



Civil and Administrative Tribunal

New South Wales

Case Name: Balogh v Cardno (NSW/ACT) Pty Ltd

Medium Neutral Citation: [2021] NSWCATCD 102

Hearing Date(s): 20 August 2021

Date of Orders: 15 October 2021

Decision Date: 15 October 2021

Jurisdiction: Consumer and Commercial Division

Before: G Bassett, General Member

Decision: The application is dismissed

Catchwords: BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW) — Residential building work — contractual breach — Delay

Legislation Cited: Home Building Act 1989 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Parsons v Adams [2019] NSWCATAP 301

Category: Principal judgment

Parties: Carmel Balogh (Applicant)
Cardno (NSW/ACT) Pty Ltd (First Respondent)
Body Corporate Services Pty Ltd (Second Respondent)
Genuine Building Solutions Pty Ltd (Third Respondent)

Representation: Applicants (Self represented)
S Denny (Second Respondent)
G Jardine (Third Respondent)

Counsel:
M Gan (First Respondent)

File Number(s): HB 21/26281

Publication Restriction: Ni

REASONS FOR DECISION

- 1 On 17 June 2021 the Ms Balogh applied for an order in the Home Building Division of the Tribunal that she be paid \$24,000.00. In her “Dispute Details” on the originating application she alleged she was “a direct party to the contract for internal repairs to the property”. She alleged delay in completing works, stating works ought to have been completed on 20 July 2020 when in fact they not finished until 8 June 2021. She alleged the contract overran time for 45 weeks and there was a contractual clause that delay damages ran at \$500.00 per week. She alleged lack of project management and supervision by both the first respondent (Cardno) and the third respondent, (GBS). She also alleged that Body Corporate Services Pty Ltd (BCS), the strata management company of the applicants’ own strata, was a cause of delay “due to communication and payment issues”.
- 2 At the conciliation hearing it became apparent the applicant had misnamed the respondents and not provided ASIC company extracts for the respondents despite the request of the Tribunal. The issue was raised as to Ms Balogh being a direct party, or indeed a party at all, to the home building contract alleged. Parties were put on notice that the hearing subject of this determination would consider whether the applicant had a contractual nexus or cause of action under a home building claim against any of the respondents.
- 3 The contract relied on by Ms Balogh was not a home building contract in any of the standard forms such as that of the Office of Fair Trading or an industry association such as the Housing Industry Association. Furthermore, it was common ground between the parties that the works involved were to common walls of the strata. Access was sought through Ms Balogh’s individual lot to these common walls. Access to such walls required removal and restoration of Ms Balogh’s kitchen and bathroom.
- 4 The applicant applied for an Arabic interpreter in her originating application. That interpreter was available at the beginning of the hearing but the representative for Ms Balogh said no interpreter was needed.

- 5 The version of the contract provided by the applicant for hearing was missing key pages. Cardno and GBS provided a full copy, in particular the crucial and missing title page which named the parties to the agreement.
- 6 The main terms and conditions were:
- (a) the contract was between GBS and The Owners of Strata Plan No. 3755 (“The Owners SP 3755”)
 - (b) Cardno was nominated as a contact point for communications about the contract and was a supervisor of the contract, but not a party
 - (c) the contract was for a sum of \$146,300.00 to do restoration works as set out in a contract schedule at Appendix A of the agreement
 - (d) the contract was signed on behalf of the Owners SP 3755 by a representative of their strata management company, being BCS.
- 7 The delay clause relied on by the applicant was at Claus A8 of the contract. It stated delay damages for non-completion by the contract date were limited to \$500.00 per week.

What is a home building claim?

- 8 Under section 48A of the Act a building claim is a claim for payment of money such as in this case (delay damages) 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.
- 9 In no part of the contract is Ms Balogh supplied building goods or services. There is no collateral contract between her and any of the respondents for the work done in her unit to access the common walls or restore areas in her apartment. The only agreement is for GBS to supply those goods and services to The Owners SP 3755.

Ascertaining parties to a home building claim

- 10 In *Parsons V Adams* [2019] NSWCATAP 301 the Appeal Panel of the Tribunal considered the factors to take into consideration when ascertaining parties to a home building contract. At [15] it stated the Tribunal must consider:

As explained by the NSW Court of Appeal in *Boral Limited v Foley & Bear Pty Ltd trading as J&R Industries* [2016] NSWCA 373 at [22], the task of identifying the proper parties to a contract requires consideration of the particular contract and ascertaining objectively who were the parties to the contract:

The identity of a contracting party is to be determined by looking at the matter objectively, examining and construing any relevant documents in the factual matrix in which they were created and ascertaining between whom the parties objectively intended to contract. That is a process of construction not dissimilar from the task of identifying whether a clearly contractual document, such as a bill of lading, is made with one party or another. Where the documents are silent or ambiguous, but there is undoubtedly a contract, the identity of the parties must be determined objectively from the surrounding circumstances: *Air Tahiti Nui Pty Ltd v McKenzie* (2009) 77 NSWLR 299; [2009] NSWCA 429 at [28]

- 11 The written contract is unequivocal. Ms Balogh is not a party. Cardno is not a party. It only had a supervisory role and acted as a contact point for the strata when issues arose under the contract. Most definitely BCS is not a party in any remote way. It only has a strata management agreement with The Owners SP 3755. It had no capacity to control or have any input into the building works. It had no ability whatsoever to have any influence on how works progressed. BCS had no role in the building and were not the cause of any delays. For example, if there was a delay caused by failure to make a progress payment, this default would have been done by The Owners SP 3755, not BCA. It is true that GBS supplied the building goods and services under the contract, but not to Ms Balogh, only to the strata.
- 12 Ms Balogh was asked what negotiations she had with The Owners SP 3755 prior to the contract being entered into. Presumably, there ought to have been management committee meeting resolutions, requests and notices to unit owners whose properties were to be impeded. All those negotiations and agreements well well outside the scope of the building agreement subject of this dispute.
- 13 Such negotiations and agreements may come under the *Strata Schemes Management Act 2015*. For example, section 106 states:

106 Duty of owners corporation to maintain and repair property

(1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.

(2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.

(3) This section does not apply to a particular item of property if the owners corporation determines by special resolution that—

(a) it is inappropriate to maintain, renew, replace or repair the property, and

(b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

(4) If an owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) or (2) in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.

(5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.

(6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.

(7) This section is subject to the provisions of any common property memorandum adopted by the by-laws for the strata scheme under this Division, any common property rights by-law or any by-law made under section 108.

(8) This section does not affect any duty or right of the owners corporation under any other law.

- 14 It may be the owner's corporation were acting under their section 106 duty to have the common walls repaired which required access to, and works on Ms Balogh's unit. But that would have been an agreement between Ms Balogh's and the Owners Corporation. Section 106(5) allows an owner of a lot in a strata scheme to recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation. Ms Balogh seeks delay damages. It is unclear as to how the Owners Corporation would have been able to control the progress of the works under the building contract. That issue would be a matter for evidence between those parties.
- 15 Only the day before this hearing Ms Balogh made a request to join The Owners SP 3755 to this proceeding. There would be little utility in doing that. Any claim between her and the Owners Corporation would be in a different division of the

Tribunal for strata matters. It would also involve different evidence as indicated above. Any claim would have to be brought against the correct party in the correct division of the Tribunal.

16 The application is dismissed.

The image shows a handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right. Below the signature is a circular official seal. The seal features the text "NSW CIVIL & ADMINISTRATIVE" at the top and "TRIBUNAL" at the bottom, separated by two small stars. In the center of the seal is the coat of arms of New South Wales, which includes a shield with a kangaroo and a sheep, topped by a crown and a star.

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

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