



Civil and Administrative Tribunal

New South Wales

Case Name: Kakoz v G Storm Group Pty Ltd

Medium Neutral Citation: [2022] NSWCATCD 119

Hearing Date(s): 27 July 2022

Date of Orders: 1 September 2022

Decision Date: 1 September 2022

Jurisdiction: Consumer and Commercial Division

Before: R C Titterton OAM, Senior Member

Decision: The application is dismissed as the Tribunal has no jurisdiction.

Catchwords: BUILDING AND CONSTRUCTION – date of practical completion of works – jurisdiction

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW) – s 41
Home Building Act 1989 (NSW) - ss 3B, 18E, 48K(7) and cl 121(1) of Sch 4

Cases Cited: Administration Corporation [2005] NSWCTTT 230
Karan v Champion Homes Sales Pty Ltd [2016] NSWCATCD 84
Kizas v Lawteal Pty Ltd [2010] NSWCTTT 257
Owners Corporation SP 53127 v Fair Trading
Myers v Vero Insurance Ltd [2009] NSWCTTT 698

Category: Principal judgment

Parties: J Kakoz (Applicant)
G Storm Group Pty Ltd (Respondent)

Representation: Applicant: self-represented
Respondent: No appearance

File Number(s): HB 22/13772

Publication Restriction: Nil

REASONS FOR DECISION

Introduction

- 1 By application filed 29 March 2022 the applicant Mr C J Kakoz (**Homeowner**) seeks rectification orders and an order that the respondent G Storm Pty Ltd (**Builder**) pay him \$100,000.
- 2 These reasons consider the meaning and application of ss 18E and 48K(7) and cl 121(1) of Sch 4 of the *Home Building Act 1989* (NSW) (**HB Act**).
- 3 For the following reasons, the application is dismissed for lack of jurisdiction.

Procedural matters

- 4 The matter was first listed for directions on 4 May 2022. On that occasion, the Homeowner appeared in person, but there was no appearance by the Builder. The Tribunal made the usual orders for the filing of evidence and submissions, and the matter was adjourned for a final hearing.
- 5 Subsequently the final hearing was scheduled for 22 July 2022.
- 6 At the final hearing the Homeowner appeared in person. Again, there was no appearance by the Builder. The Tribunal decided that the hearing should proceed in the absence of the Builder, for the reasons given when the Tribunal made interlocutory orders on 22 July 2022.

Evidence

- 7 The evidence relied on by the Homeowner include the following: a statutory declarations of the Homeowner sworn 10 July and 13 July 2022; text messages between the parties; photographs of the Homeowner's property; a statement of the Homeowner dated 14 July 2022; various quotations and a report dated 1 August 2022 prepared by Ashoor Youhanna t/as ACO Interiors. Mr Youhanna is a builder (**Youhanna Report**).
- 8 No evidence was by the Builder.

- 9 At the hearing, the Homeowner was administered an oath. He subsequently swore to the truth of the contents of his statutory declarations and statements and his various other documents.

Summary of issues

- 10 This is best explained in the Homeowner's application which states:

GSTORM were engaged in mid 2014 to supply and install new roof, gutters, downpipes and cappings to my new built home. The total cost of works was \$14,300.00. From the first instances when we moved in there were 2 occasions in which leaks occurred. Mr. Cullen promptly actioned and covered the costs of the repairs personally. Following on we had constant leaks and appearing in different parts of the house. When we advised Mr. Cullen of this he advised that he had installed the incorrect roof sheeting.

My roof is a low pitched roof less than 3 deg and he had installed a metal corrugated profile roof which cannot be used on roofs below 5 deg pitch. we had several discussions and in a SMS message on the 14/2/2020. He agreed to replace the entire roof, box cutters and parapet capping. Mr Cullen promptly attend to measure up on 17/2/2020. He said that he would order the materials and be round properly with his team to replace the work. Since that day I have not heard or seen Mr Cullen even after numerous calls messages. I raised the matter with the department of Fair trading, case number 103521 89. On the 3/11/2020 the department of Fair trading sent written confirmation that they had tried to act on the matter with Mr Cullen but were unable to resolve the matter and suggested I contact NCAT. Mr. Cullens company is registered in Queensland but he works extensively in NSW.

My property cost over \$1.4m to build back in 2014. It is a very beautiful home which has been absolutely ruined internally and externally due to Mr. Cullen's work: He has admitted liability and needs to come and rectify his work externally and pay for the repairs internally. Mr. Cullen is a fair and reasonable person and we have an amicable relationship together. I have held out so long to launch with NCAT due to the hope he may come and make the repairs. But all my calls and messages have been futile. So I have now resorted to NCAT to take the necessary action.

- 11 The Homeowner then states that the order he seeks is:

An order to do work or services as stated below to the approximate value of \$200000 Replace all roofing, guttering and cappings to all roofs. Make good all internal damage to the property which has sustained major leaks in the wall linings of the entire property. Painting works internally and externally.

- 12 In addition, he claims \$100,000.

- 13 The Homeowner's evidence, which I accept given that it is unchallenged, is set out in his statement of 14 July 2022. It is appropriate to set it out in full. The statement says:

1. On or about September/October 2014 STORM were commissioned to supply and install a new Colorbond roof to my brand newly constructed

property. Mr. Nicholas Cullen attend the site meetings himself with myself in my capacity as Owner Builder.

2. The works included the supply and installation of a new roof, box gutters, all cappings to parapet walls and downpipes.

3. The roof profile installed was a corrugated profile which should not have been used on my roofs as my roof has less than a 3 degree pitch and more appropriate profile would have been either a Trimdek or Kliplok profiled roof. The latter have wider trays on the profile which are able to handle water better. Corrugated profile is only every used by roofs with a pitch 15 degrees or greater.

4. On 24th October 2014 I made a payment for the works to Gstorm for \$14,300.00 (Copy attached).

5. Almost immediately after occupancy of the property around April 2015 we started to experience major water leakage. The first was into the master bedroom, which Mr. Cullen paid for all the rectification works for a new ceiling and walls. Around 2-3 months later another problem occurred in our family roof at the ground floor level as well as the alfresco area. Again Mr. Cullen covered all the repairs directly himself.

6. Between these two initial occurrences Mr. Cullen would have spent over \$20,000 estimated for these repairs alone.

7. Upon the first leak in the master bedroom (upstairs) Mr. Cullen sent his team to repair and rectify the work to ensure no further leaks. All that was done was some extra flashing placed in certain areas and a lot of silicon was used to temporarily block openings in the sheets.

8. Year on year the problem become worse and worse and more water has entered and has affected every single room in our house. There is extensive damage to every room in the property including having to re-plaster walls, new paint, new electrical works due to chandeliers being shorted as water has entered them. Also extensive damage is done to the exterior walls of my roof as all the capping has been made incorrectly and instead of water diverting to the roof it diverts over the front of the house and destroyed the walls.

9. On the 21st June 2017 I sent a text message to Mr. Cullen asking him to come out and fix the flashings for me on the roof.

10. On the 24th July 2017 Mr. Cullen responded by saying he was going to fix the cappings so the water diverts back to the roof and not to the front of the house.

11. Sometime in July 2017 or August 2017 Mr. Cullen sent out his team to re-align the cappings and apply silicon to them as well as place other additional items so that the gutters and capping perform better.

12. The problems kept continuing and as per the numerous SMS messages and phone calls evidence this.

13. We have consistently brought the matter to Mr. Cullen's attention and nothing has happened.

14. Back on 14th February 2020 Mr. Cullen sent me an SMS message confirming that the only way to solve the problem was to change all the roof sheets, box gutters and parapet caps to the top roof.

15. He came out on 17th February 2020 and measured up as well as has siliconed some areas on the top roof and said he will be back once material has been ordered to replace the roof, gutters and caps. From that day to now we have not heard from Mr. Cullen. I have made several phone calls and SMS message plea with Mr. Cullen to come and repair my property which is a multi million dollar property and is practically worthless.

14 That recitation of the Homeowner's claim raises a number of issues. These include:

- (1) Does the Tribunal have jurisdiction to consider the Homeowner's claim?
- (2) If so, is the contract still on foot or has it been repudiated or terminated and if so by whom?
- (3) If the contract has been repudiated or terminated is the Homeowner restricted to a rectification order, or is the Homeowner entitled to damages?

15 I shall deal with each issue in turn.

16 Before doing so, it is appropriate to set out the terms of the contract between the two parties. The Tribunal notes that there was no written contract in any formal sense.

Contract

17 On the basis of the uncontradicted evidence of the Homeowner I make the following findings:

- (1) sometime in September or October 2014 the parties agreed that the Builder would supply and install a Colorbond roof on the Homeowner's home;
- (2) the works included the supply and installation of a new roof, box gutters, all cappings to parapet walls and downpipes;
- (3) on 24 October 2014 the Homeowner made a payment to the Builder for \$14,300.00;
- (4) the Homeowner started living in the premises in April 2015;
- (5) almost immediately after occupancy of the property around April 2015, the Homeowner started to experience major water leakage into the property;
- (6) despite efforts of the Builder to investigate and remedy the issue, the problem became worse every year, resulting in damage to every room. SMS text exchanges between the parties corroborate that there were water leakages (at least) in March 2017, November 2018 and February 2020;

- (7) in July 2017 the Builder said it would fix the cappings so the water diverted back to the roof and not to the front of the house;
 - (8) in July 2017 or August 2017 the Builder attended the property to re-align the cappings and apply silicon to them;
 - (9) the problems kept continuing, with the Homeowner consistently bringing the problems to the Builder's attention;
 - (10) on 14 February 2020 the Builder sent the Homeowners an SMS message stating that the only way to solve the problem was to change all the roof sheets, box gutters and parapet caps to the roof;
 - (11) the Builder attended the Homeowner's property on 17 February 2020, took measurements, siliconed some areas on the top roof and said it would return once material had been ordered to replace the roof, gutters and caps;
 - (12) the Homeowner has received no further communications from the Builder despite frequent requests for information and to undertake works.
- 18 The evidence does not enable the Tribunal to make findings as to the contract price or the time by which the contract was to be completed.
- 19 Given those findings, the Tribunal will now consider the question of jurisdiction.

Does the Tribunal have jurisdiction to consider the Homeowner's claim?

- 20 As was explained by the Tribunal in *Karan v Champion Homes Sales Pty Ltd* [2016] NSWCATCD 84:

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”.

(emphasis added)

- 21 The Tribunal notes that it discussed this issue with the Homeowner during the course of the hearing, with the Homeowner informing the Tribunal that the works were not completed as the Builder was still attending the premises as late 2017 and even 2020.
- 22 The Tribunal cannot accept that submission as it overlooks two matters.
- 23 The first matter is that s 3B of the HB Act, which provides that if the contract does not provide for when work is complete (as is the case here) 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.
- 24 The second matter is that on the evidence available to the Tribunal, being the Homeowner’s own evidence, the premises were reasonably fit for occupation, and had been since April 2015.
- 25 As noted, the application states that the works commenced in 2014. The Homeowner told the Tribunal that he moved into the house by April 2015, which suggests that the building was complete by that stage. That means that the Homeowner had six years from that point in which to make a claim for major defects. But he did not file his claim until 29 March 2022.
- 26 The effect of ss 18E and 48K(7) and cl 121(1) of Sch 4 of the HB Act is that the Tribunal does not have jurisdiction (that is the power to hear and determination the application) if for contracts entered into or work done after 1 February 2012 and where proceedings are commenced after 15 January 2015, if the application is filed more than 6 years for a breach that results in a major defect in residential building work or 2 years in any other case.
- 27 By reason of the operation of ss 3B, 18E and 48K of the HB Act, as the date of completion of the work under was not defined under the contract, if the date of

practical completion (if the provisions of Section 3B(2) apply) is earlier than 29 March 2016 (i.e. 6 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.

Conclusion

- 28 The application must be dismissed. As 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.
- 29 The Tribunal simply has no power to determine the application.
- 30 The Homeowner's delay in filing his application is perhaps understandable, given that the Builder appears to have been working with the Homeowner to rectify the problems, attending the premises on many occasions.
- 31 If the Tribunal had the power to extend the time for filing the application, it would have done so. However, as the Tribunal said in *Karan* at [36], the Tribunal has no power to invoke s 41 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) to extend the limitation period for statutory warranties under the HB Act, as s 41 of the NCAT Act only operates when the Tribunal has jurisdiction in the first place.¹
- 32 Section 41 provides:
- (1) The Tribunal may, of its own motion or on application by any person, extend the period of time for the doing of anything under any legislation in respect of which the Tribunal has jurisdiction despite anything to the contrary under that legislation.
 - (2) Such an application may be made even though the relevant period of time has expired.
- 33 Section 41 of the NCAT Act does not give the Tribunal power to create jurisdiction where no jurisdiction exists: *Karan* at [36] and the cases there referred to, namely *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.

¹ There is a typographical error in *Karan* at [36], in that the Tribunal refers to s 81 of the NCAT Act. This clearly should be a reference to s 41.

Orders

34 The Tribunal makes the following order:

(1) The application is dismissed for want of jurisdiction.

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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