

**REASONS FOR DECISION : J Bordon** : Senior Member: Consumer Trader & Tenancy Tribunal : Home Building Division : 4<sup>th</sup> April 2007

### THE APPLICATION

The applicant, Jeanette A Kidnie (referred to as the applicant) lodged an application on 16 May 2005 seeking certain orders against Wolfies Plumbing Services Pty Ltd ('the respondent') in relation to plumbing work carried out by it at "...", Manly.

Ms Kidnie as owner builder proposed to build a new 3 bedroom house at "...", Manly. She was assisted in this endeavour by Mr Stephen Drylie, a friend. Mr Drylie has expertise in retail, small business management, property development and renovation. It was Mr Drylie's own evidence that he had experience in renovation of properties using subcontractors and contractors to do the work. It does not appear to be in contest that Mr Drylie assisted Ms Kidnie by supervising and coordinating the works. It appears to be common ground from all of the evidence that Mr Justin Wolfe, the director of the respondent dealt principally if not exclusively with Mr Drylie, in effect acting as agent for Ms Kidnie.

The application as finally amended seeks an order for payment of money to her by the respondent made up as follows:

- An amount of \$17,807.46 being for refund of over payment;
- An amount of \$9,441.09 paid by her to other contractors to complete the works.
- An amount of \$1,100.00 being the costs of an adjudication awarded against Ms Kidnie, \$1,100.00;
- Money lost in advertising costs due to cancellation of an auction because of the claimed failure to supply certificates by the respondent, (\$12,387.00).
- Insufficient postage on documents sent by respondent to applicant (\$10.60).
- A total of \$40,746.15 is sought by Ms Kidnie as well as costs relating to experts.

### The hearing of the matter

Ms Kidnie was not represented by a legal practitioner at the hearing. However she was assisted in the presentation of the case by Mr Michael Drylie. Mr Drylie also gave evidence in her case. Apart from Ms Kidnie herself, Lloyd Carey a quantity surveyor, Kenneth Bucknall and Keith Colin Dunn all gave evidence in the applicant's case.

For the respondent, Mr Wolfe himself gave evidence (as director of the respondent company) as did quantity surveyor, Mr M Foster.

I should indicate that both parties presented their evidence in part, in the form of statements by each of the witnesses. These and other documents, as well as the oral evidence, formed the body of evidence upon which the parties' submissions have been made.

### The contract between the parties

At least to a significant extent the applicant's case depends on an assertion that Mr Wolfe, as director for Wolfies Plumbing Services Pty Ltd had agreed to do all the plumbing work for a fixed sum of \$18,000.00.

It is submitted on behalf of the applicant that: "*Jenny Kidnie was always of the belief that Mr Wolfe had quoted a fixed priced contract of \$18,000.00 to do the new home's plumbing works*".

The submissions, under the heading "*Summation*" go on to claim that Mr Wolfe "*obviously made a deliberate decision to conceal his intentions*" and "*to later force Jenny Kidnie to agree to a 'do and charge' style of contract*".

Sometime after he started the works, according to the applicant, Mr Wolfe "*deceitfully developed a long term plan to force Jenny Kidnie to pay exorbitant costs at 'do and charge' rates by making promises to provide compliance certificates for months without any notice of any money owing.*" It is claimed that the applicant "*was not afforded the opportunity to know that she did not have a fixed price contract by the respondent's lack of any type of other contract (written or verbal) or any notice of charges until after the work was completed in 2005*".

Attention is drawn to the fact that Mr Wolfe may have contravened the *Home Building Act 1989* by not providing a written contract before work commenced or during works and therefore denied the rights conferred by the Act to the consumer.

The evidence which is most relevant for determination of this issue is that of Mr Wolfe on behalf of the respondent and Mr Drylie on behalf of the applicant. It appears to be common ground; (although there are some minor differences in the evidence) that in late 2002 Mr Drylie had discussions with Mr Wolfe about the engagement of his company as a contractor to carry out the plumbing work. It is common ground that Mr Drylie and Mr Wolfe had a previous association in that Mr Wolfe had performed work for Mr Drylie. An issue in dispute was whether Mr Wolfe was aware that the property belonged to Ms Kidnie. His evidence was that in October 2002 he was "*of the honest belief that a property belonged to Mr Drylie.*"

According to Mr Wolfe he was shown copies of plans for the proposed construction of a dwelling house on a Lot subdivided from the rear of "...", Manly to be known as "...", including hydraulics specifications and site plans. It was then that costs were raised by Mr Drylie. Mr Wolfe had said that "*his gut feeling was that the cost would be between \$22,000.00 and \$26,000.00 but that that would not include rock excavations or PC items*". Mr Wolfe maintained that he had indicated hourly rate of \$60.00 (but that, as a favour that would be reduced to \$50.00 per hour and \$25.00 per hour for a tradesman's assistant).

The reply, according to Mr Wolfe, was "*Okay. Do it, on do and charge basis, and do it cheap.*"

According to Mr Drylie, after Mr Wolfe had completed some minor work, having become aware of the proposed construction of Ms Kidnie's house, Mr Wolfe had *'argued his case to become the plumber'*, relying on their previous association. Mr Drylie's evidence was that Mr Wolfe had indicated that the job could be done for \$18,000.00. According to Mr Drylie at no time did he tell him that he was charging at *'do and charge'* rates, which were not bound by the original agreement of \$18,000.00 (less the materials purchased personally by either himself or Ms Kidnie).

According to Mr Drylie, it was fairly obvious what was going on. Mr Wolfe was fully aware that the job was for Ms Kidnie.

In his oral evidence Mr Drylie stated that he had said to Mr Wolfe, *"How much are you going to do it for?"* His reply was that he thought it would be *"\$18,000.00, no more than twenty"*. Mr Drylie then said *"You need to put in a quote and give it to Jenny or give it to me."* While it is common ground that there was never any quote sent to Ms Kidnie, Mr Drylie claims that he was not aware of this nor did Mr Wolfe tell him that he was going to charge anything other than the quoted price.

According to Mr Drylie, the work proceeded through 2003 with Mr Wolfe sending invoices to him.

Mr Wolfe denies that a written quote had been requested by Mr Drylie. At the time he was unaware that the proprietor was Ms Kidnie. On 28 November 2002 he attended "...", on behalf of the company and redirected the sewer, in readiness for excavation and construction of a dwelling. He rendered a tax invoice on 20 December 2002 for those works. In December 2002 or January 2003 he installed an outlet for a retention tank and 2 floor grates and excavated for an outlet for the retention tank. He sent tax invoice on 14 January 2003 for those services.

In February 2003, Mr Drylie had advised him that the excavation was finished and that they were ready for him to get started. Mr Wolfe attended together with 2 plumbers and a trade assistant. He carried out certain works which involved excavation. This was necessary, according to Mr Wolfe, because the rock level had not been excavated sufficiently to allow for a fall to the main sewer.

A tax invoice was sent dated 4 March 2005 for this work. In April 2003, again following a request from Mr Drylie, Mr Wolfe attended and carried out further excavation made necessary because there had been a variation to the plan which involved the moving of the kitchen from the upper level to the lower level. A tax invoice was duly issued. It was in April 2003 when Mr Wolfe claims he had a conversation about invoices being sent to Mr Drylie at "...". He was then told that Jenny Kidnie was the person to whom they should be sent. According to Mr Wolfe, he had said to Mr Drylie, *"Okay. Just get me a cheque for what is owed and I will send the invoices to Jenny"*.

Mr Wolfe, claims that following this, he performed further work in June 2003 for which he had issued an invoice dated 25 June 2003. Between August and December 2003 he did further work for which he had issued a further invoice. After this time an arrangement had been made for an account with Tradelink Plumbing which resulted in the respondent purchasing the material for the job on Mr Drylie's account with that organisation.

In or about April 2004, there company performed further plumbing work at "...", for which an invoice was issued.

In May 2004, according to Mr Wolfe, Mr Drylie telephoned him asking how much it was going to cost to finish the job. Mr Wolfe had replied *"I will do you a quote"* Mr Drylie had retorted *"I will send you a list of the things we want finished"*. Following receipt of this list from Mr Drylie, he issued a quote dated 11 June 2004 and faxed it to Ms Kidnie.

This is denied by Ms Kidnie who claimed that Mr Wolfe did not fax a *'do and charge'* contract or any other contract, only the new quote which had no terms or conditions.

Mr Wolfe's version of events following this is that he had a further discussion with Mr Drylie about the quotation.

According to Mr Wolfe the company continued to carry out plumbing works on a *'do and charge'* basis as directed by Mr Drylie. A plumbing works agreement on a *'do and charge'* basis which he had faxed to Ms Kidnie had never been returned (as indicated) Ms Kidnie denied ever signing or ever having received this document. According to Ms Kidnie, Mr Wolfe proceeded to complete the works without this quote ever being accepted or her signing any other documentation because, according to her, it was clearly understood by all parties that she was not agreeing to a new quote or new contract nor paying *'do and charge'* as she was going to rely on Mr Wolfe's original quoted price of \$18,000.00. She had presumed that Mr Wolfe had realised *"she would not be taken as a fool"* and assumed he had decided to finish the work for the money he had already charged her and hope that she would not sue him for the money he had overcharged her.

A further payment of \$2,200.00 was made by Ms Kidnie by Visa Card.

Mr Wolfe claims that at all times prior to May 2005 either Ms Kidnie (or Mr Drylie as the case may be) paid, in full, invoices issued by the company for plumbing works performed by the company at the direction of Mr Drylie and that at no time before this had he ever been informed that there was no intention of paying anything further for the plumbing services.

Matters came to a head in May 2005 in relation to tax invoice dated 30 March 2005. Mr Wolfe contends that because of the refusal to pay this amount (on behalf of the company) he declined to provide any further services including providing compliance certificates.

On 20 June 2005 the company filed an adjudication application pursuant to the *Building and Construction Industry Security of Payment Act 1999* in respect of the non payment of this invoice. The respondent was successful in obtaining an adjudication in its favour. I note the evidence given by Ms Kidnie of the circumstances of this adjudication. While there is

nothing to prevent the subject matter of that adjudication being considered by this Tribunal I agree with the submission there is no legal basis for the claim by the applicant for a refund of the adjudication fee of \$1,100.00.

Mr Wolfe also testified that in August 2005 he caused to be supplied to Ms Kidnie all compliance for the plumbing works at "...", Manly.

It is noted that Ms Kidnie agrees with this however, her claim is that this was 9 months late and 6 months *after* he had promised them to the selling agent this had resulted in her losses in relation to the costs of auction which had to be aborted.

### DISCUSSION AND CONCLUSIONS

As submitted on behalf of the respondent, the applicant's claim largely depends on the assertion that a lump sum contract existed between the parties.

It is not disputed that the role of Mr Drylie was to act on the applicant's behalf. It was Mr Drylie who had negotiated with Mr Wolfe, supervised the works and considered accounts before payment was recommended by him. There was no written contract. The evidence given by Mr Drylie does not disclose any final oral agreement that the work to be carried out by the respondent would be done for a fixed price of \$18,000.00. Mr Drylie's evidence was that he was told by Mr Wolfe that the work would be performed for \$18,000.00 no more than \$20,000.00 and that he had asked Mr Wolfe to send a quotation to Ms Kidnie. This is denied by Mr Wolfe.

The subsequent conduct of Mr Wolfe (on behalf of the respondent) and Mr Drylie was that Mr Drylie would oversee consider accounts submitted by the respondent and recommend payment. It is submitted on behalf of the applicant that Ms Kidnie did nothing other than to pay Mr Wolfe on his demand, on the basis that she had a fixed priced contract and Mr Wolfe was known to her personally as a trustworthy licensed professional plumbing contractor. It is further submitted that Mr Drylie made it clear to the respondent, after he produced the completion quote, that no more money would be forthcoming as the original quoted price had been surpassed and "*he would be sued if he did not finish the job and supply the compliance certificates for the amount already paid to him at that date*". It is submitted that after this period from May 2004 to April 2004, the respondent continued to carry out work without producing or mentioning any further charges.

A sum of \$2,200.00 inclusive of GST was paid. According to the applicant this was only an inducement to ensure that she would receive her compliance certificates.

However, the evidence in relation to the payment of accounts and discussions about the accounts is more consistent with there being no lump sum agreement between the parties. The objective view of the conduct of the parties leads, on balance leads to the conclusions they did not behave as if they were bound by a fixed price contract. The applicant continued to pay accounts when they were well in excess of the claimed fixed price.

I have to agree with the submission that it is irrelevant that the applicant firmly believed that she '*was given a fixed price contract verbally*' by the respondent. This impression could only have come from Mr Drylie and not directly from Mr Wolfe. There is considerable force in the respondents' submission that Mr Drylie was in a position to determine whether work for which payment had been claimed had been carried out and to determine whether the charges were reasonable. Mr Drylie, with his experience, approved the payments without complaint (with the exception of the final claim).

I find that there was no contract between the parties that the work would be carried out for \$18,000.00.

On balance I prefer Mr Wolfe's evidence about the contractual relationship. Furthermore, I am not satisfied that it has been established, to the extent that this appears to be the applicants' case, that there was misleading or deceptive conduct on the part of the respondent, ('to conceal his intentions' "and to later force Jenny Kidnie to agree to a 'do and charge' style of contract").

### Overcharging

Much of the evidence submitted on behalf of the applicant and the submissions, focus' on the question of overcharging. Looking at this issue in absolute terms, rather than by reference to the assertion that there was a fixed price contract, it seems to me that the only satisfactory way to ultimately determine the question is by reference to the expert reports of the quantity surveyors. However specific issues have been raised both in evidence and in submission on the applicant's behalf.

It is argued that the respondent did not carry out all the work in the quote given by it to complete the works in June 2004 and that the amount finally charged exceeded the amount in the quote.

I have considered the detailed analysis of this particular quotation as well as what was ultimately charged for some of the works. I can see why the applicant would have concerns about the final account having regard to the matters raised. However, there is substance in the submission that it is not to the point that all the work in the quote was not done by the respondent and the amount finally charged exceeded the sum and the quote. Quite correctly it is submitted that the quote was not accepted. I agree that it does not follow that the charges for the work actually carried out were unnecessary or unreasonable.

A quote is in effect only an estimate when it is not accepted. Similarly, there is substance in the submission that it is not fair to isolate individual items and claim that they could or should have been carried out for less money, unless it is also established by evidence that the totality of the amount charged was unreasonable.

I ultimately have to return to what the experts say about the work. I agree that reference to quotes from other plumbers as referred to in the applicant's submission, can be given little weight in circumstances where they were not called to give

evidence and had not inspected the property and the precise terms on which they were asked to provide the quotes, were not provided.

For the reasons submitted by the respondent, I can place little weight on the calculations in the submissions relying on Rawlinson's Costs Guide. I accept (as submitted) that much will always depend on the precise configuration of the site and proposed dwelling, the nature of the instructions received; the quality of supervision and so forth.

First, in relation to the excavation of a Sydney Water mains sewer, I note that the respondent concedes that there is no dispute that this work might not have been necessary. It is submitted that the issue is whether it could reasonably have been considered as being necessary at the time. I agree with the submission that Mr Wolfe should not be expected to have been made aware of the work the preceding plumber had carried out. As submitted, if Mr Drylie was unaware that this work had been carried out it is difficult to see why the plumber should have had better information. I also note that the evidence of Mr Wolfe was that he was instructed by Mr Drylie to attempt to link the sewer outlet from the house under construction with the sewer line being used for the site toilet, as there was a better fall to this route and it required less rock excavation. I accept on balance that this instruction and the consequential instructions from Sydney Water caused additional costs to be incurred. These were paid *after* being scrutinised by Mr Drylie without complaint. The work which was carried out by the respondent is not criticised in the evidence. I must agree with the submission that there is simply no evidence of unnecessary or unreasonable charging in relation to the work.

In relation to the costs of excavation, the costs were referred at the time to the person responsible for supervising the works. I accept Mr Wolfe's evidence in this regard for the reasons given in the respondent's submissions (in preference to the evidence of Mr Dunn).

#### **The expert evidence**

The quantity surveyors who gave evidence in the proceedings were Mr Mal Forster and Mr Lloyd Carey. I found the evidence of Mr Mal Forster to be authoritative. The submission that Mr Carey had not inspected the site, the fact that he had not allowed for excavation, nor had he allowed for a flow and return system, nor for the works at "...", Manly, has force. The respondent is justified in submitting that Mr Carey did not know what really happened on site and I must agree that it is at least a matter about which comment can be made that he appears to have raised no issue about the costs involved in carrying out the last part of the work for which a quotation was sought and rejected. Generally, I also accept the submission that Mr Carey has left out items in his calculations. I prefer Mr Foster's evidence to Mr Carey's.

In relation to applicants' claim concerning excavation works, I note Mr Wolfe's evidence was consistent with the invoices. Again, it is significant that the invoices for excavation works were paid after scrutiny by Mr Drylie. There was no complaint at the time. There is also the evidence of Mr Foster that in his assessment, the amount charged by the respondent was reasonable and that he had extrapolated a rock excavation by hand from a recent and analogous project in which he had been involved. Again, I agree with the submission that there is no evidence to support the alternative calculation for rock excavation in the respondent's submissions.

#### **Losses Because of Aborted Auction**

I agree with the submission of the respondent. First, there is no evidence that the certificates were necessary for the sale of the premises. Secondly, I agree that there was no term which gave rise to a contractual obligation to provide such certificates. Third, in circumstances where there was still work to be done certificates could not be provided. Finally (and most importantly in my view), it has not been established that, but for the absence of the certificates, the costs of the auction would not have been wasted. It is noted that the property has still not been sold despite certificates having been provided.

In the end result, unfortunately for the applicant, her application must fail. She bears the burden establishing her case.

It is not difficult to sympathise with the applicant being faced as she was with escalating costs in circumstances where the contractor should have provided a written agreement in compliance with the *Home Building Act 1989*. It is perhaps an anomaly that, in the present circumstances it is Ms Kidnie who bears the burden of proof. This burden would have fallen on the contractor, if it had been seeking payment for the work done. The respondent would not have been able to rely on any contract between the parties (because of the absence of writing) and would have to establish a case in *quantum meruit*. However, this is not the case here and, for the reasons given above, the application must fail.

In addition, costs should follow the event. Although they are discretionary it would seem that an order in relation to costs should be made in favour of the respondent. However, I will give the parties an opportunity to make further submissions within 14 days of this decision.

#### **ORDERS**

1. The application HB 05/25206 is dismissed.
2. The parties are to make any further submissions in relation to costs within 14 days of this decision.

The applicant (Ms Kidnie) assisted by Mr Drylie;

Mr Davie of counsel instructed by Stuart Latham, solicitor for respondent Wolfies Plumbing Service Pty Ltd.