

**REASONS FOR DECISION. B. Pickard** Consumer, Trader & Tenancy Tribunal. Home Building Division. 17<sup>th</sup> January 2008

#### **APPLICATION**

An application received on 28 May 2007 seeking payment for an amount of \$4,906.00 arising out of a contract for the provision of building work carried out by the Applicant for the Respondent.

#### **APPEARANCES**

Mr Steven Evans and Ms Karen Evans for the Applicant. Mr David Taylor for the Respondent.

#### **JURISDICTION**

The matter before the Tribunal is a "building claim" arising from the supply of building goods and services, the Tribunal has jurisdiction to hear and determine the matter under section 48K of the *Home Building Act 1989* ("the Act"). In accordance with Schedule 1 of the *Consumer, Trader and Tenancy Tribunal Act 2001*, the Tribunal's jurisdiction in respect of any matter arising under the Act is exercised in the Tribunal's Home Building Division.

#### **PROCEEDINGS**

The matter first came before the Tribunal on 6 July 2007. The matter was adjourned with procedural directions being made. On 16 August 2007 the matter was further adjourned due to the Respondent's representative being interstate and the Respondent also requesting further time to provide documents. On 27 August 2007 the Respondent's solicitors lodged a "defence" and submissions for legal representation. A formal hearing was conducted on 31 August 2007 at Tweed Heads. It was not necessary to consider the issue of legal representation as the Respondent did not have legal representation present at the hearing and did not require a determination on that issue.

#### **APPLICANT'S EVIDENCE**

Mr Steven Evans and Ms Karen Evans presented the evidence for the Applicant. They provided sworn oral evidence and written submissions and documents. In summary their evidence was:

- The Applicant is a building contractor licensed to carry out waterproofing work. The Applicant was contracted by the Respondent by way of purchase order to carry out waterproofing work to a high rise multiple dwelling complex in Kingscliff ("the building"). Work was first carried out in May and June 2005. The Applicant was paid for this work.
- On 10 March 2006 the Applicant received a purchase order no. 3209 to carry out waterproofing works to the basement area of the building. This followed a site meeting on 6 March 2006 with a representative of the Respondent where it was agreed that due to subsequent work by other parties the integrity of the waterproofing work had been compromised.
- The Applicant completed additional work between March 2006 and May 2006. The Applicant has submitted invoices totalling \$9,494.65 for that work. An amount of \$4,588.65 has been paid. The amount of \$4,906.00 remains unpaid.
- On 10 August 2006 there was a meeting held at the Respondent's office. Mr Evans attended the meeting along with his supplier's representative Ms Maria Bobledyk and various representatives of the Respondent including Mr Taylor and the project manager Mr Tim Easterbrook. The meeting was about the additional work carried out by the Applicant. At issue was whether it was remediation of previous defective work or additional work to rectify damage caused by other contractors. The meeting became quite heated. Threats were made. No agreement was reached. A minute of the meeting made by Ms Bobledyk was provided to the Tribunal.
- The Applicant also provided to the Tribunal
  - (i) a letter dated 24 July 2006 to the Respondent setting out a summary of an onsite meeting and response to defect issues;
  - (ii) a purchase order dated 10 March 2006 no 3029 issued by the Respondent to the Applicant.
  - (iii) A non conformance report issued by the Applicant dated 14 May 2005;
  - (iv) A report of Burchill VDM consulting engineers dated 18 October 2006;
  - (v) Various photographs with annotations.

#### **RESPONDENT'S EVIDENCE**

A written "defence" was firstly submitted on behalf of the Respondent. In summary it denies the claim for the following reasons:

- (i) On 10 August 2006 the Applicant and Respondent agreed to carry out the work as it was rectification of work carried out under the original works contract. The Respondent agreed to contribute \$1,500.00 towards the work. On completion of the work the parties would release each other from all claims.
- (ii) The Tribunal has no jurisdiction to hear the claim. The Applicant made a claim for the amount owing pursuant to the *Building and Construction Industry Security of Payment Act 1999*. The Respondent certified that an amount of \$1,650.00 was the agreed amount. This amount has been paid and not disputed by the Applicant. The Applicant subsequently withdrew the claim.
- (iii) If the subsequent work carried out by the Applicant is found to be a claim in equity, then the works were performed by agreement for an agreed sum of \$1,500.00 and the Respondent had a reasonable expectation that the works would be carried out for that amount.

- (iv) That the various claims for payment have been settled by an agreement made 10 August 2006 for the Respondent to pay \$1,500.00.
- (v) The Respondent disputes that that the purchase order 3029 was a contract to perform work but rather a site instruction to advance the works.
- (vi) The Respondent denies that defects on the southern wall of the basement were due to the Respondent.
- (vii) Disputes that the report from Burchill VDM draws a conclusion that the defects were caused by the Respondent

Mr David Taylor a director of the Respondent provided the following sworn evidence:

- He attended the meeting with the Applicant and Ms Bobledyk on 10 August 2006. There was an agreement that the work that had been completed for which the Applicant was seeking payment was rectification work except for along a trench grate and the sum of \$1500 was agreed as compensation for that work. Ms Bobledyk, on behalf of the product supplier offered to provide the materials fee of charge. The agreement also included a term that the parties would release each other from all claims.
- It was not disputed that the original work was carried out. At issue is that the work required rectification. The water penetration was due to the Applicant's work and except as agreed all the work was rectification work.
- Water penetration is still a problem at the building.

Mr Alexander Simpson gave sworn oral evidence for the Respondent as follows:

- He is the owner/developer on whose behalf the Respondent was carrying out the building work. He attended an on site meeting with Mr Evans and representatives of the Respondent on 1 September 2006 where the water penetration was discussed. Mr Evans agreed to carry out the work as rectification of previous work for no charge. He called at the site 2 or 3 days later and Mr Evans said that he should not have agreed to carry out the work. He asked Mr Evans what it would take to finish the work and gave him \$500.00.
- He confirmed that the statutory declaration dated 6 July 2007 provided to the Tribunal was true and correct.

Mr Malcolm Bladen provided evidence for the Respondent in the form of a statutory declaration dated 29 August 2007 and under oath confirmed that it was true and correct.

#### **FINDINGS**

Before turning to the substantive issues there are some procedural matters that need to be dealt with. It is noted that the Respondent is named as David Taylor Building Services Pty Ltd. A company of that name does exist and a purchase order no. 3209 dated 10 February 2006 is made under that name. The letterhead shows Queensland and New South Wales building licence numbers. A search on both the name and number does not reveal that the company was licensed as a builder in New South Wales at the relevant time. However another company DTBS Pty Ltd is licensed and the Tribunal from the evidence and submissions finds that this was the relevant company that carried out the building work and on whose behalf the purchase order no 3209 was issued to the Applicant. The companies are 'associated' within the meaning of the *Corporations Act 2001*. Therefore it is appropriate that Respondent be amended to DTBS Pty Ltd and any reference to David Taylor Building Services or David Taylor Building Services Pty Ltd is a reference to DTBS Pty Ltd.

The other issue is the submission by the Respondent that the Tribunal has no jurisdiction to here the application because it has been dealt with pursuant to the *Building and Construction Industry Security of Payment Act 1999* ("BCISPA"). The purpose of this legislation is as stated in its objects in section 3. This is to allow any person who undertakes to carry out construction work to recover progress payments in relation to that work by way of statutory entitlement regardless of the contract's provisions. However as stated in subsection 3(4) of BCISPA it does not limit any other claim a person may have either under the construction contract or otherwise. Some have characterized the purpose as "pay now and litigate later". This submission is rejected. The Tribunal has jurisdiction to hear the claim.

The Issues to be resolved are as follows:

- (1) Was the work carried out for which the Applicant seeks payment additional work for which the Respondent should be paid or was it rectification of defective work carried out previously ? and
- (2) Whether all claims between the parties were settled by a subsequent agreement?

In relation to the first issue the Tribunal finds on the basis of the evidence provided that there was a contract to carry out additional works. The Tribunal finds that the purchase 3029 was an offer to the Applicant made by the Respondent to carry out certain work. The Applicant accepted the offer by performance of the work. The Respondent has provided no evidence that prior to this work being undertaken that there was any discussion of rectification work being undertaken. Given the time between the performance of the original work in May 2005 and the issue of the purchase order the Respondent's argument that the purchase order was merely a site instruction is simply an attempt to characterise the purchase order as something that it clearly was not.

It appears from the evidence and correspondence that subsequent to the contract for the additional work being performed that some rectification work was identified to be repaired by the Applicant. This is set out in the letter of 24 July 2006 from Mr Evans to the Respondent. Mr Simpson refers to conversations with Mr Evans in early September 2006. The Tribunal is not satisfied that Mr Evans was referring to the additional work the Respondent had completed in early June 2006. In any event what Mr Evans may have said does not have any bearing on the Applicant to recover moneys owing for services performed. The Tribunal is satisfied from the evidence provided that the work carried out for which

the Applicant seeks payment was additional to the original work and did not arise from defective work carried out by the Applicant on an earlier date.

The second issue to determine is whether there was a concluded agreement made on 10 August 2006 to settle all claims by the Respondent paying the Applicant the sum of \$1,500.00. Understandably the evidence of the parties differs considerably. The evidence in support of such an agreement is that of Mr Taylor, Mr Bladen and Mr Simpson. Against the agreement is that of Mr Evans and the minute made Ms Bobledyk. In resolving this issue it is necessary to determine firstly, whether it could be said that in the absence of any documentary evidence there was a concluded agreement. Secondly, if there was a concluded agreement terminating the earlier agreement under which the Respondent was obliged to pay the Applicant (called accord and satisfaction), that the subsequent agreement either had form or consideration to make it a binding agreement.

Considering the later issue the law is that termination of a contract by way of accord and satisfaction requires the party seeking to be released from performance to provide some form of consideration or alternatively the agreement to be in the form of a deed (said to have "form"). Clearly from the evidence there is no deed as there is nothing in writing. The Respondent offered \$1,500.00. The amount owed was \$4,906.00. The payment of a lesser sum than that owing, is not sufficient to discharge the debt; *Foakes v Beer* (1884) 9 App Cas 605. Something more must accompany the payment. It may be argued that they agreed to release each other from all claims as additional consideration. However that does not constitute additional consideration when it is a mutual exchange. Given also that there are statutory liabilities arising from the work one cannot see how this constitutes additional consideration to support the release of the Respondent from the Applicant's claim.

On the issue of whether there was a concluded agreement, the law of contract imposes certain rules about offer and acceptance. If there was an agreement made on 10 August 2006 there must be identified firstly an offer capable of acceptance and secondly a clear and unqualified acceptance; as it is expressed in contract law, "a meeting of minds". Where, as in the present matter, there is no subsequent behaviour from which one could infer that an agreement had been made the "reasonable bystander" test is used. In other words, what would the reasonable bystander infer from the words and actions of the parties ?

Based on the evidence provided, the Tribunal is not satisfied that there was a concluded agreement made on 10 August 2006 or at any other time, to terminate the contract and release the parties from obligation under the contract. Further, the Tribunal is not satisfied that even if such an agreement was made that it had the necessary form or consideration to constitute accord and satisfaction of the contract under which money is owed by the Respondent to the Applicant.

The Tribunal finds that the sum of \$4,906.00 is owing to the Applicant by the Respondent for additional building work carried out by the Applicant between set out in the Applicant's invoices dated 25 March 2006, 30 April 2006, 21 May 2006.

#### **ORDERS**

1. The name of the Respondent is amended to DTBS Pty Ltd
2. The Respondent is to pay the Applicant the sum of \$4,906.00 immediately

Mr Steven Evans and Ms Karen Evans for the Applicant.  
Mr David Taylor for the Respondent.