied under a contract of sale or lease. In the absence of a contract with the respondent, the applicants must prove negligence.

***Are either of the respondents liable to the applicants in negligence?***

23. To prove negligence, the applicants must show that (1) the respondents owed them a duty of care, (2) the respondents failed to meet a reasonable standard of care, (3) it was reasonably foreseeable that the respondents' failure to meet that standard could cause the applicant's damages, and (4) the failure caused the claimed damages.
24. I find that the respondents owed the applicants a duty of care when replacing a boiler in the home the applicants owned. However, I am not satisfied that the respondents breached a reasonable standard of care. In cases of professional negligence, it is generally necessary for the applicants to prove a breach of the applicable standard of care with expert evidence (see *Bergen v. Guliker*, 2015 BCCA 283). This is because the standards of an industry are often outside of the knowledge or expertise of an ordinary person. In this dispute, I would require expert evidence to prove that the respondents' work fell below the standard of a reasonably competent boiler replacement tradesperson.

25. The applicants provided no expert evidence to prove that a reasonably competent tradesperson would have completed the boiler replacement any differently or that the respondents did not complete the boiler replacement to a reasonable standard. The applicants submitted a recording of a conversation between Mr. Chen and the third contractor, who attended to perform additional work on the boiler system on December 29, 2018. The contractor stated that the boiler was overheating due to bad design, and he is installing a bypass. When asked if the previous installer should have installed a bypass, the contractor responded, "I think they left it like this because the old system was working, they never had a problem." This is consistent with the other evidence. Maxpower said the scope of its contract was simply to replace the boiler and not to overhaul the piping system. Based on the invoice and the photographs of the old and new boiler, I agree. Although the expansion tank failed, there is no evidence that the respondents were negligent in providing or installing the expansion tank.
26. For those reasons, I dismiss the applicants' negligence claims against the respondents. As I have found that they have no claim under the contract, I dismiss all the applicants' claims.
27. What about Maxpower's counterclaim of \$126 for the service call? I dismiss the counterclaim as well. Maxpower attended the applicants' home to determine whether there was a problem with the boiler it installed. There is no evidence that Maxpower informed the applicants about a service call charge until after the visit, when he quoted the cost to replace the expansion tank. It is not clear whether the quote was for the previous attendance or for future attendance when the expansion tank would be replaced. Either way, I find that there was no meeting of the minds on the service call charge. Even on a *quantum meruit* basis (payment for work based on value), I find that Maxpower did not provide any work of measurable value to the applicants during the service call. I dismiss the counterclaim.
28. Under section 49 of the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable

dispute-related expenses. None of the parties were successful in this dispute, so each will bear its own costs and expenses.

## **ORDERS**

29. I dismiss the applicants' claims. I dismiss Maxpower's counterclaims and this dispute.

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Micah Carmody, Tribunal Member