



## Civil and Administrative Tribunal New South Wales

<b>Medium Neutral Citation:</b>	<b>Karan v Champion Homes Sales Pty Ltd [2016] NSWCATCD 84</b>
<b>Hearing dates:</b>	1 August 2016
<b>Decision date:</b>	20 October 2016
<b>Jurisdiction:</b>	Consumer and Commercial Division
<b>Before:</b>	G.J. Sarginson, Senior Member
<b>Decision:</b>	The application is dismissed as the Tribunal has no jurisdiction.
<b>Catchwords:</b>	Home Building---Limitation of Actions---Statutory Warranties---Date of Practical Completion
<b>Legislation Cited:</b>	Home Building Act 1987 ss 3B, 18B, 18E, 48K Civil and Administrative Tribunal Act 2013 ss 36, 81
<b>Cases Cited:</b>	Myers v Vero Insurance Ltd [2009] NSWCTTT 698 Owners Corporation SP 53127 v Fair Trading Administration Corporation [2005] NSWCTTT 230 Kizas v Lawteal Pty Ltd [2010] NSWCTTT 257 Griffiths v Gates [2013] NSWCTTT 302 The Owners Strata Plan No 78670 v Cavill Properties Pty Ltd [2014] NSWCATCD 218 Owners Corporation Strata Plan 64757 v MJA Group Pty Ltd [2011] NSWCA 236 Concourt Pty Ltd v Kerr [2015] NSWCATAP 106
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Manita & Jyotish Karan – Applicants Champion Homes Sales Pty Ltd – Respondent
<b>Representation:</b>	Applicants: In person Respondent: G Vardas, Business Manager
<b>File Number(s):</b>	HB 16/18233
<b>Publication restriction:</b>	unrestricted

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### REASONS FOR DECISION

- 1 The matter was listed for hearing at the Tribunal in Liverpool on 1 August 2016. The applicants appeared and gave evidence. Mr Vardas, Business Manager, appeared for the respondent and gave evidence.
- 2 There is no dispute that the applicants are the owners of residential premises at Hoxton Park NSW, or that the respondent is a licenced builder who was in a contractual arrangement to construct the residential premises. The significant issues in dispute are:
  - (a) Whether the Tribunal has jurisdiction in the matter, by reason of the 7 year limitation period for the statutory warranty implied into all residential building contracts under Section 18B of the *Home Building Act 1989* ('the HB Act'). To determine this issue, the provisions of Section 18E of the HB Act, which pertain to the warranty period, must be considered;
  - (b) If the Tribunal has jurisdiction in the matter, whether the applicants have established the builder breached Section 18B of the HB Act, and if so, what is the appropriate remedy;
  - (c) If the Tribunal has jurisdiction in the matter, whether the Tribunal should grant an adjournment after determining the issue of jurisdiction, so that the applicants may obtain further expert evidence.
- 3 The proceedings were filed with the Tribunal on 15 April 2016. The applicants sought damages of \$30,000.00. The application identifies the allegedly defective building work as follows:
  - (a) Inadequate waterproofing of an upstairs balcony, resulting in water leaks into the downstairs lounge room and dining room;
  - (b) Water leaking from the roof into the upstairs unsuited. The water leak from the roof is alleged to have also damaged the kitchen ceiling, causing cracks to the architraves and ceilings of the upstairs unsuited and downstairs kitchen;
  - (c) Water leaking from the roof into the downstairs theatre room;
  - (d) A crack in the kitchen benchtop due to inadequate installation.
- 4 The matter was before the Tribunal at a Group List and Conciliation Hearing on 6 May 2016. The applicants appeared and there was no appearance by the respondent. The Tribunal made directions regarding the filing and serving of documentary evidence by both parties, and granting the applicants leave to file and serve any amended application. The applicants' sought an extension to file and serve documentary evidence and any amended application, which was granted by the Deputy Divisional Registrar.
- 5 The applicants filed an amended application together with their supporting documentation, with the Tribunal on 10 June 2016. The amended application sought damages of \$37,939.00 for the cost of rectification of "the leaking balcony and internal ceiling".

#### **APPLICANTS DOCUMENTS**

- 6 The documents the applicant filed and served which were admitted into evidence were as follows:

- (a) A document entitled "Final Statement" from the respondent to the applicants dated 1 April 2009. The document relevantly sets out the amounts paid by the applicants under the contract, and a "final settlement amount". The document also states: "Our office will be in contact with you to arrange a convenient time for settlement and handover of keys. Final settlement amount is required by bank cheque or cash";
- (b) A tax invoice from the respondent to the applicants in the sum of \$9,075.00 in respect of the "final progress payment" stating payment is due within 5 days from the date of the invoice. The document also contains a signed authorisation from the applicants regarding payment to be made by electronic funds transfer;
- (c) A facsimile from ANZ Bank to the applicants dated 17 April 2009, and signed by the applicants on 17 April 2009. The document relevantly states that the applicants acknowledge that ANZ recommends that final payment be withheld until a valuation of the property is performed, but "we confirm that the house... has been completed to our satisfaction and we require that the final stage payment of \$6,800.00 be issued by ANZ... to the builder...regardless of this recommendation";
- (d) A bank cheque from the applicants to the respondent dated 17 April 2009 in the sum of \$6,800.00;
- (e) A bank cheque from the applicants to the respondent dated 17 April 2009 in the sum of \$2,275.00;
- (f) A copy of the contract for residential building work between the parties dated 29 October 2007;
- (g) A "Final Inspection Report" of the respondent signed by the applicants dated 2 April 2009. The document relevantly sets out a list of defects and minor omissions at Annexure A, and states: "We further confirm that practical completion as defined in our building agreement has been reached at the date of this inspection. The defects and minor omissions set out in Annexure A do not prevent the building works from being reasonably capable of being used for their usual purpose";
- (h) A series of emails between the applicants and the respondent for the period from 1 June 2011 to 28 November 2013; and from 30 April 2015 to 7 May 2015;
- (i) An email from Mr Aidan Woodhouse, Technical Support Manager of Meagasealed dated 30 June 2015. That email attaches an unsigned and undated report referring to an inspection by Mr Woodhouse of the residential premises on 23 June 2015, and in particular, the upstairs balcony of the premises. The report is unsigned, undated and does not refer to the NCAT Expert Witness Code of Conduct. The report is 2 pages long;
- (j) A letter from the local State Member of Parliament, Mr Lynch, to the applicants dated 24 March 2014;
- (k) A letter from a NSW Fair Trading Building Inspector, Mr Chris Hall, to the applicants dated 16 July 2014. The letter relevantly states: "The matter has been referred to me for inspection. Your work related concerns were assessed on 03/06/2014 during site mediation. As a result of site mediation it was agreed that you and the contractor would attempt to come to a commercial agreement in regard to the first floor balcony leak. As per the Complaint Inspection Advice issued further enquiries were

made into other matters raised but failed to conclusively justify the contractor's liability". The letter also states that the relevant statutory warranty period for residential building work is, for contracts entered into prior to 1 February 2013, seven years from the date that work done under the contract was completed or seven years from the date of the contract if work was not completed. The letter further states "It is the responsibility of the homeowner to apply to the Tribunal before the expiration of the seven year statutory limitation period";

- (l) A letter from Mr Nandan, the father of Ms Karan, to the NSW Minister for Fair Trading dated 28 March 2016;
- (m) An email from Mr N Foster of NSW Fair Trading to Mr Nandan dated 14 April 2016. Relevantly, that email states: "Fair Trading has attempted mediation onsite at the above address with your daughter and son in law and builder on 3 June 2014. I have been advised that the inspector was satisfied that the leak from the balcony was the builder's responsibility and was prepared to issue a rectification order to Champion Homes to rectify leak to balcony and any consequential damage caused. However, as he was advised your son in law and the builder were in negotiations for a commercial settlement no order was issued. The inspector did issue a letter to the parties dated 16 July 2014 advising that if the negotiations for a commercial settlement did not resolve the dispute they should consider independent legal advice or lodging an application to NSW Civil and Administrative Tribunal (NCAT)... There is now insufficient time remaining of the statutory warranty period to allow for further Fair Trading mediation or intervention and daughter and son in law need to be advised to lodge an application with NCAT today as previously discussed";
- (n) A quotation of AWS Sydney Pty Ltd dated 17 May 2016 in the sum of \$37,939.00 for the rebuilding of the upstairs balcony of the residential premises. The quotation contains a "scope of works" itemising the cost of each component of the rebuilding of the balcony, but does not contain any expert opinion as to defects in the construction of the balcony by the respondent;
- (o) 9 photographs of the lounge and dining room ceilings and floor of the lounge and dining rooms. The photographs show water damage, and pooling of water on the floor of the premises. According to the applicants, such photographs were taken between January 2015 and January 2016.

#### **APPLICANTS' EVIDENCE**

- 7 The oral evidence of the applicants can be summarised as follows:
- 8 On or about 1 April 2009, the applicants received a telephone call from a representative of the respondent to attend a final site inspection on 2 April 2009. Mr Karan stated that he believed the person who called him was the representative of the respondent he had usually dealt with during the construction of the residence, Mr Bob Hauber. The applicants could not recall having been sent the Notice of Practical Completion dated 1 April 2009.
- 9 On 2 April 2009 the applicants attended the final inspection on site with Mr Hauber. The applicants signed the final inspection report. The applicants were told by Mr Hauber that they could pick up the keys and take possession of the property when they made

the final progress payment;=.

- 10 On 17 April 2009, the applicants made the final progress payment to the respondent by attending the respondent's office and paying the final outstanding amount by bank cheques. The applicants were given the keys to the premises, and took possession on the same day. As of 17 April 2009, no occupation certificate had been issued.
- 11 After 6 months of residing in the property (i.e. in about October 2009) water leaks started to appear in the ceiling of the lounge and dining rooms below the upstairs balcony, after rain. The applicants telephoned the respondent and spoke to Mr Hauber. Mr Hauber attended the premises and performed rectification work, which the applicants believed involved the sealing of weep holes in the balcony. The ceiling was also patched.
- 12 There were no further water leaks until the middle of 2011. The applicants complained to the respondent about water leaking from the upstairs balcony into the ceiling of the lounge and dining room area. The applicants documents included an email to the respondent dated 1 June 2011 that relevantly stated: "It will be the third time the balcony will need assessment and some sort of fix which will hopefully prevent the rain from damaging the ceiling on the level below. I know and have witnessed Champion Homes has tried everything possible but the weather somehow gets the better of us. Water has leaked into the 2 old spots where we had problems before and a new spot in the formal lounge now. We are happy to work with you and get a permanent fix to this problem as it is always somehow reoccurring".
- 13 In December 2011, there were water leaks from the balcony that damaged the ceiling of the lounge room and dining room. The respondent engaged Meagasealed to attend the residence and perform repairs, but it was unclear from the applicants' oral and email evidence precisely what repairs had been performed. The respondent also engaged its tradesmen to attend the residence and perform repairs on the ceiling of the lounge and dining room, but again it was unclear from the evidence of the applicants as to precisely what repairs had been conducted in December 2011.
- 14 In early 2012 there were further water leaks from the upstairs balcony. The applicants' complained to the respondent. The respondent again arranged for a third party contractor, Meagasealed, to attend the premises and perform repairs. According to the document attached to the email of Mr Woodhouse of Meagasealed, the repairs performed were a "de grout and re grout of the front balcony as there was some calcification to the grout joints and some grout was popping out of the tile joints" (which was performed on 8 February 2012) and repairs to facia tiles and a "small number of grout joints affected by calcification" (which occurred on 24 February 2012).
- 15 In January 2013 there were further water leaks from the upstairs balcony. The applicants complained to the builder. According to the document attached to the email of Mr Woodhouse of Megasealed, there was also attendance at the premises on 6 February 2013 and 6 March 2013 with Megasealed performing minor repairs and additional work as directed by Champion Homes which included "the sealing up of

weep holes on the balcony". In February 2013, the builder performed gyprock repairs and replacement of sections of the ceiling of the lounge and dining room that had been water damaged.

- 16 In August 2013 there were further water leaks from the upstairs balcony. The applicants' evidence contained a series of emails between the applicants and the builders for the period between 20 August 2013 and 28 November 2013. Again, the oral evidence of the applicants' was vague as to what repairs had been conducted, but the emails of the applicants' to the respondent make clear that there was further water leaking issues, and that both representatives of Meagasealed and the respondent attended the premises and performed repairs. On 22 October 2013 Mr Karan emailed the respondent relevantly stating as follows:

"Tell your management that the guys repairing have directly told me that they cannot find the leak and are guessing as they are going along. So the next time it leaks and we both know it will, I will come and personally speak to your management and tell them exactly what it is. I will have a good chat with Megasealed, rest assured...The leak has been a major issue all this while taking priority over the render that has cracked and fallen off around the outside as well as the cracks in the gyprock walls inside. So before your 7 years are up and you attend to all these construction faults that are now showing up".

- 17 On 27 November 2013, the director of the respondent Mr Malesev, emailed Mr Karan as follows:

"I understand that there is no leak. The work that was carried out meets the requirements of the BCA and the Australian Standards. I also understand that there are no other items that need any rectification works. Accordingly, there is nothing more I can add".

- 18 On 28 November 2013 Mr Karan replied to the email relevantly as follows:

"The roof/balcony and accessories used in the construction of our residence are defective as the leak is clearly visible at this present time (please refer to attached photograph). More evidence of the faulty workmanship will be forwarded to you shortly. This makes it clearly evident that our property was not fully constructed in accordance with the requirements of the Building Code of Australia. Hoping to work towards getting it up to the required standards".

- 19 In 2014, the applicants lodged a complaint with NSW Fair Trading. A building inspector, Mr Hall, attended the residence on 3 June 2014. There was an on- site mediation attended by the applicants and a representative of the respondent. As discussed above, Mr Hall did not issue a rectification order because the applicants and the respondents were in negotiations regarding a "commercial agreement" to resolve the dispute. According to the applicants, there was no agreement with the builder about resolving the dispute, either by way of payment of monies or the respondent performing rectification work. The applicants did not further contact Mr Hall, or NSW Fair Trading.

- 20 When asked by the Tribunal as to why the applicants did not further approach NSW Fair Trading to seek a rectification order or other intervention by NSW Fair Trading prior to 14 April 2016, despite the evidence of the applicants that there had been long standing water leaks from the balcony since the construction of the dwelling and the builder's refusal to perform rectification work or enter into a "commercial agreement", the applicants stated that they had not further contacted NSW Fair Trading because

they were “disappointed” that no rectification order had been made in June 2014.

- 21 The applicants made a number of attempts to request Megasealed to attend the premises. Megasealed refused on the basis that they had been engaged by the builder, and any defects were the responsibility of the builder and not due to any work Megasealed had performed. Eventually, Mr Woodhouse provided an emailed report to the applicants.
- 22 The applicants stated that the balcony continues to leak water during periods of heavy rain, and that the water leak is of such magnitude that during heavy rain, significant amounts of water drip from the ceiling to the floor of the lounge and dining room. The applicants provided photographs of such water pooling which the applicants stated had occurred in January 2016.

### **APPLICANTS EXPERT EVIDENCE**

- 23 The applicant only filed and served 2 documents that could be described as expert evidence. One was the quote from AWS Sydney Pty Ltd. The quotation does not identify the alleged defective work in respect of the balcony, or why the balcony is leaking, and is simply a quotation to re-construct the balcony.
- 24 The second document is the email from Mr Woodhouse of Megasealed. That document also does not identify the allegedly defective work of the builder, or give any clear reasons or opinion as to why the balcony is leaking.

### **RESPONDENTS'EVIDENCE**

- 25 The documentary evidence of the respondent was as follows:
  - (a) A complete copy of the written contract between the parties to perform residential building work dated 29 October 2007;
  - (b) A letter dated 1 April 2009 entitled “Practical Completion”. That letter relevantly states: “In accordance with our obligations under Clause 26 of the Building Contract, we now enclose a Notice of Practical Completion (to which is attached our final progress claim for \$10,575.00)”;
  - (c) A “Notice of Practical Completion” dated 1 April 2009. Relevantly, that document states: “Champion’s assessment of the date of practical completion is 8 April 2009”; that the respondent “appoints the following date and time for you to meet Champion on site to carry out an inspection of the building works-Thursday 2 April 2009 at 10.00 am”; and “Champion’s final progress claim is attached”;
  - (d) A “Final Statement” and “Summary of Account” dated 1 April 2009. The document is signed by a representative of the respondent. The document relied upon by the respondent is unsigned by the applicants. However, the applicants documentary evidence contains a copy of an identical document, that is signed by the applicants dated 8 April 2009;
  - (e) A copy of the Final Inspection Report dated 2 April 2009;
  - (f) A ‘Handover Statement’ of the respondent dated 17 April 2009;
  - (g) A NSW Fair Trading “Complaint Inspection Advice” dated 17 June 2014. Relevantly, the document is signed by Mr Karan, Mr Hall of NSW Fair

Trading, and Mr Barbaro of the respondent. The document states that a site inspection occurred on 3 June 2014 and relevantly states:

“Issues: A list of issues raised by the consumer has been inspected at the site inspection.

Outcome: Further research is required by Inspector into some of the matters prior to making a final determination”.

- 26 The document states that the “research” will be completed by 17 October 2014 and “The person making the complaint is to contact the Inspector within 7 days after the date the work is to be completed by (as stated above) otherwise the dispute is assumed to be resolved”.

#### **WRITTEN SUBMISSIONS OF THE RESPONDENT**

- 27 The respondent also provided 2 written outlines of submissions. The first outline of submissions is dated 30 June 2016, and was filed and served with the documentary evidence. The supplementary submissions were provided at the hearing on 1 August 2016, and a copy provided to the applicants at the hearing.
- 28 The respondent’s submission was that it had sent the notice of practical completion to the applicants on 1 April 2009 and that the written acknowledgement of the applicants at the inspection on 2 April 2009 that there had been practical completion meant that, as of 2 April 2009, practical completion had been achieved under the contract. The respondent submitted that the date on which the applicants paid the final progress payment claim, and took possession of the property (17 April 2009) was not the date of practical completion.
- 29 The respondent provided no sworn evidence (by way of statutory declaration, or affidavit) that the notice of practical completion had been sent by post on 1 April 2009. Rather, Mr Vardas asserted from the bar table that he believed that sending the notice by post on the date of the notice was the usual practice of the respondent. When the Tribunal raised with the respondent the importance of this issue, after the applicant Mr Karan had given oral evidence during the hearing that he could not recall having received the notice of completion, and could only recall a representative of the builder telephoning him to arrange for the final inspection on 2 April 2009, Mr Vardas submitted the respondent had been “surprised” and sought an adjournment to adduce evidence of the usual practice of the respondent regarding the sending of notices of practical completion.
- 30 The Tribunal refused to adjourn the matter part-heard for the respondent to adduce further evidence, in circumstances where it was the respondent who had raised the issue of jurisdiction and provided written submission and documents on that issue. The respondent was clearly on notice of the importance of the date of practical completion, as it was the respondent who was arguing that practical completion had occurred prior to 15 April 2009. The Tribunal not being satisfied that there was a proper basis for the adjournment application, and in accordance with the guiding principle of the Tribunal under Section 36 of the Civil and Administrative Tribunal Act 2013, refused to adjourn



the matter part-heard.

## RELEVANT LEGAL PRINCIPLES

- 31 The applicants claim is brought against the respondent on the basis that the respondent has breached the warranties implied into the contract to perform residential building work under Section 18B of the HB Act and in particular the statutory warranty under Section 18(1)(a) of the HB Act that work is to be performed with “due care and skill”.
- 32 The limitation period for actions based on breach of statutory warranties is contained in Section 18E of the HB Act. Prior to the Home Building Amendment Act 2011, the relevant limitation period (which will be discussed in more detail below) was 7 years. The limitation period under Section 18E of the Act was amended by the Home Building Amendment Act 2011, which was proclaimed on 1 February 2012. Relevantly, the limitation period was amended to 6 years for structural defects and 2 years for non-structural defects. However, Schedule 4 Clause 109 of the HB Act states that the amendments contained in the Home Building Amendment Act 2011 do not apply “in respect of a contract for residential building work entered into before the commencement of the amendment”.
- 33 Section 18E of the HB Act, as it applied to contracts entered into prior to 1 February 2012 stated:

“18E Proceedings for Breach of Warranties

Proceedings for a breach of statutory warranty must be commenced within 7 years after:

the completion of the work to which it relates, or

if the work is not completed:

(i) the date for completion of the work specified or determined in accordance with the contract, or

(ii) if there is no such date, the date of the contract”.

- 34 Section 18E of the HB Act was further amended by the Home Building Amendment Act 2014, which replaced the term “structural defect” with “major defect” and “non-structural defect” with “any other defect”. However, the Home Building Amendment Act 2014 did not further amend the statutory warranty limitation period, and notwithstanding Schedule 4 Clause 121 of the HB Act, by reason of Schedule 4 Clause 109 of the HB Act, the Tribunal is satisfied that the relevant limitation period in this matter is 7 years rather than 6 years. Further, the respondent did not seek to argue the statutory warranty period was less than 7 years in this matter, the respondent’s submission being that the 7 year period had expired prior to the commencement of proceedings on 15 April 2016.

- 35 The jurisdiction of the Tribunal to hear and determine residential building claims is set out in Section 48K of the HB Act. Relevantly, Section 48K of the HB Act states:

“48K Jurisdiction of the Tribunal in relation to building claims

...

(7) The Tribunal does not have jurisdiction in respect of a building claim arising from a breach of statutory warranty implied under Part 2C if the date on which the claim is lodged after which the claim is lodged is after the end of the period within which proceedings for a breach of the statutory warranty must be commenced (as provided by Section 18E)."

36 The Tribunal has no power to invoke Section 81 of the Civil and Administrative Tribunal Act 2013 ('the NCAT Act') to extend the limitation period for statutory warranties under the HB Act, as Section 81 of the NCAT Act only operates when the Tribunal has jurisdiction in the first place. Section 81 of the NCAT Act does not give the Tribunal power to create jurisdiction where no jurisdiction exists (*Myers v Vero Insurance Ltd* [2009] NSWCTTT 698; *Owners Corporation SP 53127 v Fair Trading Administration Corporation* [2005] NSWCTTT 230; *Kizas v Lawteal Pty Ltd* [2010] NSWCTTT 257).

37 Accordingly, if the proceedings have been commenced outside the limitation period contained in the HB Act the Tribunal has no jurisdiction in the matter, and the Tribunal has no power to extend the limitation period.

38 To ascertain whether or not the limitation period has expired, the Tribunal must determine the date that residential building work was completed. Section 3B of the HB Act was introduced by the Home Building Amendment Act 2011. Schedule 4 Clause 106 (a) of the HB Act provides that Section 3B of the HB Act applies to all contracts "commenced or completed" prior to 1 February 2012. Unlike the amendments to the limitation period in Section 18E of the HB Act, Section 3B of the HB Act applies to these proceedings (*Griffiths v Gates* [2013] NSWCTTT 302 at [46]; *The Owners Strata Plan No 78670 v Cavill Properties Pty Ltd* [2014] NSWCATCD 218 at [16]).

39 Prior to the introduction of Section 3B of the HB Act, there was no statutory definition of the date of practical completion. In such circumstances, the date of practical completion was dependent upon findings of fact pertaining to the contractual provisions between the parties (if there were contractual provisions that defined the date of practical completion), or if there were no contractual provisions (or the contractual provisions did not apply) the date of practical completion was the date at which "all building work is complete, or all but completed, in accordance with the contract and the premises are reasonably fit for occupation" (*Owners Corporation Strata Plan 64757 v MJA Group Pty Ltd* [2011] NSWCA 236; *Concourt Pty Ltd v Kerr* [2015] NSWCATAP 106 at [33]).

40 Section 3B of the HB Act states:

"3B Date of completion of residential building work

(1A) This section does not apply to residential building work to which section 3C applies.

Note> Section 3C provides for the date of completion of new buildings in strata schemes.

(1) The completion of residential building work occurs on the date that the work is complete within the meaning of the contract under which the work was done.

If the contract does not provide for when work is complete (or there is no contract) the completion of residential building work occurs on practical completion of the work, which is when the work was complete except for any omissions or defects that do not prevent the work from being reasonably capable of being used for its intended purpose.

It is to be presumed (unless an earlier date for practical completion can be established) that the practical completion of residential building work occurred on the earliest of whichever of the following dates can be established for the work:

- a) the date on which the contractor handed over possession of the work to the owner,
- b) the date on which the contractor last attended to the site to carry out work (other than work to remedy any defect that does not affect practical completion),
- c) the date of issue of an occupation certificate under the Environmental Planning and Assessment Act 1979 that authorises commencement of the use or occupation of the work,

...

This section applies for the purposes of determining when completion of residential building work occurs for the purposes of any provisions of this Act, the regulations, or a contract of insurance under the Home Building Compensation Fund”.

- 41 By reason of the operation of Sections 3B, 18E and 48K of the HB Act if the date of completion of the work under as defined under the contract, or the date of practical completion (if the provisions of Section 3B(2) apply) is earlier than 15 April 2009 (i.e. 7 years prior to the commencement of proceedings in the Tribunal) then the proceedings are out of time and the Tribunal has no jurisdiction to hear and determine the proceedings.

### Provisions of the Contract

- 42 Section 3B(1) of the HB Act prescribes that the starting point is the definition of the date of completion under the contract. The contract between the parties in this matter contained provisions regarding the date of completion. Relevantly:
- 43 Clause 1 of the contract stats that the “date of practical completion” is “the date that is deemed to be the date of practical completion under Clause 26 except where the date is determined by dispute resolution (including litigation) then it is that date”.
- 44 Clause 26 of the contract states:

#### “Practical Completion

26.1 The builder must give the owner a notice of practical completion at les 5 working days prior to practical completion being reached.

26.2 The notice of practical completion is to:

state the builder’s assessment of the date of practical completion;

state the date and time for the owner to meet the builder on the site to carry out an inspection of the building works; and

have attached the builder’s final progress claim.

26.3 The owner must meet with the builder on the site of the inspection at the date and time stated by the builder in the notice of practical completion or at a date and time otherwise agreed with the builder and either:

pay the amount of the final progress claim; or

if the owner believes that the building works have not reached practical completion give the builder a written notice detailing anything to be done to reach practical completion.

26.4 If the owner pays the amount of the final progress claim under sub-clause 26.3

(a) the date of practical completion stated in the notice of practical completion is deemed to be the date of practical completion.

26.5 If the owner gives the builder a notice under sub-clause 26.3(b) of work to be

completed:

the builder must carry out any work required for practical completion and give the owner a further notice of practical completion; or

if the builder does not agree that there is any further work required for practical completion, the builder must give the owner written notice:

rejecting the owner's notice; and

(ii) referring the matter to dispute resolution.

26.6 If the owner does not pay the amount of the final progress payment claim under sub-clause 26.3(a) or give the builder notice under sub-clause 26.3 (b):

the amount of the final progress claim is deemed to be a debt due and owing from the owner to the builder;

the date of practical completion stated in the notice of practical completion is deemed to be the date of practical completion; and

the owner acknowledges the builder works have reached practical completion.

26.7 On the owner paying the final progress claim, the builder must give the keys to the building works to the owner."

45 In respect of the sending of notices by the builder, Clause 40 of the contract is relevant.

46 Clause 40 of the contract states:

"40.1 Unless otherwise stated in this contract, a notice is deemed to be given if the notice is:

delivered by hand to the other party;

posted by ordinary pre-paid mail to the other party's last known address on the day following the day it was posted; and

sent by facsimile transmission to the party's last known facsimile number on receiving confirmation of transmission."

#### **APPLICATION OF LAW TO FACTS-THE ISSUE OF JURISDICTION**

47 As discussed above, the starting point for the determination of the date of practical completion of the residential building work is the date of completion as defined in the contract. The Tribunal must determine if and when the builder's Notice of Practical Completion dated 1 April 2009 was served.

48 Under Clause 40.1 (a) of the contract a notice is deemed serve if it is hand delivered to the other party; and under Clause 40.1 (b) of the contract the notice is deemed to be given if it is posted on the other party's known address "on the day following the day it was posted".

49 The applicants do not recall the Notice of Practical Completion having been hand delivered to them by a representative of the builder, nor having received the document in the mail. The respondent had provided no evidence of how it asserts the document was served, other than the assertion from the bar table by Mr Vardas that the usual practice of the respondent was to send notices in the mail. Pursuant to Clause 40.1 (b) of the contract, the notice is served on the day following when it was posted, not the date it was actually received by the other party.

50 However, there is documentary evidence to support a finding that the Notice of Practical Completion was served on the applicants. The Notice of Practical Completion

sets out the time and date of the final inspection, and the date that the respondent asserts is the date of practical completion under the contract (8 April 2009). The document states that the respondent's "final progress claim is attached".

- 51 The documents relied upon by the applicants contain a copy of the respondent's "Final Statement and "Summary of Account" dated 1 April 2009, which sets out the final progress payment claim. That document is signed by the applicants and dated 8 April 2009. The tax invoice of the respondent dated 8 April 2009 in the sum of \$9,075.00 is signed by the applicants. There was no evidence by the applicants regarding how they received the final progress payment claim, and an inference is drawn that it was attached to the Notice of Practical Completion. The Tribunal is satisfied that the Notice of Practical Completion was received by the applicants on or before 8 April 2009, and that it was likely served by post on 1 April 2009.
- 52 The Tribunal being satisfied that the respondent gave a Notice of Practical Completion in accordance with Clause 40 of the contract, the Tribunal must then consider Clause 26 of the contract.
- 53 1 April 2009 was a Wednesday, and 2 April 2009 was a Thursday. On the basis that the Notice of Practical Completion was served by post on 1 April 2009, its deemed date of service under Clause 40.1 (b) of the contract is 2 April 2009. The Notice of Practical Completion states that builder's assessment of the date of practical completion is 8 April 2009. 5 working days from 2 April 2009 is 9 April 2009. That day is one day after the date of the builder's assessment of practical completion in the notice, but still prior to 15 April 2009, which is the key date for the purpose of the 7 year statutory limitation period (the proceedings having been commenced on 15 April 2016).
- 54 Clause 26.1 of the contract does not state that a Notice of Practical Completion is invalid if the date identified in the notice does not reflect 5 working days from the date it is served. Rather, it states that the notice must be given "at least 5 days prior to practical completion being reached". The respondent has complied with Clause 26.1 if it has served the notice in accordance with Clause 40, and the notice is served at least 5 working days prior to the date of practical completion.
- 55 Under Clause 26.3 of the contract, the respondent and the applicants had a final site inspection with a representative of the respondent on 2 April 2009. The applicants signed a final inspection report on 2 April 2009 stating that they were satisfied that practical completion had occurred on that date pursuant to the contract, and "the defects and minor omissions set out in Annexure A do not prevent the building works from being reasonably capable of being used for their usual purpose". The applicants did not give the respondent a notice stating that they did not believe practical completion had occurred pursuant to Clause 26.3 (b) of the contract. As the final progress payment claim was not paid on 2 April 2009, then under Clause 26.6 (b) of the contract, the date of practical completion is "deemed to be the date of practical completion" contained in the respondent's Notice of Practical Completion (i.e. 8 April 2009).

- 56 However, as the Tribunal is not satisfied that the respondent has proved that the Notice of Practical Completion was served pursuant to the provisions of Clause 40 of the contract on 1 April 2009, the date of practical completion in the Notice of Practical Completion (8 April 2009) does not reflect a date at least 5 working days from the date of service of the Notice of Practical Completion. Accordingly, the Tribunal is not satisfied that the respondent can rely upon Clause 26.6 (b) of the contract as deeming the date of practical completion to be 8 April 2009.
- 57 Despite the respondent not being able to establish that pursuant to Clause 26.6 (b) of the contract the date of practical completion is 8 April 2009, the Tribunal must still determine the date of practical completion. The statutory definition in Section 3B (2) of the HB Act reflects the position at common law that the date of practical completion is the date upon which building work is complete and the premises are fit for occupation. The applicants acknowledged in writing on 2 April 2009 at the final site inspection that the premises were reasonably capable of occupation, other than minor defects and omissions that did not affect the date of practical completion. There is no evidence that the respondent attended the site after 2 April 2009 and performed work other than to remedy defects that did not affect the date the premises were reasonably capable of occupation. The fact that the applicants did not pay the final progress payment claim and obtain the keys to the property until 17 April 2009 is not the relevant date of practical completion. The Tribunal is satisfied that as of 2 April 2009 the building work was effectively complete and the premises fit for occupation, independent of the contractual provisions under Clause 26.6 of the contract.
- 58 As the Tribunal is satisfied that practical completion occurred more than 7 years prior to 15 April 2016, the proceedings against the respondent have been commenced outside the limitation period and by reason of the operation of Sections 18E and 48K of the HB Act, the Tribunal has no jurisdiction in the matter.
- 59 The applicants may perceive an injustice to have occurred because the Tribunal has no jurisdiction in this matter, and the oral evidence of the applicants and the emails between the parties clearly indicate that there has been a long history of water leaks from the upstairs balcony. However, the letter from Mr Hall of NSW Fair Trading to the applicants dated 16 July 2014 refers to the limitation period and the email from Mr Karan to the builder dated 22 October 2013 states that the builder should rectify defects "before your 7 years are up". The applicants were aware, or should reasonably have been aware, of the importance of the limitation period. The Tribunal has no power to extend the limitation period if the proceedings have been commenced out of time, irrespective of whether or not there has been defective work or that there have been a series of complaints to the builder since the construction of the residence regarding the issue of water leaking from the upstairs balcony.

#### **APPLICATION BY THE APPLICANTS TO ADJOURN**

- 60 During the course of the hearing, the Tribunal pointed out to the applicants the manifest

inadequacy of their expert evidence in proving (if the Tribunal had jurisdiction) that builder had performed defective work in construction of the upstairs balcony; the precise nature of the defects; the work necessary to rectify any defects; and the cost of rectification. The applicants sought an adjournment to adduce further expert evidence. The reasons provided for the applicants failing to file and serve expert evidence in accordance with previous Tribunal directions were that they did not understand the importance of obtaining appropriate expert evidence, and that they had financial difficulties in obtaining such evidence.

- 61 No adjournment was sought to obtain further evidence on the limitation issue. Even if an adjournment was sought to obtain further evidence on the date of practical completion, by reason of the above analysis of the contractual provisions and the evidence of the parties (including documentary evidence) regarding the date of practical completion, there is nothing to indicate that any further evidence of the applicants would affect the findings regarding the date of practical completion. Direction 10 of the Tribunal dated 6 May 2016 also clearly indicated that the limitation issue was an issue for determination at the hearing, and the applicants should obtain advice on this issue.
- 62 The respondent did not oppose or consent to any adjournment application in respect of the applicants obtaining further evidence on the issue of defective work if the Tribunal had jurisdiction in the matter, but submitted that the issue of jurisdiction should be determined by the Tribunal at the hearing on 1 August 2016. The Tribunal pointed out to the applicants that, when the matter was set down for hearing on 6 May 2016 it was on the basis that all issues would be heard and determined including the issue of jurisdiction. The Tribunal determined that the hearing proceed on all issues, but if the Tribunal found that the proceedings had been commenced within the limitation period and the Tribunal had jurisdiction in the matter, the Tribunal would also determine whether or not an adjournment be granted for the applicants to adduce further expert evidence on the issue of defective work.
- 63 The reasons provided by the applicants as to why they did not obtain (and file and serve) appropriate expert evidence are far from compelling. However, as the Tribunal has determined that it has no jurisdiction in the matter, it is futile to adjourn the proceedings for the applicants to obtain further expert evidence on the issue of defective work.
- 64 For the above reasons, the proceedings are dismissed because they have been commenced outside the limitation period and, by reason of Section 48K of the HB Act, the Tribunal has no jurisdiction.

**G.J. Sarginson**

**Senior Member**

**Civil and Administrative Tribunal of New South Wales**

**20 October 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

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Decision last updated: 15 December 2016