Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Channell v Graham [2016] NSWCATCD 80**
Hearing dates:	28 October 2015, 15 and 16 February 2016
Decision date:	29 September 2016
Jurisdiction:	Consumer and Commercial Division
Before:	D. Goldstein, Senior Member
Decision:	1. The application is dismissed. 2. The parties are at liberty to make a costs application in these proceedings. 3. Any costs application pursuant to section 53 of the Consumer, Trader and Tenancy Tribunal Act 2001 must be lodged in the Tribunal and served on the costs respondent within 21 days of the date of this order either attaching or referring to the documents relied upon in support of the application. 4. The costs respondent will have 21 days after the date it receives the application referred to lodge in the Tribunal and serve on the costs applicant its submissions, if any, in response to the cost applicant's costs application, such submissions either attaching or referring to the documents relied upon. 5. The cost applicant will have 14 days after the date it receives the cost respondent's submissions to lodge in the Tribunal and serve on the costs respondent its submissions, if any, in reply, such submissions either attaching or referring to the documents relied upon. 6. The Tribunal will determine any costs application on the basis of the papers lodged in the Tribunal
Catchwords:	What constitutes a 'building claim', Contract formation
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Consumer, Trader and Tenancy Tribunal Act 2001 Consumer, Trader and Tenancy Tribunal Regulation 2009 Home Building Act 1989
Cases Cited:	Dennis Pethybridge v Stedikas Holdings Pty Ltd [2007]

	NSWCA 154 Brendan Jay McAllery and Tracy Catherine McAllery v Alta Building & Developments Pty Ltd [2014] NSWCATCD 106 Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd and Anor [2001] NSWCA 313
Texts Cited:	Building and Construction Contracts in Australia, Dorter and Sharkey, Second Edition
Category:	Principal judgment
Parties:	Applicant: Irene Channell Respondent: Roberta Graham
Representation:	Counsel: Mr N. Siafakas for the applicant Mr L. Gor for the respondent Solicitors: J.S. Mueller & Co for the respondent
File Number(s):	HB 12/53320
Publication restriction:	Unrestricted

REASONS FOR DECISION

1 These proceedings were commenced in October 2012 when the applicant claimed the sum of $108,157.74 from the respondent in connection with an agreement between the parties which was described in the application in terms of the respondent being the applicant's agent and project manager in connection with the renovation of a residential property owned by the applicant in Sans Souci.

2 The Consumer Trader and Tenancy Tribunal was abolished as of 1 January 2014 and the *Consumer, Trader and Tenancy Tribunal Act* 2001 and the *Consumer, Trader and Tenancy Tribunal Regulation* 2009 were repealed. As the application was not fully determined at that time, the proceedings were 'unheard proceedings' as defined in clause 6 of Schedule 1 of the *Civil and Administrative Tribunal Act* 2013.

3 Transitional provisions in relation to unheard proceedings are set out in clause 7 of Schedule 1 of the *Civil and Administrative Tribunal Act* 2013. Pursuant to section 7(3) of Schedule 1 to that Act, the current Tribunal has and may exercise all the functions that the Consumer, Trader and Tenancy Tribunal had immediately before its abolition, and the provisions of the *Consumer, Trader and Tenancy Tribunal Act* and *Consumer, Trader and Tenancy Tribunal Regulation* continue to apply to unheard proceedings which expression includes pending proceedings.

4 The proceedings were adjourned on a number of occasions. In May 2013 the proceedings were adjourned to allow related proceedings against the respondent to be finalised. That resulted in the proceedings being adjourned for all of 2013. There was little progress made in 2014 due to proceedings in the 'related proceedings'. It was in April 2015 that directions were made to have these proceedings ready for hearing.

5

The proceedings were heard on 28 October 2015 and on 15 and 16 February 2016.

6 At the conclusion of the hearing orders were made for the filing of written submissions. The dates for the filing of the submissions were extended as requested by the parties. Written submissions were filed by the parties. The applicant's submissions in reply raise for the first time a representational case. I have not addressed that case on the basis that the respondent has not been heard in connection with it.

7 The evidence in the hearing was:

(a) Exhibit A, volumes 1, 2 and 3 except pages 147–182;

(b) Exhibit B, four page extract from the applicant's passport;

(c) Exhibit C, quotation dated 15 December 2009 - Hicks Constructions;

(d) Exhibit D, Hayden Fowler Corbett Jessup letter with attached settlement sheet;

(e) Exhibit E, joint report dated 16 February 2016 'Conclave Agreement';

(f) Exhibit F, Doctor's certificate 15 February 2016;

(g) Exhibit 1, 3 court attendance notices;

(h) Exhibit 2, T and M Ferraro joinery document;

(i) Exhibit 3, Annexure X in respondent's statement;

(j) Exhibit 4, Annexure W from respondent's statement;

(k) Exhibit 5, letter 18 September 2009 Latham to Graham

(l) Exhibit 6, ICO21 and ICO22;

(m) Exhibit 7, invoice 17 December 2009 from T and M Ferraro;

(n) Exhibit 8, invoice 4 March 2010 from Home Control and Audio;

(o) Exhibit 9, letter from Mr Hardwick to Ms Graham 12 May 2010;

(p) Exhibit 10, statutory declaration Roberta Christine Graham 14 September 2015;

(q) Exhibit 11, statutory declaration Roberta Christine Graham 23 October 2015;

(r) Exhibit 12, Mr Hall's statutory declaration 22 October 2015 together with annexures A and B; and

(s) Exhibit 13, email chain commencing February 12 2016.

8 The applicant's claim is for:

(a) Overcharging/refund/restitution; and

(b) Rectification of building works.

A building claim

9 There is a dispute that the applicant's claim in these proceedings is a building claim as defined in the *Home Building Act* 1989 (the 'Act') and that I have the jurisdiction under the Act to hear and determine that claim.

10 Section 48K(1) of the (the 'Act') provides that :

> '(1) The Tribunal has jurisdiction to hear and determine any building claim brought before it in accordance with this Part in which the amount claimed does not exceed $500,000 (or any other higher or lower figure prescribed by the regulations).'

11 The applicant's claim is within the jurisdictional limit.

12 A 'building claim' is defined in section 48A(1) of the Act as follows :

13 ***'building claim*** means a claim for:

> (a) the payment of a specified sum of money, or
>
> (b) the supply of specified services, or
>
> (c) relief from payment of a specified sum of money, or
>
> (d) the delivery, return or replacement of specified goods or goods of a specified description, or
>
> (e) a combination of two or more of the remedies referred to in paragraphs (a)–(d),
>
> that arises from a supply of building goods or services whether under a contract or not, or that arises under a contract that is collateral to a contract for the supply of building goods or services, but does not include a claim that the regulations declare not to be a building claim.'

14 Further in connection with the meaning of the expression 'building claim', section 48(2) of the Act states that :

> 'a building claim includes the following:
>
> (a) an appeal against a decision of an insurer under a contract of insurance required to be entered into under this Act,
>
> (b) a claim for compensation for loss arising from a breach of a statutory warranty implied under Part 2C.'

15 Building goods or services are defined in section 48A of the Act to mean:

> 'goods or services supplied for or in connection with the carrying out of residential building work or specialist work, being goods or services:
>
> (a) supplied by the person who contracts to do, or otherwise does, that work, or
>
> (b) supplied in any circumstances prescribed by the regulations to the person who contracts to do that work.'

16 Finally, residential building work is defined by the Act in section 3 to mean:

> 'any work involved in, or involved in co-ordinating or supervising any work involved in:
>
> (a) the construction of a dwelling, or
>
> (b) the making of alterations or additions to a dwelling, or
>
> (c) the repairing, renovation, decoration or protective treatment of a dwelling.'

17 In considering whether the applicant's claim is a 'building claim' it is necessary to consider the nature of the agreement entered into between the applicant and the respondent and the nature of the services that the respondent would provide. It is also necessary to consider whether the applicant's claim arises from a supply of building goods and services for or in connection with the carrying out of residential building work.

18 The applicant states in submissions that her case is that the respondent:

> (a) Charged her an hourly rate for aesthetic consultancy, as distinct to a management fee;
>
> (b) organised various trade persons to carry out residential building work;

(c) was involved with the various trade persons on a regular basis for the purposes of carrying out residential building work;

(d) supervised and coordinated the trade persons who carried out residential building work; and

(e) organised trade persons to rectify defects.

19 I find that the applicant's claim is for the payment of a specified sum of money thus satisfying section 48A(1)(a) of the Act.

20 Further, I find that the applicant's claim arises from a supply of building services under a contract, satisfying one of the element's necessary to establish a 'building claim' under the Act.

21 The reasons why I have found that the applicant's claim arises from a supply of building services are as follows. I have found that the services that the respondent was supplying, included decorating advice about the applicant's renovation, organisation of trade persons to carry out building work relating to the applicant's renovation, organisation of suppliers to supply items for the renovation work, liaising with the applicant and tradesmen regarding work carried out and arranging for the payment of tradesmen and suppliers. I find this work constitutes a supply of services for or in connection with the carrying out of residential building work.

22 I also find that the services provided by the respondent were supplied for or in connection with the carrying out of 'residential building work' as that term is defined, because those services were involved in co-ordinating and supervising work involved in the making of alterations to a dwelling, or the renovation or decoration of a dwelling. I find that the respondent was involved in the organisation of various tradesman and suppliers to carry out work and supply necessary items in relation to the renovation of a dwelling and in relation to making alterations and additions to a dwelling including arranging their payment, and that activity comes within the concept of 'co-ordination' of work. The concept of 'supervising' work should in my view be construed liberally rather than in a narrow way. Later in these reasons I find that the agreement between the parties included a term that the respondent would liaise with tradesmen including to ensure that a design intent had been successfully implemented. This activity would in my view come within supervision of work involved in the renovation of a dwelling, because liaison for that purpose includes either accepting work or if it is not accepted, instructing how it is to be performed so that the design intent will be successfully implemented.

23 I do not think that it is disputed that the applicant's property in Sans Souci was a dwelling. However if there is any doubt about that, I find that it was a dwelling.

24 It follows from the reasons set out above that I find that the applicant's claim is a building claim for the purposes of the Act and that I have the jurisdiction to determine it.

25 The respondent refers to the need to ascertain the real issues in dispute in these Proceedings, one of which is, what was the scope of works and services to be provided by the respondent? I agree.

The applicant's case

26 The applicant filed Points of Claim in the proceedings. The applicant's Points of Claim leave much to be desired from a legal perspective. However they were no doubt drafted by a lay person. The main issue that I have with them is that they do not restrict themselves to advancing the legal basis of the applicant's case. They recite and mix in with legal issues, numerous factual issues, or the evidentiary basis of the applicant's case.

27 In her Points of Claim the applicant claim is for:

(a) $75,648.24 for overcharging on building work; and

(b) $32,509.50 for rectification of defective building work.

28 In her Points of Claim the applicant alleges that the respondent agreed to:

(a) perform work of a professional nature and to supervise residential building and renovation work to the residence; and

(b) deal with all third parties involved in the residential building and renovation work to the residence.

29 In addition the applicant alleges that the parties agreed that the respondent would provide her professional services for reward in the form of an 8% management fee payable on all aspects of the building and renovation work.

30 It is further alleged at paragraph 6 of the Points of Claim that the respondent presented the applicant with a written quote which stated that a reasonable cost for the building and renovation work would be $73,903.05.

31 At paragraph 2.34 of her Points of Claim the applicant alleges that a building contract came into existence in October 2009 upon the terms which are recited which are that the respondent:

(a) 'could complete the building work at a 'reasonable cost';

(b) was suitably experienced and qualified to complete the work involved;

(c) 'would charge only a 'nominal fee' to which an 8% management fee to the applicant for organising and supervising all facets of the renovation building work;'

(d) would enter into legal obligations with third parties for the building work to be performed on behalf of the applicant;

(e) would hold and store these 'third party contracts' until the work had been completed;

(f) would organise tradesmen;

(g) would personally supervise these tradesmen;

(h) would supervise the rectification of the defects;

(i) would obtain warranties, certifications and insurances on behalf of the applicant;

(j) would pay all the respondents tradesmen directly from the funds provided by the applicant to the respondent;

(k) keep records regarding these payments to the respondents tradesmen

from the funds provided by the applicant; and

(l) the work would be finished by Christmas.'

32 No doubt because the Points of Claim were not drafted by a lawyer the applicant does not formally allege that the contract was breached and which of the terms of the contract were breached.

The contract

33 The first issue that I must deal with is the nature of the contract that was entered into by the parties to these proceedings. I have no doubt that the applicant and respondent were in a contractual relationship in connection with the renovation carried out at the applicant's residence. The issue is what was the nature of that relationship?

34 The applicant's case is that the respondent contracted as builder to carry out residential building works. The respondent denies this and submits that the contract obliged her to provide a concept for the aesthetic look feel and finish of the renovation at the residence and then to ensure that such aesthetic look feel and finish had been put into effect.

35 It is useful to quote from the respondent's submissions in this respect. She states [at para 3]:

> 'Ms Graham entered into a contract with Ms Channell on 15 July 2009. The contract required Ms Graham to provide a concept for the aesthetic look, feel and finish of the renovation at Ms Channell's newly purchased property at Sans Souci. Ms Graham was to be remunerated for different aspects of the service; the development of the concept at an hourly rate, the acquisition of various appliances and furnishing by the splitting of any trade discount, and by a reference to the value of the building and other renovation works for ensuring Ms Channell's builders and other trades faithful execution of the aesthetic concept which Ms Channel and Ms Graham had agreed upon.'

36 The respondent submits that an oral agreement between the parties was concluded at a meeting between the parties on 15 July 2009. The evidence in relation to this agreement is found at paragraphs 72 – 75 of Exhibit 10. The applicant disputes this version of what occurred on 15 July 2009.

37 I do not agree with the respondent's submission. In my view the discussion that occurred between the parties on 15 July 2009 was no more than a general discussion between them regarding the renovation that the applicant planned. I find that the respondent used the occasion to describe to the applicant what services she could offer to assist the applicant in the implementation of her renovation and the terms on which she would work.

38 The applicant denies stating that she wanted the respondent involved. I accept her evidence. The fact that the applicant paid an invoice which relates to this period of time does not cause me to find in the respondent's favour on this issue. It was entirely open to the applicant to make a retrospective payment, if she considered it appropriate to do so, which she did in response to a tax invoice which was dated 18 October 2009, after she had made a payment of $20,000.00 to allow work to commence.

39 At the 15 July 2009 meeting the respondent offered to do the following things. She

offered to assist by providing interior decorating services, which included choosing supply items. She also offered to suggest tradesmen to perform the necessary work. In relation to interior decorating services, the respondent stated that her hourly rate was $220.00 but she would charge the applicant a lesser amount. She also stated according to her own evidence that she would liaise with the relevant tradesmen to ensure '*that the finishes of their work are what you and I agreed upon*'. In other words she would liaise with tradesmen to see that they had carried out their scope of work correctly. As stated earlier, this activity would in my view come within supervision of work involved in the renovation of a dwelling, because liaison for that purpose includes either accepting work, or if it is not accepted, instructing how it is to be performed so that the design intent will be successfully implemented.

40 She also stated, again according to her own evidence, that she would charge the applicant 8% (of what she did not say) for:

(1) 'liaising';

(2) reporting to the applicant;

(3) providing feedback (to whom she did not say);

(4) providing trades; and

(5) paying the builder and tradesmen on the applicant's behalf as they completed work.

41 The respondent also offered to share with the applicant discounts she received from suppliers. In other words if an item was discounted the applicant would pay the respondent the discounted supply price plus one half of the discount and the respondent would pay for the supply item.

42 The applicant's evidence is that there were a number of discussions between her and the respondent in or about September 2009. She alleges that the respondent made a number of statements to her in this period. Her counsel submits that the parties contracted on 15 October 2009 and that the respondent agreed to carry out residential building work for the applicant. Precisely how this came about is not dealt with. However the date of 15 October 2009 is nominated as the date of contract since this was the date of the first payment by the applicant to the respondent.

43 I am urged to place weight on the findings of his Honour Dr Brown who heard proceedings whereby the respondent was prosecuted for breaches of the Act. I decline to do so as that would be an abrogation of my role in dealing with the issues in these proceedings. I would observe that proceedings for breaches of the provisions of the Act may involve considerations which are quite separate to the determination of a building claim under the Act.

44 The evidence is that after their meeting on 15 July 209 the parties conducted various visits together to view work that the respondent had been involved in, as deposed to by the respondent. I accept her evidence. She also visited various suppliers in connection with the applicant's renovation.

45

The respondent states and the applicant does not deny that a meeting took place on 25 August 2009 at the residence where the respondent submitted concepts for the renovation. In addition various tradesmen and suppliers attended. I find that it was the respondent who had arranged for the tradesmen and suppliers to attend at the residence for the purposes of the renovation.

46 The respondent prepared a document for the meeting which is at annexure P1 of exhibit 10. The respondent seeks to minimise the effect of this document by stating that it is not made up of architectural plans or professional type documents. That is not surprising since the respondent states that she is an interior decorator, not an interior designer and that she does not possess technical drawing skills.

47 I find that annexure P1 is a basic scope of work that the respondent was presenting to the applicant on the 25 August 2009 as a proposal of what should be done to give effect to the applicant's renovation. I would add that P1 goes beyond soft furnishings, the colour of walls, the nature of floor coverings or finishes, the choice of furnishings, or light, door and plumbing finishes all of which I would consider the province of an interior decorator. In addition to those matters, the respondent proposed building work to the front steps of the residence, to the bathroom namely removing a shower, building a new wall and building a new shower and the creation of a courtyard deck. This is an indication that the scope of the respondent's work was extending beyond Interior Decoration.

48 The respondent's 25 August scope of work indicates that the role she was playing and the services she was providing were wider than she suggests in her submissions as extracted above.

49 Of relevance in connection with the 25 August 2009 meeting is the fact that tradesmen and suppliers were in attendance and that after those persons had left the meeting the respondent spoke to the applicant about the arrangements that could be put into place to allow, through the respondent, tradesmen and suppliers to be paid. I accept the respondent's evidence in this regard.

50 The respondent's evidence is that between 25 August and 22 September 2009 she communicated with the tradesmen and suppliers to obtain quotes for the renovation works. I find that she was doing this as preparatory work for the applicant's renovation.

51 On 22 September 2009 the respondent sent to the applicant a document which brought all of her work together. The document which is at annexure P2 to exhibit 10, served a number of purposes. It was in three parts. First, supply items, secondly 'Building works' and thirdly 'Outstanding items'. The building work contained a scope of work, noting exclusions, which was priced. Outstanding items were also identified. With the exception of 2 items they were not priced. It is significant in my view that the pricing included the respondent's 'management fee' of 8% and a split of savings on retail supply items.

52 The 22 September 2009 document calculated the priced items at $68,190.00. There were other costs mentioned under the heading of 'Outstanding items'.

53 I find that this document was not, as alleged by the applicant in paragraph 6 of her Points of Claim, a written quote which stated that a reasonable cost for the building and renovation work would be $73,903.05. The document itself is described as 'Quotes For Refurbishment'. I find that the 22 September 2009 was a partially priced scope of work. A careful reading of the document would have revealed that there were a number of areas that remained to be priced. The exclusions were stated and there were a number of outstanding items, meaning, I find, that they had not been quoted on or costed.

54 In addition the 22 September document did not state a period for construction or state that the work would be completed by any particular date.

55 I find on the evidence of the respondent that the parties met for the purposes of the respondent providing the applicant with the 22 September 2009 document.

56 I find that an examination of the 22 September 2009 document dispels the respondent's contention that she was only providing a concept for the aesthetic look, feel and finish of the renovation as asserted by her in submissions and in her evidence.

57 She was, among other things, arranging the supply of a kitchen excluding appliances, sink and taps to the value of $18,854.00. I infer how that was to be designed, fabricated and installed were for her to arrange. I find that it is absolutely plain on the evidence that the applicant, apart from stating what she wanted, had nothing to do with that process. The respondent was to be paid an 8% fee for that work.

58 To make it clear that building work was involved, the 22 September 2009 document also provides an allowance for the demolition of the existing kitchen at a cost of $1,600.00 plus an 8% fee. The fee of 8% for demolition work could not I find, have been for the '*faithful execution of the aesthetic concept which Ms Channel and Ms Graham had agreed upon'* as submitted by the respondent.

59 The respondent was also arranging bathroom work excluding plumbing labour, taps and showerhead for $13,890.00. That was substantial work without a costed labour component. I do not accept that the fee of 8% for this work which was only generally described was for no more than providing a concept for the aesthetic look, feel and finish of the bathroom or ensuring *faithful execution of the aesthetic concept which Ms Channel and Ms Graham had agreed upon'*. Work to that value with labour still to be priced does not emerge out of a vacuum. As with the kitchen, I infer that how that work was to be designed, ordered and installed were for the respondent to arrange.

60 Finally and significantly the respondent stated that she would charge an 8% fee for the construction of a rear deck and fence costed at $8,400.00. I find that such work does not sit comfortably with the provision of, or a concept for the aesthetic look, feel and finish of the renovation or ensuring *faithful execution of the aesthetic concept which Ms Channel and Ms Graham had agreed upon'.* It is more likely that a rear deck to the value of $8,400.00 would require design, liaison with contractors specialising in external carpentry work, ordering and inspection. I find that it must have been the intention of the parties that the respondent would do that work.

61 The value of the items that I have referred to in the preceding paragraphs is $42,744.00

or 63% of the sum of $68,190.00 referred to in the 22 September 2009 document. I find that the work that I have referred to went beyond the provision of or a concept for the aesthetic look, feel and finish of the renovation or ensuring *faithful execution of the aesthetic concept which Ms Channel and Ms Graham had agreed upon',* as submitted by the respondent.

62 The respondent's evidence is that she was asked for a $20,000.00 deposit from a tradesman who was going to do the building work and she in turn requested that amount from the applicant. The applicant agrees that she arranged for two payments of $10,000.00 to be made to the respondent on 15 and 16 October 2009 in order for the work to commence.

63 The applicant's allegation that the agreement between the parties came into effect on 15 October 2009 is based on this payment as pleaded in paragraph 2.33 of the Points of Claim. In other words the applicant accepted the respondent's offer to provide services to her in connection with the renovation of the residence by the payment of the amount requested.

64 I prefer this analysis of how the contract was made.

65 I find on the basis of the parties evidence before the Tribunal that the parties dealings regarding the applicant's residence commenced on 15 July 2009 when they met at the residence. I also find that the applicant accepted the respondent's proposals and participation in her renovation by the payment of the money requested to allow work to commence on 15 October 2009.

66 I find that the factual matrix prior to the formalisation of the contract establishes was it was clear to the respondent that the applicant would need help with the renovation. In that context the respondent offered to the applicant her assistance and the services which I have described in order to complete the renovation. I also find that it was clear to the respondent that the applicant relied upon her completely so far as arranging for the work to be carried out.

The terms of the contract

67 The terms and conditions of the contract remain to be identified. Most contracts or agreements contain terms as to the payments to be made, the scope of the services to be provided and the terms and conditions which apply to the contract. In this case there is no suggestion that, apart from the respondent's remuneration, the parties ever agreed or even contemplated the terms and conditions which would apply to the contract, this being a relatively simple agreement.

68 So far as pricing was concerned it was, I find, a term of the contract or the agreement between the parties that the applicant would pay the respondent:

(1) a fee of 8%. I further find that although the respondent had not identified what the 8% would relate to, that it would relate to the cost of the 'Building Works' as that work was described in the respondent's 22 September 2009 letter;

(2) Approximately one half of any discount that the respondent obtained in

connection with retail supply items; and

(3) An hourly rate of no more than $220.00 or a lesser amount for interior decorating services.

69 So far as the services that the respondent would provide, I find that there were terms of the contract or the agreement between the parties that the respondent would:

(1) provide interior decorating services which included choosing or recommending supply items;

(2) suggest to the applicant tradesmen known to her to perform the necessary work to carry out and complete the applicant's renovation;

(3) liaise with tradesmen to see that they had carried out their scope of work correctly;

(4) reporting to the applicant as regards the work being undertaken;

(5) provide feedback to the applicant and tradesmen; and

(6) pay the builder and tradesmen on the applicant's behalf as they completed work.

70 To the extent necessary terms may be implied into the parties' simple agreement if that was necessary to give it business efficacy. I find that if it was not express then it was implied that the respondent would attend to arranging contracts to be entered into between the applicant and tradesmen and/or suppliers, or that she would contract herself with tradesmen and/or suppliers as the applicant's agent. This term is necessary to give the contract business efficacy and in particular to give effect to the term that I have found that the respondent would suggest to the applicant tradesmen to perform the necessary work to carry out and complete her renovation.

71 I have no doubt that the respondent stated words to the effect alleged at paragraph 33 of the applicant's 25 July 2012 statement which is in exhibit A. Otherwise, I do not accept the entirety of the applicant's evidence as contained in paragraphs 34, 35 and 50 of her 25 July 2012 statement for the reason that her accounts of the conversations have no semblance of an account of a conversation that actually occurred. Rather these paragraphs replicate one account of a conversation in identical terms. With the exception of item 13, the conversation in paragraph 35 is identical to that referred to at paragraph 50. Overall I prefer the evidence of the respondent as to what was said between them in connection with her involvement in the applicant's renovation and the services that she would provide.

72 I also find based on all of the evidence in the proceedings that the respondent did not ever state that she would carry out the renovation as a builder.

73 I do not accept the respondent's submissions as to the nature of her contract with the applicant. I have found that the services that she was to provide went further than decorating services and inspecting completed work to ensure that it complied with a design content.

74 I also find that the respondent's submission that the 8% fee which is said to be payable for inspecting completed work to ensure that it complied with a design content is not credible. If as asserted the respondent was essentially providing interior decoration

services, it stretches credibility to suggest that an 8% fee rather than an agreed hourly rate would be charged merely to attend to view work to ascertain whether it adhered to a design intent. The 8% management fee charged by the respondent went further than merely confirming that interior decoration concepts were successfully implemented. The respondent's role went to suggesting tradesmen, arranging contracts with them liaising with them, providing feedback to them and organising the payment of their work. I do not accept the respondent's evidence that the 8% fee was only for ensuring that the aesthetics of the concept were adhered to.

75 I further find that the respondent's description of the services she agreed to provide is self-serving and that she seeks to distance herself as far as possible from the suggestion that she was a 'builder'.

76 As I have stated at paragraph 48 what was required from the respondent entailed much more work than she submitted was required. I find that the 8% fee charged by the respondent related to all the services that I have found were contained in the contract with the exception of the item 'Provide interior decorating services which included choosing supply items' for which an hourly rate would be charged.

77 The terms of the contract that I have found differ to those submitted by the parties.

78 In making my findings regarding the nature of the contract that the parties entered into, I have had regard to the decision of the Court of Appeal in *Dennis Pethybridge v Stedikas Holdings Pty Ltd* [2007] NSWCA 154 and in particular to paragraph 59 of the judgement of Campbell JA where his Honour stated:

> 'There was some argument about whether it was permissible to have regard to subsequent communications for the purpose of deciding with whom the contract was entered. The present state of the law throughout Australia on whether and if so when it is possible to use post-contractual conduct as an aid to construction of the contract is not yet settled: see the authorities cited in Cheshire and Fifoot's *Law of Contract,* 8th Australian edition, p 392-393*; Cross on Evidence,* 7th Australian edition, para [39290]; ***Royal Botanic Gardens and Domain Trust v South Sydney City Council*** [2002] HCA 5; (2002) 186 ALR 289 at 318 [109], per Kirby J. The more restrictive view, favoured in this Court, is that subsequent communications cannot be looked to as an aid to construction of a contract, but can be looked to as an aid to deciding whether a contract has been entered into at all: ***Brambles Holdings Ltd v Bathurst City Council*** [2001] NSWCA 61; (2001) 53 NSWLR 153 at 163-164, [2001] NSWCA 61 at [25]- [26]; ***Magill v National Australia Bank Ltd*** [2001] NSWCA 221; (2001) Aust Contract R 90-131 at 91,609-91,610, [2001] NSWCA 221 at [50]- [53] per Ipp AJA (with whom Meagher and Heydon JJA agreed); ***Walker v Andrew*** [2002] NSWCA 214; (2002) 20 ACLC 1476 at 1483-1484, 116 IR 380 at 388, [2002] NSWCA 214 at [39]; ***Independent Timber Importers v Mercantile Mutual Insurance*** [2002] NSWCA 304; (2002) 12 ANZ Ins Cas 61-543 at 76,367, [2002] NSWCA 304 at [17]; ***El-Mir v Risk*** [2005] NSWCA 215 at [66].'

79 Based on the above passage I have decided not to have regard to the parties post contractual conduct as an aid to the construction of the contract and in particular the nature of the terms of the contract so far as the respondent's services are concerned.

80 I find that the agreement that was reached between the parties may be described as one which required the respondent to provide interior decoration services as well as services that may be described as construction management or project management services.

81 So far as Interior decoration services were concerned, I accept the respondent's description of those services, namely to provide a concept for the aesthetic look, feel and finish of the renovation at Ms Channell's newly purchased property, although I find that is a minimum description of that work. In my view that role would have extended to, as stated above, soft furnishings, the colour of walls, the nature of floor coverings or finishes, the choice of furnishings, or light, door and plumbing finishes. In addition on the basis of the facts that I have found, the respondent's interior decoration role extended to advising the applicant on the supply of a kitchen and arranging substantial bathroom work.

82 So far as construction management or project management services were concerned, the agreement required the respondent, once the interior decoration/design concept and the exterior concept so far as the decking was concerned was finalised, to arrange for the implementation of these concepts by the appropriate tradesmen and suppliers. This included building work to be carried out as I have found above, such as the demolition of the existing kitchen, work to the front steps of the residence, demolition of the existing shower and building a new wall to close off the existing toilet. I also find that the implementation of these concepts by the appropriate tradesmen (such as plumbers tilers and electricians) and suppliers included the supply and installation of items such as carpets and blinds and the fabrication and installation of items such as the kitchen. To use plain English, the respondent's role for which she was paid an 8% fee was to see that all of the necessary work was carried out. I have found that the respondent did not assume the sole responsibility for this work, but that she agreed to arrange for this work to be delivered by arranging contracts direct with or on behalf of the applicant with the tradesmen, fabricators or suppliers. Again, her 8% fee remunerated her for the provision of this service.

The applicant's claims - Overcharging

83 The first of the applicant's claims is for overcharging. The sum of $75,648.24 is claimed.

84 The applicant's submissions address this head of claim under the heading 'Expert Opinion - Quantity Surveyor'.

85 It appears that the applicant's overcharging case is reliant on an expert report by Mr Antidormi dated 10 July 2014. Mr Antidormi's opinion was that the fair and reasonable price of the work performed and material supplied was $91,459.50. Mr Antidormi states that the difference between his fair and reasonable estimate and the actual costs he states were paid to the respondent is $56,488.74. He then states that he has assumed that a contract was not entered into between the parties and that he has formed the view that the most suitable form of contract was a cost plus arrangement. On that basis Mr Antidormi allows for a management fee of 15% and concludes that the applicant overpaid $56,488.74.

86 Exhibit E is a conclave agreement dated 16 February 2016 in which the experts value

the work carried out.

87 At this point it is necessary to note that the assumption referred to by Mr Antidormi, namely that a contract was not entered into between the parties has not been borne out in my findings. Secondly the parties did not enter into a cost plus contract. On the basis that the assumptions relied upon by Mr Antidormi have not been sustained, his report is, I find, of little value.

88 The evaluation of the work carried out by the applicant's expert, which was replied to by the respondent's expert, pre-supposes that the applicant has a right at law to have the work re-valued. Engineering contracts sometimes provide for the re-measurement of work. Refer paragraph 8.60 Building and Construction Contracts in Australia, Dorter and Sharkey Second Edition. The contract that I have found came into effect between the parties contained no such term, or indeed any term about the final cost to the applicant.

89 The applicant has not articulated a cause of action which would entitle her to claim for the overcharging she alleges. She does not point to a breach of contract that would entitle her to, in effect, re-value the work that was carried out and claim an overpayment from the respondent.

90 In *Brendan Jay McAllery and Tracy Catherine McAllery v Alta Building & Developments Pty Ltd* [2014] NSWCATCD 106 the owners referred to terms to be implied into a cost plus contract in connection with the assertion that only 'direct actual costs that have been reasonably and properly incurred' could be recovered. In these proceedings the applicant does not point to costs that she states were not reasonably and properly incurred. Her complaint is that the costs should have been less.

91 In addition I note that the experts disagree on only a number of items. The fact that the applicant's expert does not agree with a price actually incurred and prefers a price based on Cordell's or some other publication does not persuade me that the price paid was excessive. Merely because a price or a rate is published in Cordell's is not conclusive proof that such a price or rate can be obtained by a purchaser of services in the residential construction industry, especially in a one off renovation project.

92 In *Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd and Anor* [2001] NSWCA 313 Meagher JA stated in connection with an issue of assessment of damages:

> 'The owner received a quotation to do the rectification work in June 1997. It was in the amount of $566,560. However, on the first or second day of the trial, the owner revealed that the rectification was completed and cost $354,281. The trial then proceeded on that basis. The defendants could not have found out earlier, because the files relating to the performance of the work were not discovered (it was not suggested otherwise than unwittingly). On appeal, learned counsel for the owner suggested that the works done for $354,281 related to only part of the works requiring rectification - and, on the face of it, that seems correct. However, in my view it is too late to change horses: the trial was clearly conducted on the basis that $354,281 was paid for all the required rectification work.
>
> 19 What is surprising is that his Honour stated "in the absence of any alternative method of calculating rectification costs or any expert evidence on the point" he would accept the figure of $566,560. It seems almost too simplistic to point out the actual cost

> was an impeccable alternative method of calculating cost.'[Emphasis added.]

93 There is no reason in my view to prefer the applicant's expert's assessment in preference to the actual cost, especially given that the assumptions upon which he based his report were not found to exist. In my view and I so find, the actual costs incurred in the circumstances of these proceedings are an impeccable method of calculating cost.

94 There is also the fatal obstacle to the applicant's overcharging case that it has not been underpinned by a cause of action that is identified and explained.

95 The applicant's overcharging case is for the reasons provided rejected.

Defects

96 The basis of the applicant's defects claim has not been identified. Ordinarily a home owner's defects claim will rely on section 18B of the Act. The owners expert Mr Worthington prepared a scott schedule which in connection with each item states why he is of the view that the item of work that he identifies is defective. The applicant does not press some 9 items in the scott schedule. The items that are pressed by the applicant are pressed on the basis of work not being fit for purpose, and complaints such as incomplete work, item 1.3 and workmanship such as item 1.2 'Tiled splash back not been properly sealed'.

97 At the relevant time section 18B of the Act stated:

> 'The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work:
>
> (a) a warranty that the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract,
>
> (b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,
>
> (c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,
>
> (d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,
>
> (e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,
>
> (f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.' [emphasis added}

98 As previously stated residential building work is defined by the Act in section 3 to mean:

> 'any work involved in, or involved in co-ordinating or supervising any work involved in:
>
> (a) the construction of a dwelling, or

(b) the making of alterations or additions to a dwelling, or

(c) the repairing, renovation, decoration or protective treatment of a dwelling

99 I have found that the services provided by the respondent were supplied under a contract between the parties. I have also found that the respondent was to provide services for or in connection with the carrying out of residential building work because those services were involved in co-ordinating or supervising work involved in the making of alterations to a dwelling, or the renovation or decoration of the dwelling. I found that the organisation of persons to carry out residential building work comes within the concept of co-ordination of work.

100 By reason of my findings that the services provided by the respondent were supplied for or in connection with a contract to carry out residential building work, section 18B of the Act will be implied into the contract that I have found came into existence between the applicant and the respondent. However the warranties that are implied only relate to the work that the respondent was obliged to do.

101 The performance of defective work by tradesmen engaged directly by the applicant or by the respondent on the applicant's behalf will not automatically impose liability on the respondent under section 18B of the Act.

102 The applicant signed quotes from T&M Ferraro Joinery on 18 October 2009, and signed an agreement with Mr Jones on 19 October 2009.

103 In connection with the section 18B(a) warranty, I find that warranty may with some difficulty apply to the work or services that the respondent contracted to undertake, namely interior decoration services and construction or project management services. Those services did not relate to the actual work involved in the making of the alterations or additions or constructing new work to the applicant's dwelling. The phrase 'the work will be performed in a proper and workmanlike manner' traditionally applies to the carrying out of building work.

104 At paragraph 1.470, the Authors of Building and Construction Contracts in Australia state:

> 'Ordinarily the implied warranty will require that the building be constructed with the skill, care and competence of an ordinary contractor and in accordance with good building practice: see Brian Geaney Pty Ltd v Close Constructions Pty Ltd [2003] Aust Torts Reports 81-719; [2003] QSC 393. See further Riverside Motors Pty Ltd v Abrahams [1945] VLR 45; Foster v AT Brine & Sons Pty Ltd [1972] WAR 157; Cassidy v Engwirda Construction Co (No 2) [1968] Qd R 159 at 161 per Hoare J; Barton v Stiff [2006] VSC 307.
>
> The proper performance of the implied duty of skill and care will extend in appropriate cases to require conformity with standard building practice. (See Simpson Steel Structures v Spencer (1964) WAR 101.)'

105 If the applicant had produced evidence that the respondent had failed in some respect in providing interior decorating services or in the manner in which the construction management services were delivered, there would be some basis for considering more definitively whether the warranty in section 18B(a) of the Act applies to those services. However there is no evidence of that type and the applicant's case is not put in that way. On that basis I find that the respondent did not breach section 18B(a) of the Act.

106 In connection with the section 18B(b) warranty, the applicant's case as I understand it there are three items where the allegation is that materials supplied were not fit for purpose, namely items 1.1, 1.4, and 3.6. However the respondent was not personally responsible for the fabrication supply or provision of the relevant items. On that basis I find that the respondent did not breach section 18B(b) of the Act.

107 In connection with the section 18B(c) warranty, there is no allegation that the work undertaken does not comply with law.

108 In connection with the section 18B(d) warranty, there is one allegation that the work was not done with due diligence or within the agreed time. Item 9.4 of the scott schedule claims $717.00 based on a three month delay. I have found that the parties agreement did not oblige the respondent to finalise the renovation within a specific time frame. I dismiss this aspect of the claim.

109 In connection with the section 18B(e) warranty, there is no allegation that the applicant's residence is not reasonably fit for habitation.

110 In connection with the section 18B(f) warranty, the allegation that materials were not fit for purpose must be the same as in connection with the section 18B(b) warranty. For the same reasons as are stated in connection with section 18B(b) of the Act I find that the respondent did not breach section 18B(f) of the Act.

Conclusion

111 The effect of my reasons is that the application fails because the applicant's contract with the respondent did not provide for the applicant assuming the role of carrying out and completing the renovation work as a builder. The agreement that I have found existed required the respondent to provide interior decoration services as well as services that may be described as construction management or project management services.

112 In her application to the Tribunal the applicant stated that the respondent acted as an 'Agent and project manager'.

113 In a letter of demand sent on behalf of the applicant on May 12 2010 the author states that the applicant 'instructs that you were -:…..a project manager/agent for Mrs Channell'.

114 The effect of my findings is that I agree with the applicant's own early characterisations of the respondent's role in the renovation.

115 For the preceding reasons the application is dismissed.

Costs

116 The parties are at liberty to make a costs application in these proceedings.

117 Any costs application pursuant to section 53 of the *Consumer, Trader and Tenancy Tribunal Act* 2001 must be lodged in the Tribunal and served on the costs respondent within 21 days of the date of this order either attaching or referring to the documents

relied upon in support of the application.

118 The costs respondent will have 21 days after the date it receives the application referred to lodge in the Tribunal and serve on the costs applicant its submissions, if any, in response to the cost applicant's costs application, such submissions either attaching or referring to the documents relied upon.

119 The cost applicant will have 14 days after the date it receives the cost respondent's submissions to lodge in the Tribunal and serve on the costs respondent its submissions, if any, in reply, such submissions either attaching or referring to the documents relied upon.

120 The Tribunal will determine any costs application on the basis of the papers lodged in the Tribunal.

D Goldstein

Senior Member

Civil and Administrative Tribunal of New South Wales

29 September 2016

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

Decision last updated: 01 December 2016