

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Budulica v Optima Construction Services & Ors* [2020] QCAT 235

PARTIES: **SLAVICA (SYLVIA) BUDULICA**
(applicant)

v

OPTIMA CONSTRUCTION SERVICES
(first respondent)

MAREK KRAMER
(second respondent)

MOSHEN RAHMAIAN
(third respondent)

APPLICATION NO/S: BDL143-19

MATTER TYPE: Building matters

DELIVERED ON: 25 June 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Kent

ORDERS:

- 1. The application and counter-applications are dismissed.**
- 2. The Application to join Optima Constructions Australia Pty Ltd is refused.**
- 3. Any party seeking an order for costs must file in the Tribunal and give a copy to the other parties of submissions and any supporting evidence on costs, by 4:00 pm on 21 August 2020.**
- 4. If submissions are filed under Direction 4, the other parties must file submissions and any evidence in response, by 4:00pm on 25 September 2020.**
- 5. Any application for costs will then be decided by the Tribunal on the papers and without an oral hearing.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – where contract of sale included condition requiring rectification and additional improvements – where purchaser alleges rectification and

additional improvements were either not performed or were defective – where purchaser claims loss because rectification and additional improvements were defective

Queensland Building and Construction Commission Act 1991 (Qld), s 77(1), Schedule 2

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 47

Stewart v Scott [2020] QCAT 110

Salomon v Salomon & Co Ltd [1897] AC 22

Lee v Lee's Air Farming Ltd [1961] AC 12

DMW v CGW (1982) CLR 491

Fraser Property Developments P/L v at Sommerfeld & Ors [2005] QCA 134

Watford v Office Shop Renovations Australia Pty Ltd [2013] QCAT 122

Tait Management Services Pty Ltd t/as BTA v Rosa [2012] QCAT 564

Murtagh v Queensland Building and Construction Commission [2018] QCAT 258

Felstead v Bundaberg Homes Pty Ltd [2016] QCAT 294

Beck v Kerry M Ryan Pty Ltd [2019] QCAT 38

Elderslie Property Investments No 2 Pty Ltd v Dunn [2007] QSC 192

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

Issues to be decided

- [1] The following are the issues to be decided in these proceedings:
- (a) Is this a building dispute as defined by the *Queensland Building and Construction Commission Act 1991* (Qld) (the QBCC Act), i.e. does the Tribunal have jurisdiction to hear this matter under the QBCC Act?
 - (b) If the answer to (a) is yes, then:
 - (i) who are the appropriate respondents?
 - (ii) should the Application for Miscellaneous Matter filed on 4 September 2019 be granted or refused? Alternatively,
 - (c) If the answer to (a) is no should the substantive application in BDL143-19 and the counterclaims be dismissed due to the Tribunal's lack of jurisdiction?

Background

- [2] Ms Budulica (the applicant and the buyer) purchased a house from Optima Constructions Australia Pty Ltd ABN 59 609 651 407 (the seller; hereafter

“Constructions”; it may immediately be noted that this entity is not a party to these proceedings). The settlement date was listed on the contract as 3 November 2017. Attached to the written contract was a document called Annexure “A”. This document appears to indicate that the seller both before and after settlement would arrange some rectifications and/or additions to the property referred to as the “the work”.

- [3] Ms Budulica says that “the work” has not been completed in accordance with the contract. She claims a loss as a result of that failure and has commenced proceedings in the Tribunal for the resolution of a domestic building dispute and seeks the following orders:
- (a) An order that the Tribunal release the \$8,000 retention monies owing to her plus interest. These monies are currently held by “Own-It” Conveyancing Beenleigh;
 - (b) An appeal of the Queensland Building and Construction Commission (QBCC) decision that the house was deemed liveable and no rectification to be directed (i.e. presumably a contention that this was an incorrect conclusion which should be set aside);
 - (c) An order that all defective work is to be rectified by an independent licensed builder and it is to be paid for by the respondents.

Annexure “A” – prior to settlement

- [4] This annexure is unsigned by the parties and states that the seller (Constructions) agreed to make a number of changes prior to settlement including: tiling the master and spare bedroom to match the tiles in the rest of the house; the installation of shelving in robes in the bedrooms and the pantry space and the linen cupboard; the installation of a side gate on the property; installation of exhaust fans in both bathrooms; and installation of a wired front doorbell.
- [5] It was a condition of the purchase that the vendor would attend to some rectification works. The applicant says that “the work” has either not been completed in accordance with the contract or is defective.

Annexure “A” – post settlement

- [6] Annexure “A” further states that the seller agreed to attend to a number of items within 14 days of settlement including: replacing the hot water system with a larger one and supplying a timber cover for the unit; concreting of the backyard to match existing pathways surrounding the house and the installation of a clothesline in the back yard.

At settlement

- [7] According to the unsigned Annexure “A” the seller (Constructions) and buyer (Ms Budulica) agreed \$8,000 would be retained from the settlement monies to be held in the buyer’s solicitor’s trust account (Own-It Conveyancing Beenleigh) until the agreed prior and post settlement works were completed “in a workman like manner and to the buyers [sic] satisfaction”. If 14 days after settlement the seller had not completed the works, the retention monies were to be immediately released to the buyer.

- [8] The question to be decided by me is whether the Tribunal has the jurisdiction to hear this matter. To this end all the parties were asked to file submissions as to jurisdiction.

Issue (a): Is this a building dispute as defined by the *Queensland Building and Construction Commission Act 1991 (Qld)*?

Submissions

Ms Budulica

- [9] The applicant made submissions via an email which contained a photocopy of a handwritten document. This email was forwarded to the Tribunal on 8 January by Ms Judi Grimes stating that she was doing so on behalf of Ms Budulica. This statement failed to address the topic of the Tribunal's jurisdiction. It only contained a statement that Ms Budulica had a recording of the third respondent saying that he would "release the \$8 K; that he would fix all the defective work; that not once did he inspect any of the work done on the house; that he sold Optima Constructions to Marek Kramer for \$10,000 and forfeited loss of \$250 K".

Mr Mohsen Rahmaian

- [10] Mr Rahmaian was a previous director of Constructions. His submission was filed on 24 January 2020. He disputed all statements made by the applicant in her handwritten pages. He said that her complaints had nothing to do with him as they were about the items that were agreed with the property owners (Constructions) and Marek Kramer. Additionally, he submitted that the applicant and the property owners agreed to carry out the listed items in annexure 'A' for the sum of \$8,000. He submitted that it was clear from the correspondence filed in the Tribunal that this dispute related to items listed as works in annexure "A". He said that this formed a part of the sale/purchase contract of the property. He submitted that he had no part in any negotiation of the sale/purchase contract of the property and that he had resigned his position as director of Constructions on 21 November 2017. In summary he claimed that this matter was between the applicant and the property owners (Constructions) and the dispute was over the agreed conditions of a sale or purchase contract. He requested that the Tribunal release him from the applicant's claims.

Marek Kramer

- [11] On 28 January 2020 there was a submission received from Mr Marek Kramer, the second defendant. He stated that he wanted the Tribunal to make the following orders: he requested that the Tribunal release the \$8,000 retention money held by Own-It Conveyancing, Beenleigh to Constructions; that the Tribunal order the applicant to pay \$9,000 to him as compensation for "all the threatening, bullying, abusing, attacking, intimidating stress caused me and my family by the applicant" and finally that the Tribunal release him of all the applicant's claims as he was just an employee of the builder.

Optima Construction Services

- [12] Submissions on behalf of this entity were filed on 28 January 2020 and signed by Marek Kramer. These submissions can be summarised as follows: Optima Construction Services (hereafter "Services") had never been involved in any of the work at the property; as Services had nothing to do with the matter, it was requested that the Tribunal release it from the matter.

Discussion re issue (a)

- [13] None of the parties made any cogent submissions that went to the issue of jurisdiction as they had been directed to do, with the possible exception of the First Respondent, whose point that it was not a contracting party at least raises (perhaps tangentially) the lack of jurisdiction in that, it having no contractual or other connection to the applicant or the subject matter of the proceedings, there is no basis on which the jurisdiction of the Tribunal could be concluded to be engaged.
- [14] Despite this lack of assistance from or compliance with directions by the parties it is still necessary to consider whether the Tribunal has jurisdiction.
- [15] As outlined in *Stewart v Scott*¹ the Tribunal has jurisdiction to decide a ‘building dispute’: see section 77(1) of the QBCC Act. Whether the dispute here is a building dispute as defined depends, through a chain of definitions,² on whether it is ‘domestic building work’ as defined in section 4 of Schedule 1B of the QBCC Act.
- [16] What is central to all definitions of a building dispute is that the essence of the contract or agreement entered into by all parties is one for the building construction; construction or associated works, in this case with a domestic dwelling.
- [17] In the current case there is no building contract. The applicant has entered into a contract for the purchase of house and land. A building dispute means³ a dispute between a building owner and a building contractor. Ms Budulica contracted only for the purchase of a house and land from a company, Constructions (as outlined, not a party to these proceedings). Companies have their own legal identity that is separate to other entities or persons.⁴ There is no evidence or suggestion that this company is identical with the three named respondents. If there was any building contract it was certainly not between Ms Budulica and those persons/entities she has named.
- [18] Further, the claim can in any case only be a claim for damages under the sale contract. The Tribunal has no jurisdiction to hear that claim. The claim against the respondents cannot be characterised as a building dispute. This is a dispute that is over the agreed conditions of the contract of sale (with an entity that is a non-party).
- [19] As the agreement or contract entered into by Ms Budulica does not in any way meet the requirements of a domestic building contract within the QBCC Act and is in fact a contract of an entirely different nature namely one for the sale of a house and land (from a non-party) an application to have this matter heard as a building dispute by its very nature is doomed to failure.

Authorities concerning lack of jurisdiction

- [20] In the Tribunal decision of *Watford v Office Shop Renovations Australia Pty Ltd*,⁵ the learned member stated that the then equivalent legislation to the QBCC Act, the *Queensland Building Services Authority Act 1991 (Qld)* (QBSA Act) provided that a

¹ [2020] QCAT 110, [6].

² ‘Building dispute’, ‘domestic building dispute’ and ‘reviewable domestic work’ in Schedule 2 to the QBCC Act.

³ QBCC Act, Schedule 2.

⁴ This is, of course, trite law: *Salomon v Salomon & Co Ltd* [1897] AC 22; *Lee v Lee’s Air Farming Ltd* [1961] AC 12.

⁵ [2013] QCAT 122.

person involved in a building dispute may apply to the Tribunal to have the Tribunal decide the dispute:

The Tribunal is a court of record⁶ but it is not a superior court of general jurisdiction. Where a superior court is presumed to act within jurisdiction, there is no such presumption with an inferior court (or tribunal). The law on this is very old.

Nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged.” See *Peacock v Bell* [1845] Eng R 175; 91667) 1 Wms Saund 69 at 74 ... (85 ER 81 at pp87-88).⁷

In a nutshell, building construction must be a central feature of the dispute between parties if the Tribunal is to exercise jurisdiction in respect of a building dispute, not a peripheral attribute used as a threshold point of entry to the Tribunals hearing rooms.

- [21] In the decision of *Tait Management Services Pty Ltd t/as BTA v Rosa*⁸ (“Tait”) Senior Member Stilgoe (as she then was) stated that when the matter is a dispute about a breach of contract, and not building work, the Tribunal has no jurisdiction.

Conclusion re: jurisdiction

- [22] The application concerns a contract about the sale of a house and land, not a building contract. Thus, I find that due to this vital fact, the Tribunal has no jurisdiction to hear this matter as a building matter – or indeed any jurisdiction to hear a dispute about the contract for the sale of land and a house. So, the answer to question (a) of the issues listed at the start of these reasons is no – the Tribunal does not have jurisdiction to hear the application or any counter-applications in proceedings BDL143-19.

Power to dismiss

- [23] Section 47 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) confers on the Tribunal the power to dismiss or strike out proceedings and relevantly provides that:

- (1) This section applies if the tribunal considers a proceeding or a part of a proceeding is—
 - (a) frivolous, vexatious or misconceived; or
 - (b) lacking in substance; or
 - (c) otherwise an abuse of process.
- (2) The tribunal may—

⁶ QCAT Act, s 164.

⁷ *DMW v CGW* [1982] HCA 73; (1982) CLR 491; *Fraser Property Developments P/L v at Sommerfeld & Ors* [2005] QCA 134, [23] (McPherson JA).

⁸ [2012] QCAT 564.

- (a) if the party who brought the proceeding or part before the tribunal is the applicant for the proceeding, order the proceeding or part be dismissed or struck out;

[24] In the Tribunal case of *Murtagh v QBCC*,⁹ Member Traves noted that:

Pursuant to section 47(2)(a) the tribunal may exercise its discretion to strike out or dismiss a proceeding or part of a proceeding brought by an applicant...

The power should be exercised sparingly so that claims that are groundless or which lack merit are barred. If there is a real question to be tried then dismissal at an interlocutory stage is not appropriate.

[25] Additionally, in the case of *Felstead v Bundaberg Homes Pty Ltd*,¹⁰ Senior Member Brown noted that:

Section 47(2)(a) empowers the tribunal to strike out or dismiss a proceeding or part of a proceeding brought by an applicant. It requires the exercise of a discretion by the tribunal. In exercising the discretion, it is necessary to consider whether it is either necessary or appropriate to do so in the circumstances...¹¹

...The exercise of the discretion to strike out requires a consideration of the factors relevant in an application under UCPR r 171: ensuring the relevant documents filed in the Tribunal disclose a reasonable cause of action or defence, do not prejudice or delay the fair trial of the proceeding, are not unnecessary or scandalous, frivolous or vexatious or otherwise an abuse of process.¹²

[26] In *Beck v Kerry M Ryan Pty Ltd*,¹³ Senior Member Brown also noted that:

Section 47 of the QCAT Act is, in effect, a summary judgment power. In an application for summary judgment under the Uniform Civil Procedure Rules 1999 (Qld) current QCAT President Daubney J found in *Elderslie Property Investments No 2 Pty Ltd v Dunn*:

... the court needs to be satisfied not only that the defendant has no real prospect of successfully defending all or a part of the claim, but also that 'there is no need for a trial of the claim or the part of the claim'.

As to the onus of proof in an application for summary judgment, Daubney J held:

As this is the plaintiff's application, the burden of satisfying the court of the matters referred to in UCPR 292(2)(a) and (b) rests on the plaintiff: see *Old Park Pty Ltd v Lott*; as his Honour observes there, this approach is consistent with that under the former rules. As under the former rules, where a plaintiff leads evidence to make out a prima facie entitlement to judgment, the evidentiary onus shifts to the defendant: see *Old Park Pty Ltd v Lott*.

Summary judgment will be granted in only the clearest of cases. The power conferred by s 47 should only be exercised in those cases where it is clear that

⁹ [2018] QCAT 258.

¹⁰ [2016] QCAT 294.

¹¹ Ibid, [39].

¹² Ibid, [76].

¹³ [2019] QCAT 38, [22] – [24].

a party has no real prospects of success and there is no need for a hearing. For KMR to be successful in the application for summary dismissal, I must be satisfied that has no real prospect of success in the proceeding and that there is no need for a hearing in respect of his claim against KMR. As McMeekin J observed in *Reardon v Deputy Commissioner for Taxation*:

The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.

- [27] In the present case I am satisfied to a very high standard that the outcome for Ms Budulica would be totally unsuccessful if she progressed to a hearing of this matter. This is not a building dispute, and the applicant is asking for orders to be made that are outside of the powers of the Tribunal. Further she is asking the Tribunal to review a decision of the QBCC without joining them or following due process. Her application is totally without merit and must be dismissed.

Other orders sought

- [28] Ms Budulica's requested several "orders" be made by the Tribunal that could not be granted, underlining her misapprehension of the jurisdiction.
- [29] Firstly, her request that the Tribunal order her solicitor (a non-party) to release money to her is an order that is not within the jurisdiction of the Tribunal in these circumstances.
- [30] The second order sought by Ms Budulica was a request to review a decision of the QBCC in the Tribunal's review jurisdiction. The QBCC was not a party to this matter nor was the correct procedure followed to commence a review application in the Tribunal. An alleged building dispute is not a method to seek review of a decision such as the one made by the QBCC. This is not an order that could ever be made in a building dispute matter. The Tribunal simply has no power to make this order where the Tribunal has jurisdiction to decide a building dispute, let alone in circumstance such as these where there is no jurisdiction.
- [31] Ms Budulica's last requested order was that the respondent (she does not specify which one) should pay for all defective works to be rectified by a licensed builder. She does not specify the amount of this order. As previously found by me this is not a building dispute, and the Tribunal thus has no jurisdiction to make such an order.

Counter-applications

- [32] Mr Kramer made a counter-application for the Tribunal to release the \$8,000 retention money held by Own-It to Constructions. As stated above the Tribunal has no power to make such an order binding the conveyancing solicitors, who again are non-parties.
- [33] He also requested a payment of \$9,000 for "all the threatening, bullying, abusing, attacking, intimidating stress caused me and my family by the applicant". It is worth noting that Mr Kramer produced no evidence, medical or otherwise to prove his claims. In any case, as there is no jurisdiction for the Tribunal to hear this matter there is no need to consider this counter-application. Finally, he requested that the Tribunal release him from all the applicant's claims as he was just an employee of the builder. Again, as there is no jurisdiction to hear the claim there is equally no jurisdiction to deal with this counter-application. However, to be clear, as with the

application, the counter-applications are struck out under section 47 of the QCAT Act as they are misconceived. Mr Kramer does not have to defend this application or file any further evidence in support of his counter-application as both the application and the counter-application have been struck out.

- [34] Mr Rahmaian has asked for himself to be released from the claims. As I have previously found the application must be dismissed as being misconceived due to the Tribunal's lack of jurisdiction so it follows that Mr Rahmaian must be relieved of any duty to defend the application.
- [35] Similarly, the submission filed on behalf of Services asks for it to be relieved of the burden of defending this application; the orders have this effect.
- [36] In summary the application and any counter application are dismissed under the powers granted to me by section 47 of the QCAT Act.

Issue (b)(i): who are the appropriate respondents?

- [37] Although the answer to question (a) as discussed above makes this question redundant, for the sake of completeness, I will make findings relating to the appropriate respondents. I reiterate my finding that this is not a building dispute within the meaning of the QBCC Act and as such the Tribunal has no jurisdiction to entertain this matter.
- [38] Ms Budulica contracted only for the purchase of a house and land from a company, Constructions. Companies have their own legal identity that is separate to other entities or persons. There is no evidence that proves that the party Ms Budulica contracted with was anyone other than this company.
- [39] There is no building contact here that could enliven the jurisdiction of the Tribunal. The only contract here is not between Ms Budulica and those parties she has named as the first, second and third respondents.
- [40] It appears from material filed by the applicant that she advances the idea that Mr Rahmaian and Mr Kramer may be somehow liable to her as they may have been directors of Constructions.
- [41] Ms Budulica has not named the party she actually entered into a contract (albeit for something other than a building contract) with and has made an application to the Tribunal to join Constructions as a party to these proceedings. My finding in relation to issue (a) logically means that any finding about the question of joining another party to a matter that the Tribunal has no jurisdiction to hear is otiose. As there is no dispute that the Tribunal has the jurisdiction to hear – nor could there be, based on the relevant contract – I refuse the application to join this company. There are no proceedings within the Tribunal's jurisdiction that it may be joined to as a party.
- [42] I refer to the QCAT decision of Senior Member Stilgoe (as she then was) in *Tracey & Anor v Wagner and Anor*,¹⁴ where she found that as a company is a legal but not a real person it must therefore act through individuals. The individual does not owe the same duty or obligation as the company unless there is an agreement to that effect, or the duties imposed by law.

¹⁴ [2012] QCAT 193.

[43] In the above decision Senior Member Stilgoe quoted Justice Chesterman in the decision of *Noosa Shire Council v Farr & Ors*:¹⁵

...it will not ordinarily be the case that directors, even of “small one-man companies”, will assume personal responsibility to a customer with whom they transact business on behalf the company. The ordinary expectation of persons is that the company, not the individual assumes responsibility for the consequences of not effecting the transaction with reasonable care.

[44] There is no evidence before me that indicates that Mr Kramer or Mr Rahmaian was doing any more than acting as a company’s agent. Even this is not clear on the evidence. There is no mention of the first respondent, Services, in the contract at all and it is denied that this entity had anything to do with the property. There is nothing to indicate that any of the respondents accepted personal liability to Ms Budulica for the fulfilment of any condition under the contract for the purchase of a house and land. There is no evidence that Mr Kramer, Mr Rahmaian or Services entered into the contract in their personal capacity and there would be many good reasons why they would resist doing so.

[45] As set out in *Noosa Shire Council* it is not enough for an applicant to say that the respondents did the work. It is unclear who if anyone undertook the attempted fulfilment of the contract for the sale of the house and land. In any event this is not an issue that needs to be considered by this Tribunal due to my finding on issue (a).

[46] All the evidence before me leads me to the inevitable conclusion that any claims against the respondents must be dismissed, there being no building dispute between these parties. The answer to issue (b)(i) is that none of the current respondents are the appropriate respondents in the proceeding.

Issue (b)(ii): Application to add the company

[47] Ms Budulica has not named the party she entered into a contract with (albeit for something other than a building contract). She has made an application to the Tribunal to join Constructions as a party to these proceedings. My finding in relation to issue (a) logically means that any finding about the question of joining another party to a proceeding that the Tribunal has no jurisdiction to hear is pointless. Thus, I refuse the application to join the company. This is the answer to issue (b)(ii) as enumerated earlier in this decision.

Issue (c): if the answer to (a) is no should the substantive application in BDL143-19 and the counterclaims be dismissed due to the Tribunal’s lack of jurisdiction

[48] For the reasons outlined above the answer to this is clearly yes and I dismiss the application and any counter-applications in BDL143-19.

[49] I also dismiss the application to join a party filed 4 September 2019.

Conclusion

[50] It is clear that this dispute has already taken an enormous toll on all parties. As is often the case in disputes people become extremely upset and adopt defensive positions and seek to prosecute what they perceive to be other wrongs or harms that

¹⁵ [2001] QSC 60, [86].

have been done to them. A building dispute was commenced by Ms Budulica. Prior to this occurring she has journeyed down other avenues in search of a remedy, e.g. a complaint to the QBCC and she has publicised her story in the media. These forays have not solved what she perceives as her issue. Ms Budulica has now sought to bring a building dispute claim in QCAT. Due to this being a misconceived action and the Tribunal having no jurisdiction to entertain this matter it means that this action is not a vehicle for collateral goals or the righting of wrongs that she perceives have been visited upon her. The Tribunal cannot consider these irrelevancies but does recognise the personal impact of this dispute on the individual parties. However, such recognition can in no way substitute for jurisdiction to hear this matter. To do otherwise or to make the orders requested would amount to a nullity.

Orders

1. The application and counter-applications are dismissed.
2. The Application to join Optima Constructions Australia Pty Ltd is refused.
3. A party seeking an order for costs must file in the Tribunal, and give a copy to the other party of, submissions and any supporting evidence on costs, by 4:00pm on 21 August 2020.
4. If submissions are filed under Direction 4, the other parties must file submissions and any evidence in response, by 4:00pm on 25 September 2020.
5. Any application for costs will then be decided by the Tribunal on the papers and without an oral hearing.