# Civil and Administrative Tribunal
## New South Wales

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| Case Name: | Home Education Association, Incorporated v The Trustee for Peter Wennersten Family Trust (trading as Icon Innovations Pty Ltd) |
| Medium Neutral Citation: | [2019] NSWCATCD |
| Hearing Date(s): | 16 January 2020 |
| Date of Orders: | 29 January 2020 |
| Date of Decision: | 29 January 2020 |
| Jurisdiction: | Consumer and Commercial Division |
| Before: | Graham Ellis SC, Senior Member |
| Decision: | 1 The application is dismissed.<br><br>2 On or before Friday 07 February 2020, the Respondent is to indicate to the Tribunal and to the Applicant, by email, whether it wishes to make a claim for costs.<br><br>3 If the Respondent indicates it wishes to make a claim for costs, a copy of any written submissions the Respondent wishes to make in support of its claim for costs should be provided to the Tribunal and the Applicant on or before 14 February 2020.<br><br>4 If the Respondent indicates it wishes to make a claim for costs, a copy of any written submissions the Applicant wishes to make in response to the Respondent's claim for costs should be provided to the Tribunal and the Respondent on or before 21 February 2020.<br><br>5 Any submissions as to costs submitted by either party should also address the question of whether the question of costs can be dealt with "on the papers" (ie on the basis of the written submissions without a further hearing). |

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| Catchwords | Consumer claim, Supply of goods - website and logo, Terms of contract, Whether breaches were proved |
| Legislation Cited: | *Australian Consumer Law*<br>*Civil and Administrative Tribunal Act 2013*<br>*Civil and Administrative Tribunal Rules 2014*<br>*Competition and Consumer Act* 2010<br>*Fair Trading Act* 1987 |
| Cases Cited: | *Canning v Temby* (1905) 3 CLR 419<br>*Oceanic Sun Line Shipping Company Inc v Fay* (1988) 165 CLR 197<br>*Olley v Marlborough Court* [1949] 1 KB 532 |
| Category: | Principal judgment |
| Parties: | Home Education Association, Incorporated (Applicant)<br>The Trustee For Peter Wennersten Family Trust (trading as Icon Innovations Pty Ltd) (Respondent) |
| Representation: | Karen Chegwidden, Teresa Latimer (Applicant)<br>Peter Wennersten, Kerry Wennersten (Respondent) |
| File Number(s): | GEN19/45990 |
| Publication Restriction: | Nil |

## REASONS FOR DECISION

### Background

1 Home Education Association, Incorporated (the Applicant) commenced proceedings against The Trustee for Peter Wennerstein Family Trust, trading as Icon Innovations Pty Ltd (the Respondent). From the six page narrative in the application, it is sufficient to indicate that the Applicant alleges there was a contract made on 29 September 2016 as a result of the Applicant accepting the Respondent's quote of $22,000 plus GST for work relating to design and artwork for the Applicant's brand and the Applicant's website. It is alleged that the work done by the Respondent was not fit for its purpose, was not of acceptable quality and did not fit the agreed description. Further, the Applicant alleged that the Respondent engaged in misleading and deceptive conduct. In its application, the Applicant seeks a refund of the contract amount plus $15,000 in damages.

### The Applicant's documents

2 The Applicant has lodged five bundles of documents. The document received on 14 October 2019 has become Exhibit A, the three bundles of documents lodged on 12 November 2019 have been marked Exhibits B, C and D while the document provided to the Tribunal on 20 December 2019 is now Exhibit E. Two documents were admitted as Exhibits G1 and G2 during the hearing as they were in response to the documents lodged by the Respondent.

3 Exhibit A contains a 16-page overview of the Applicant's case. However, it was difficult to follow that document as the references in that document to tabs and pages suggest 58 tabs and 458 pages of documents while Exhibit B contains, behind 35 tabs, the 407 pages of documents upon which the Applicant relies. For that reason, the Applicant's representatives were asked to revise that document at the hearing so that it could be used in conjunction with Exhibit B. Exhibit C is the affidavit of Karen Chegwidden dated 06 November 2019. Exhibit D is the affidavit of Teresa Latimer dated 07 November 2019.

4 In order to understand that Applicant's case, it has been necessary to read through Exhibit A, referring to the documents in Exhibit B as and when necessary. The Applicant's lay evidence is contained in the affidavits which are Exhibits C and D while the expert evidence upon which the Applicant relies are the three reports which are in Exhibit B behind tabs 31-33.

**The Respondent's documents**

5 The documents lodged with the Tribunal by the Respondent on 26 November 2019 have been marked as Exhibit E, In the first document in that exhibit, headed Points of Defence, the Respondent repeats the assertion: "[The Applicant has] *not established the terms of the agreement and what terms of the agreement have been breached*" and otherwise denies the Applicant's claims. It is also suggested: "*All tasks were delivered, approved and paid*" and that the "*contract ended on 05 May 2018*."

6 Exhibit E also contains 85 pages of documents behind five tabs, including a statement signed by Susan de Wall and Chris de Wall, the statutory declarations of Beverly Paine and Myfanwy Dibben and two impact statements from Peter and Kerry Wennersten who are the two directors of the Respondent company.

7 An email, sent by the Applicant to the Respondent on 09 December 2019 (Exhibit F), contained a number of requests. There does not appear to have been any response to that email and the matters raised in that email were not pursued during the hearing.

**The hearing**

8 At the hearing, the issues of what was the contract, what were the breaches and what were the damages were addressed by providing then Applicant then the Respondent with an opportunity to address each of those issues after which closing submissions were made.

**Jurisdiction**

9 In order for the Applicant to succeed in these proceedings it needs to have both a legal basis and a factual basis for its claim. By reference to the provisions of the *Fair Trading Act* 1987, it is clear that the Applicant is a consumer (within section 79D) bringing a consumer claim (within section 79E), for a supply of goods (within section 79G), being goods that were supplied in New South Wales (within section 79K) and that the Applicant is entitled to have its claim determined by the Tribunal (section 79I). The amount of the claim is the contract price of $24,200, damages of $15,000 and a claim for an additional amount of $1,100 that was paid to the Respondent. The total of those amounts is $40,300 and, although that exceeds the $40,000 monetary limit (imposed by section 79S), the Applicant's claim will not breach that limit in the event the Applicant is successful provided the Applicant accepts the jurisdictional limit of the Tribunal.

10 The claim has been brought within three years (as required by section 79L) since the application was lodged on 14 October 2019 and the causes of action upon which the Applicant relies occurred after 14 October 2016 in relation to a contract made on 29 September 2016.

**The law**

11 The effect of section 27 and 28 of the *Fair trading Act 1987* is that the provisions of the *Australian Consumer Law* (ACL), being Schedule 2 to the *Competition and Consumer Act* 2010 (Cth), apply. In these proceedings, the Applicant alleges the goods supplied by the Respondent were (1) not fit for their purpose, (2) were not of acceptable quality, (3) did not fit the agreed description, and involved both (4) delays and (5) misconduct. Accordingly, the Applicant is alleging breaches of sections 18, 54, 55 and 56 of the ACL. In relation to the relief sought, the Applicant relies on sections 236-238 and 259-263 of the ACL.

12 Sections 18, 54, 55 and 56 of the ACL, insofar as they are relevant to these proceedings, are set out below.

(1) Section 18 provides: “A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. …”

(2) Section 54 reads: “If … a person supplies, in trade or commerce, goods to a consumer … there is a guarantee that the goods are of acceptable quality. …

(3) Section 55 says: “If … a person (the supplier) supplies, in trade or commerce, goods to a consumer … there is a guarantee that the goods are reasonably fit for any disclosed purposes, and for any purpose for which the supplier represents that the are reasonably fit. …

(4) Section 56 is as follows: “If … a person supplies, in trade or commerce, goods by description to a consumer … there is a guarantee that the goods correspond with the description.”

13 The Applicant’s Summary seeks a refund of money paid, damages and compensation and refers to sections 236-238, 259-261 and 263 of the ACL.

**Analysis**

14 The three primary issues in this matter are: (1) what was the contract, (2) have any of the alleged breaches of statutory provisions been breached, (3) if so, what should be the damages or other remedy. There are also allegations relating to delays and allegations of misleading and deceptive conduct.

**The contract**

15 On 11 August 2016 the Respondent provided the Applicant with a proposal that set out a the following summary of what was included in the proposal:

Tasks to complete for the HEA.

- Design & Artwork of the HEA brand

- Design of the HEA website
- Framing and Build Of the HEA website
- Membership Integration & Testing
- Shopping Cart Integration for membership + product(s)
- Adding Forum Integration
- Migration of all HEA Content

  Included will be any third party premium extensions.

  Not included is any photography that would be required.

This can be achieved by engaging a photographer and or purchasing library images.

Ongoing updates and support – Monthly options available.

Total HEA investment:

- $22,000 + GST

Options available of six monthly instalments of $4,000

16 By email sent on 29 September 2016 (B113) Ms Latimer, on behalf of the Applicant, accepted that proposal by advising the Mr Wennersten, on behalf of the Respondent: *"Please see Susan's email below – the Committee would like to hire you to do a new website and branding for the HEA …"*

*17* The reference to Susan's email was to an email sent to Ms Latimer the night before (B113) which included the words: *"Could you please advise Pete – we will work with his branding document that he has already sent us."*

18 While that offer and acceptance contained little in the way of terms and conditions, and while no time frame was mentioned either in the offer or in the acceptance, it is clear that the parties had agreed that the Respondent would complete seven tasks, itemised above with an asterisk, for $22,000 plus GST.

19 It should be noted that after the 11 August 2016 offer and before the 29 September 2016 acceptance there were communications in relation to the Respondent's proposal.

20 An email sent on 15 August 2016 the Respondent indicated that: (1) Good hosting should only cost around $200 per year, (2) there could be forums and Wikis set to different membership levels, (3) there would be a built-in blog, (4) the site would be fully SEO (ie search engine optimisation) optimised, (5) the shopping cart could be customised, and (6) the proposal included *"some content migration*", depending on how much there was and how easy it was to migrate to the new website from its then existing location.

21 On 16 August 2016 the Respondent sent an email that provided four examples of other websites the Respondent had built and managed.

22 On 19 September 2016 there was a teleconference call involving Mr Wennersten, on behalf of the Respondent, and the following people on behalf of the Applicant: Mrs Wennersten (Subscriptions Contractor), Ms Latimer (Administrative Contractor), Vivienne Fox (Vice President), Mrs de Wall (Secretary) and Carly Landa (Committee Member).

23 There was a telephone conference between Mr Wennersten and Ms Latimer the next day, ie 20 September 2016 that lasted for more than half an hour.

From the transcript of that meeting, without reference to what happened subsequently, the following matters were covered in the conversation on that occasion: (1) The Applicant had four shopping cart options, namely new memberships and renewals, both for either one or two years. (2) Discounts could be accommodated via a built-in feature for coupons. (3) The shopping cart could be organised to have categories for membership, services and products. (4) Anyone paying by cheque could be handled manually. (5) Migration of HEA membership data would need to retain the existing membership number. (6) There would be random products and services that would be coming in over time. (7) There would be items that could only be downloaded by members. (8) There was a need for a notification facility in order to obtain an insurance certificate for the Applicant's events. (9) Non-members would still have access to some parts of the Applicant's website. (10) There was a need to capture details of everyone who came to the website, not just members, which the Respondent said we be a custom build, meaning it would be additional to what was included in the proposal. (11) Switching to Google is a simple process but it may take up to 72 hours to migrate. (12) There would need to be staging of the facilities provided by the Respondent.

24 In the Applicant's document headed "*Full Summary of Claim*" (the Summary), which became Exhibit A, it was suggested that the website component of the contract between the Applicant and the Respondent included no less than twelve detailed aspects, labelled with the letters a to l, and that the branding or logo component had five detailed aspects. However, there are a number of difficulties that stand in the way of those matters being found to be part of the contract between the Applicant and the Respondent.

25 First, in a number of instances, the supporting references for those elements post-dated the Applicant's 29 September 2016 acceptance of the Respondent's 11 August 2016 proposal. Secondly, a consideration of the transcript of the 20 September 2016 conversation between Mr Wennersten and Ms Latimer reveals that the detailed aspects now alleged by the Applicant do not appear in the transcript of that conversation either at all or to the level

of detail alleged by the Applicant. Thirdly, the Applicant's evidence of acceptance of what the Respondent was proposing was confined to a brief email sent on 29 September 2016 and did not include the minutes of the meeting at which the Applicant's committee made the decision communicated in the email sent following that meeting.

26 As to the last of those matters, name lay the absence of the minutes, the Applicant cannot be said to be caught by surprise on that aspect since, in a letter dated 11 June 2019, signed by Ms Chegwidden, Ms Latimer and the Applicant's then secretary and treasurer, the Applicant said to the Respondent:

> "Regarding the word of mouth contract you claim exists, if that contract was made with individual committee members, they have acted outside of their authority in this matter. The alleged contract is therefore likely void. If the verbal contract had been made between Icon Innovations and the HEA Management Committee, **this would be recorded in the minutes**. We are unable to locate any evidence that any such contract was ever entered into. …" (emphasis added)

27 It also needs to be noted that, in the Summary, at paragraph 11, it was said:

> "Ms Latimer does not recall knowing that Mr Wennersten recorded the phone conversation. Around a year later, Mr Wennersten shared the phone recording with the HEA in Google Folder."

28 Since:

(1) Ms Latimer has not provided any evidence she made any notes of her telephone conversation with Mr Wennersten,

(2) Ms Latimer did not have the transcript of the conversation that was said in the conversation on 20 September 2016 at the time of the Applicant's 26 September 2016 committee meeting and has not suggested she kept notes of that conversation,

(3) there absence of relevant evidence in the affidavit of Ms Latimer (considered in the next paragraph)

there is an evidentiary vacuum not only as to what aspects Ms Latimer communicated to that committee meeting on 26 September 2016 but also as to what aspects were accepted by the committee at that meeting, due to the absence of the minutes of that meeting.

29 In her affidavit, Ms Latimer recounts her version of the events prior to the 26 September 2016 meeting, in paragraphs 10 to 27, and then, in paragraph 28, does no more than say that the Respondent was informed by email on 29 September 2016 that the Applicant had accepted the Respondent's proposal. What is lacking in the affidavit of Ms Latimer is any reference to what occurred at the committee meeting.

30 It is convenient to here note a number of deficiencies in the affidavits of Ms Chegwidden and Ms Latimer. The affidavit of Ms Chegwidden, in paragraph 7, suggests a copy for the authorisation for her to act in these proceedings is at Tab 3, page 16 in the folder that became Exhibit B. However, the document at that page is only a letter dated 01 November 2019, after these proceedings were commenced on 14 October 2019, which letter suggests there was a resolution passed at a meeting of the Applicant's committee held on 15 October 2019. That 01 November 2019 letter states: "*The Minutes of that meeting showing this resolution are attached behind this letter.*" But the document that followed that letter was a copy of the minutes of a Special General Meeting of the Applicant held on 04 May 2019 with unrelated subject matter. Secondly, as to the committee meeting held on 26 September 2016, Ms Chegwidden, in paragraph 14, only set out her understanding of what happened at that meeting. Thirdly, the bulk of what purports to be an affidavit is no more than a written submission in support of the Applicant's case.

31 The affidavit of Ms Latimer also refers to Tab 3, page 16 in Exhibit B to suggest she has authority to act on behalf of the Applicant in these proceedings and that, as indicated earlier, is an allegation without proper documentary support. Secondly, in paragraph 20 of her affidavit, Ms Latimer

suggests she took notes of the 19 September 2016 conversation with Mr Wennersten and that such notes were included in the minutes of the committee meeting held on 26 September 2016. However, there was nothing in this affidavit to suggest that any notes of the 20 September 2016 conversation with Mr Wennersten were taken let alone presented to the 26 September 2016 committee meeting and, as indicated earlier, no copy of those minutes has been included in the Applicant's evidence.

32 The affidavit of Ms Latimer suggests, in paragraph 22, that an excerpt of the minutes of that committee meeting are at pages 50-52 in Exhibit B. In fact, the documents at those three pages each relate to the 19 September 2016 conversation and there is no document to indicate what was put to the committee meeting in relation to the conversation between Ms Latimer and Mr Wennersten that was said to have occurred on or about 20 September 2016. Further, no explanation has been provided for the absence of the minutes of the committee meeting held on 26 September 2016.

33 Importantly, paragraph 26 of Ms Latimer's affidavit suggests:

> "In the final one minute of the 20 September phone meeting, Mr Wennersten said he would consider all of the requirements and make sure his quote covered all the resources he would need."

34 The transcript of that conversation, which appears to have been 37 minutes and 40 seconds long and which contains indications of elapsed time, does not support the suggestion of Ms Latimer quoted in the previous paragraph. Indeed, during that last minute Mr Wennersten said he would "*look at the quote in more detail*" and, shortly thereafter, Ms Latimer said: "*I will talk to you in the next day or two or something"* which suggests further conversations were considered necessary.

35 In these proceedings, commenced by the Applicant, the Applicant bears the onus of proof. The Tribunal is not satisfied that the Applicant has met that onus of proof in relation to the detailed aspects alleged in relation to either the

website aspect or the branding/logo aspect of the contract between the Applicant and the Respondent.

36 There is a further aspect that needs to be dealt with in relation to what constituted the contract between the parties. After the 11.19am email on 29 September 2016 which accepted the Respondent's offer, the Respondent's Mr Wennersten sent an email at 6.45pm that day. Attached to that email was a four-page document that includes matters appearing to suggest terms that would apply to the contract between the Applicant and the Respondent. As a contract between the parties had already been formed earlier that day, the contents of that attachment cannot be regarded as modifying the contract between the Applicant and the Respondent in the absence of evidence the Applicant accepted those matters. The proposition that terms cannot be added after a contract has been made has long been accepted as a correct statement of the law: *Olley v Marlborough Court* [1949] 1 KB 532, *Oceanic Sun Line Shipping Company Inc v Fay* (1988) 165 CLR 197.

37 Accordingly, the contract between the Applicant and the Respondent was confined to the Respondent's 11 August 2016 proposal, which was accepted by the Applicant in an email sent on 29 September 2016, and did not include either the details alleged by the Applicant or the additional terms suggested by the Respondent.

38 Finally, on the question of contractual arrangements, it should be observed that the evidence reveals the Respondent proceeded on the basis that its relationship with the Applicant involved ongoing work in relation to the website additional to that covered by the contract created on 29 September 2016 and rendered invoices based on that belief. However, there was nothing in the evidence to establish that the Applicant ever agreed to either the nature or extent of such work or the basis on which that work would be charged.

**Alleged breaches**

39 The breaches set out in the Applicant's Summary were based on the propositions that the website and logo provided to the Applicant by the

Respondent (1) were not complete, (2) were not fit for their purpose, (3) were not of acceptable quality and (4) did not fit the agreed description. As the foundation for those allegations, the Applicant relied on the details it suggested were part of the contract for the website and the logo. Since those details did not form part of the contract, it is not necessary to assess the four categories of alleged breach against the details upon which the Applicant relied. However, it is nonetheless necessary to consider those allegations by reference to what was the contract and what was provided.

40 From the Applicant's Summary, it is noted that, under a heading "*Product not complete, not fit for purpose and not repairable"*, the Applicant relied on the documents behind tabs 15 and 27-29 in Exhibit B, the affidavits of Ms Chegwidden and Ms Latimer and the documents behind tabs 31-33.

41 The documents behind tabs 31-33 were provided to the Applicant by: Akash deep Shakya of EB Pearls, Jennifer Ettia of Sombrilla Digital and Adam Porter of Volcano Marketing. There are a number of difficulties with giving those documents evidentiary weight. First, none of those three reports refers to the Tribunal's Code of Conduct for Expert Witnesses. Secondly, none of the documents sets out the qualifications and experience of the authors. Thirdly, it appears that each of the authors of those reports is providing a quote for work they wish to undertake with the result that they have a financial incentive for the Applicant's case to succeed. Fourthly, there is nothing to indicate what documents or other materials were provided to the authors of those reports. Fifthly, from what is available, it appears that the reports are based on the Applicant's expanded view of what was included in its contract with the Respondent.

42 The documents behind tabs 27 to 29 are no more than screen shots and other pages without additional explanation while the pages behind tab 15 reveal no more than a logo and an element of that logo.

43 As to the affidavit evidence upon which the Applicant relies, the affidavit of Ms Chegwidden, under the heading *"Product not complete, not fit for purpose and*

*not repairable",* contains, in paragraphs 31 to 38, no more than Ms Chegwidden's opinion and submissions which are also based on the Applicant's expanded view of what was included in its contract with the Respondent.

44 For present purposes, the relevant portion of Ms Latimer's affidavit commences at paragraph 73. Those paragraphs tell the story of obtaining legal advice and obtaining three assessment and quotes for repair. It is clear that Ms Latimer has proceeded on the basis that the contract between the Applicant and the Respondent was the expanded version for which the Applicant contends. There is little beyond Ms Latimer's evidence in paragraphs 76 to 78 that, when she accessed the website and the logo on or abut 27 September 2019, the website did not seem to work, that the content was from early 2017 with only *"a couple of additions evidence in April 2018 around the time when ICON submitted its final invoice."*

45 That being the evidence of the Applicant, it is necessary to consider the evidence upon which the Respondent relied on this issue, being (1) the combined statement of Mr and Mrs de Wall, (2) the statutory declaration of Ms Paine, (3) the statutory declaration of Ms Dibben and (4) the statements of Mr and Mrs Wennersten.

46 The statement of Mr and Mrs de Wall maintains that, when they resigned from the Applicant's committee in April 2018, the Respondent had completed and delivered *"all of the necessary stages up to that point*" and had been paid, with payments approved by the Applicant's committee. This statement then continued to outline additional work and services and noted: *"This service combined with the new subscriptions setup helped increase the membership by up to 500 new members."* The paragraph concluded with the sentence: *"Despite delays to the original project brought about by bringing these extra services online, the committee completed the brand process and had approved all the major components of the website."* The first sentence of the next paragraph read: *"The website build was not live at the time we left because of the political mess the HEA Inc Committee found itself in."*

47 Ms Paine was a member of the Applicant's committee in 2017 who attended committee meetings at which the new website, being prepared by the Respondent, was discussed. Her evidence was that she also participated in email discussions regarding the new website. In July 2017 she attended training sessions in order to use the Google Education platform, Zoom and her new email address, all of which she understood to be part of operating under the new website. Paragraph 13 of Ms Paine's statutory declaration read as follows:

> "As a committee member, in April 2018, having read the final website report prepared by Peter Wennertsen for the HEA Committee, and acknowledging that the development of the website and integration of Google Education platform (HEA's virtual office environment) was completed, with the website ready for handover and population of content by appropriately trained volunteers organised by the incoming committee before going live, I voted to approve the final payment to Icon Innovations."

48 Ms Dibben was also a member of the Applicant's 2017 committee. In paragraph 9 of her statutory declaration, Ms Dibben said that the website and G-suite (ie the various Google applications, which may carry an ongoing fee) formed the virtual office for the Applicant and included *"all HEA Inc documentation, membership registry, financial records and website."* She went on to suggest that website *"is currently in use by Tere Latimer, Karen Chegwidden and any volunteer working for the HEA Inc today, and yet the appellant claims this infrastructure is deficient and undelivered. How can that be?"* Ms Dibben also suggested the Respondent had completed the new website and rebranding work which had been approved by the 2017 committee and for which the Respondent had been paid. There are quotations from minutes of meetings of the Applicant's committee held on 18 September 2017 and 30 October 2017. Ms Dibben notes that it was the responsibility of the Applicant, not the Respondent, to populate the website with content. In other words, the Respondent was to provide a facility the Applicant would then use and it was not part of the Respondent's contract to write copy for the Applicant's website.

49 Again, the Applicant has not established its case on the balance of probabilities for a number of reasons. First, there was little in the way of

supporting evidence from the Applicant that the Respondent has breached the contract. Secondly, there was significant evidence from a number of witnesses providing support for the Respondent's case. In addition to the evidence of Mr and Mrs de Wall, Ms Paine and Ms Dibben, there is the statement of Mr Wennersten, considered later. Thirdly, a close review of the submissions made on behalf of the Applicant by Ms Chegwidden and Ms Latimer do not reveal any submission as to why the evidence of the Respondent's witnesses should not be accepted. In those circumstances, even just the evidence of Ms Dibben warrants a finding that the Respondent's work under the contract was complete, fit for purpose, of acceptable quality and in accordance with the description of the work contained in the accepted offer that delineated the contract.

**Delays**

50 The Applicant alleged there were delays in the Respondent's delivery under the contract. However, there was no submission as to what remedy or relief was claimed in relation to those alleged delays. In the Summary of the Applicant's case, it was first alleged that the delays covered a 15-month period from January 2017 to April 2018 although the period said to involve unexplained delays was later said to be the 19 month period from October 2016 to May 2018.

51 Although the contract between the parties did not include any provision as to the date by which the new website and rebranding work would be completed by the Respondent, it is well established that the law implies a requirement that work done under a contract be completed within a reasonable time. See, for example, *Canning v Temby* (1905) 3 CLR 419.

52 The evidence upon which the Applicant relied under this heading was documentary, being the documents behind tab 17 in Exhibit B. Paragraph 20 of the Summary (Exhibit A), suggested: "*A series of unexpected and unexplained delays ensued*" and paragraph 21 said those delays were

communicated by the Respondent to the Applicant in four documents, dated 16 January 2017, 17 March 2017, 19 October 2017 and April 2018.

53 The first of those documents set out the steps that remained and there was no evidence of any complaint by the Applicant in response. The second, dated 17 March 2017 was in the nature of a progress report that makes it clear that further discussion by the Applicant was required. Again, there was no evidence of any response from the Applicant, complaining about there being a delay. The 19 October 2017 document is another status report that does not appear to have attracted any complaint in reply. This document indicated: *"When the committee is satisfied the site is ready and tested the site can go live."* Finally, in April 2018 the Respondent sent emails on the 18th and 28th the Respondent explained its position and those two emails suggest there were already difficulties being encountered by the Respondent in its dealings with the Applicant's committee. A review of the documents upon which the Applicant relies does not support the assertion that the delays were unexplained. Indeed, those documents contain suggestions that the conduct of the Applicant was a contributing cause of the delays that had occurred.

54 Paragraph 22 of the Applicant's Summary refers to a number of documents in support of the contention that the Applicant attempted to work with the Respondent despite the delays. The role of the committee in those delays can be seen from the 09 October 2017 email which included the words: *"I have asked Pete to stop all work on the branding until I have some further clarification from the committee."* The next email the Applicant relies on is dated 06 March 2018, almost five months later, and commences with the words: *"The committee is now moving forward again …".* On 26 April 2018, an email from the Applicant to the Respondent did request an update on the progress of the website but did not contain any hint of any complaint or undue delay. The last of the documents the Applicant relied on under this heading was a 19 July 2019 request for the handover of control the website which appears to have occurred two months later, in the latter part of September 2019, following negotiations relating to amounts the believed to be owing to the Respondent, in relation to the website, and to Mrs Wennertsen (a director

of the Respondent) for administrative work said to have been done for the Applicant.

55 The Respondent's case on delay appears to involve a number of propositions. First, that there were difficulties dealing with the Applicant's committee from September 2017, according to Mr and Mrs de Wall, and occasions where the Applicant's committee put the Respondent's work "on hold", such as the 09 October 2017 email. Secondly, that there was acceptance of the Respondent's work in April 2018. Thirdly, was turmoil within the Applicant between 04 May 2018, when the Applicant's annual general meeting was postponed, and May 2019 when the litigation in the Supreme Court was finalised. Thereafter, a demand was made for the handover of control of the website which was done.

56 It is to be noted that the work the Respondent contracted to do in relation to the website and, in particular, the branding was not just a matter of the Respondent providing work: it included the need for the Applicant to consider what the Respondent had done or proposed and provide him with feedback. Further, the position in relation to a website needs to be considered since a website can be completed but administered by the creator for the client with control handed over by the creator to the client at a later date.

57 The evidence placed before the Tribunal warrants findings that there was no actionable delay arising from the period from September 2016, when the contract was formed, until April 2018, when the final contract payment was made. Further, any delay from May 2018 to May 2019 was due to the conduct of the Applicant, not the Respondent. Also, there does not appear to be any damages claimed by the Applicant to have arisen due to the alleged delays. There is also evidence to suggest that the conduct of the Applicant was a contributing factor in relation to the delays that occurred. Finally, it must be observed that any question of delay must be considered by reference to the contract between the parties as determined by the Tribunal and not the expanded version of the contract for which the Applicant contended.

**Conduct**

58 Allegations under the heading "*Conduct of ICON*" in the Applicant's Summary were set out in paragraphs 30 to 43 of that document. It appears the nature of the Applicant's complaint is that control of access to the Applicant's G-suite was provided to Mr Wennersten on or around 03 May 2019 but that it was not until 14 May 2019 that such control was handed over to the Applicant. At this time there were matters in dispute between the Respondent and the Applicant and as to the provision of ongoing services and between Mrs Wennersten and the Applicant as to payment for administrative work she had undertaken for the Applicant. It thus appears that the control of access to the Applicant's G-suite was part of the bargaining process in which the parties were engaged at that time.

59 The Applicant also suggested that there was an inconsistency in that, in response to the Applicant's complaint to the Office of Fair Trading on 01 August 2019, the Respondent had suggested it had delivered the new website design to the Applicant's 2017 committee in contrast to he handover of control of that website on 26 September 2019. As the Respondent has provided evidence of the handover of the website to the Applicant's 2017 committee from members of that committee, it appears the explanation for this aspect lies in the distinction between making a website available for use and providing control of that website.

60 There does not appear to have been any evidence provided by the Applicant in support of a claim for damages based on these allegations made in relation to the conduct of the Respondent. Nor do there appear to be any submissions made on behalf of the Applicant as to either how the alleged conduct contravened section 18 of the ACL or what damages resulted from a breach of that statutory provision. As a result, the claims made under this heading do not provide any basis for a decision in favour of the Applicant.

**Damages**

61 The Applicant made a claim for damages against the Respondent. Based on the views of the consultants that the website was not repairable, it was submitted that the cost of "*starting from scratch*" was $12,000 to $18,000 plus GST and that the cost of developing branding and a logo was estimated to be between $3,000 to $5,000 plus GST: a total of between $15,000 and $23,000 plus GST. Based on those estimates a refund of the contract price of $22,000 plus GST was sought along with a further amount of $15,000 in damages for: "*losses of membership engagement, membership purchases, monetary interest, cost of legal advice and consultants, three years of time spent by the Committee, plus the stress of dealing with deceptive conduct from the Respondent's directors*". It appears the Applicant also claims the additional $1,000 plus GST that was paid to the Respondent over and above the contract price.

62 However, there is no underlying basis for an award of damages in view of the findings set out above.

**Respondent's evidence**

63 For the sake of completeness, it is noted that the Respondent's bundle of documents (Exhibit E) included a section headed: "*Damages, Losses and Costs*". However, as there is no cross-claim made by the Respondent in these proceedings, and as the Respondent has not commenced separate proceedings against the Applicant, it is not necessary to consider the claims made on page 80 of that bundle.

64 A statement from Mr Wennersten commences at page 81. So far as is relevant for these proceedings, Mr Wennersten's statement makes the following points. First, that issues began to emerge within the Applicant's committee early in 2017 and escalated. Secondly, the committee's secretary and three other committee members continued to work with the Respondent so that the website and branding could be completed, approved and paid for by April 2018. Thirdly, actions against the committee prevented to 2017

committee from completing its obligations on the website with the result that it could not be opened to members and those tasks were left for the incoming committee. Fourthly, at a special general meeting of the Applicant held in June 2019 Mr Wennersten made three attempts to be heard in response to an attack on the 2017 committee and the Respondent but was unsuccessful.

65 The statement of Mrs Wennersten commences at page 84 of Exhibit E. That statement only addresses the issues raised by the Applicant in general terms and outlines the impact these proceedings and the events leading up to them have had on her.

**Findings**

66 By way of summary, having regard to the evidence and the submissions of the parties:

(1) The contract between the Applicant and the Respondent, covering a website and a rebranding logo, arose from the 11 August 2016 offer made by the Respondent and the acceptance of that offer by email on 29 September 2016.

(2) The work required by that contract was completed, fit for its purpose, of acceptable quality and did fit the agreed description.

(3) Although there were delays, the work was completed within a reasonable time, having regard to the nature of the work and the delays resulting from the disputation that arose within the Applicant.

(4) There was no misleading or deceptive conduct on the part of the Respondent.

**Costs**

67 As the Applicant's claim for damages did include a claim for costs, it may be that the Respondent, being the successful party in these proceedings, will

wish to bring a claim for costs. The position in relation to costs is set out below

68 Section 60 of the *Civil and Administrative Tribunal Act 2013* (the Act) provides:

(1) Each party to proceedings in the Tribunal is to pay the party's own costs.

(2) The Tribunal may ward costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.

(3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following:

(a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,

(d) the nature and complexity of the proceedings,

(e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacing in substance,

(f) whether a party has refused or failed to comply with the duty imposed by section 36(3),

(g) any other matter the Tribunal considers relevant.

(4) If costs are to be awarded the Tribunal may:

(a) determine by whom and to what extent costs are to be paid, and

(b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014) or on any other basis.

(c)

(5) In this section:

**costs** includes:

(a) the costs or, or incidental to, proceedings in the Tribunal, and

(b) the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal.

69 However, the effect of section 35 of the Act is that section 60 is subject to Rules 38 of the *Civil and Administrative Tribunal Rules 2014* and that rule states:

(1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.

(2) Despite section 60 of the act, the Tribunal may award costs in proceedings to which this rules applies even in the absence of special circumstances warranting such an award if:

…

(b) the amount claimed or in dispute in the proceedings is more than $30,000

70 Section 50 of the Act provides a way for the Tribunal to dispense with a hearing and deal with a matter on the basis of written submissions, commonly termed “on the papers”, but only after both providing an opportunity for the parties to make submissions about such a proposal and taking those submissions into consideration.

71 Accordingly, the orders made in these proceedings need to include directions for (1) the Respondent to indicate whether it wishes to make an application for costs, (2) if so, for the parties to indicate whether costs can be determined “on the papers” and, (3) for any question of costs to be dealt with by the Tribunal.

**Decision**

72 The orders that will be made in these proceedings are as follows:

(1) The application is dismissed.

(2) On or before Friday 07 February 2020, the Respondent is to indicate to the Tribunal and to the Applicant, by email, whether it wishes to make a claim for its costs of these proceedings.

(3) If the Respondent indicates it wishes to make such a claim for costs, a copy of any submissions the Respondent wishes to make in support of its claim for costs should be provided to the Tribunal and the Applicant on or before 14 February 2020.

(4) If the Respondent indicates it wishes to make such a claim for costs, a copy of any documents upon which the Applicant wishes to rely in response to the Respondent’s claim for costs should be provided to the Tribunal and the Respondent on or before 21 February 2020.

(5) Any submissions as to costs submitted by either party should also address the question of whether the question of costs can be dealt with "on the papers" (ie on the basis of the written submissions without the need for a further hearing).

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

Registrar