

**NSW Civil and Administrative Tribunal
Consumer and Commercial Division**

APPLICATION NO: HB 11/58417

APPLICANTS: Liang (Leon) Yao & Yin Jia (Emily) Sheng

RESPONDENT: Quan Yao (Jacky) Chen

APPLICATION: Jurisdiction

HEARING: 17 July 2012, 8 February 2013 and
22 October 2013

APPEARANCES: Mr M Birch for the applicants;
Mr P Snelgrove for the respondent

ISSUES: Jurisdiction

LEGISLATION: *Home Building Act 1989*

KEYWORDS: Practical completion; completion of work

ORDERS

1. The Tribunal has jurisdiction to determine this claim in accordance with the provisions of s 48K(7) of the *Home Building Act 1989*.
2. The respondent is to pay the applicants' costs of the application in relation to the determination of jurisdiction of the Tribunal.

REASONS FOR DECISION

1. These proceedings were commenced by an application filed on 25 November 2011. The applicant asserts the breach of statutory warranties implied under Part 2C *Home Building Act 1989*.

2. The preliminary question I am asked to determine is whether the Tribunal has jurisdiction in respect of the claim. S 48K(7) of the Act, at the time these proceedings were commenced, so far as is material, was in the following terms:

The Tribunal does not have jurisdiction in respect of a building claim arising from a breach of a statutory warranty implied under Part 2C if the date on which the claim was lodged is more than seven years after:

- (a) the date on which the residential building work the subject of the claim was completed...

3. Other provisions relate to claims where the work is not completed when the proceedings are commenced. Those provisions do not arise in this case because both parties accept the work had been completed long before the proceedings were commenced, they disagree as to when.
4. Essentially, the respondent who I will refer to as the “builder” asserts the work was completed when he issued a Certificate of Practical Completion in April 2004. There is some ambiguity about the date in April, but no issue turns on that ambiguity.
5. The applicants who I will refer to as the “homeowners” assert work was being performed under the building contract up until the Occupation Certificate was issued on 23 June 2005. If this is the correct or preferable view on the material before me the Tribunal has jurisdiction to hear the claim.
6. The resolution of the preliminary question turns on what is essentially a straight forward question of fact which may be formulated in the following terms: is the correct and preferable view on the material put before the Tribunal by the parties that the work was completed after 25 November 2004?
7. Since the commencement, the proceedings have had a relatively drawn out history in the Tribunal. I will set out the timeline of these proceedings:

25 November 2011	Application filed in the Tribunal.
23 January 2012	Adjournment granted on grounds the applicants were overseas.
13 March 2012	Procedural directions made by the Member.

28 June 2012	Adjournment granted on grounds the Registrar had set the matter down on a date the respondent's solicitor had previously advised he was unavailable.
17 July 2012	The interpreter was several hours late at the Tribunal, this reduced the available hearing time. Parties estimated a further four hours of hearing time to run to completion.
22 November 2012	Adjournment granted on grounds the respondent's solicitor was unavailable.
8 February 2013	Part heard for further hearing.
4 June 2013	Adjournment granted on the grounds the respondent's witness was overseas.
22 March 2013	Evidence completed.
26 November 2013	All written submissions and submissions in reply filed in Tribunal.

8. The Home Building Contract related to the construction of a *"two story new house, brick veneer structure with double garage (detached)."* The contract price was \$375,253.00. A large number of fittings and fixtures were to be supplied by the homeowners themselves. It was common ground that certain works were to be undertaken by them separately from the contract.

9. I am satisfied that substantial work continued to be performed at the homeowners' premises under the contract after April 2004. The homeowners tendered a number of receipts signed by the builder which I accept relate to payments for work done under the contract. I interpolate that some work appears to have been done at the homeowners business premises by the builder, but the receipts referred to above were not related to the building work at the factory.

10. The receipts are as follows:

- The sum of \$10,000.00 was paid on 20 July 2004 "for the construction cost";
- The sum of \$2,000.00 was paid on 10 August 2004 "for construction cost";
- The sum of \$7,500.00 was paid on 7 September 2007 "for cost of house construction and cost of handrails".
- The sum of \$3,000.00 "as a supplementary construction cost.
- (Painting of the balcony and the front area of the garage and the sewer in the back yard garden)"

11. I find that these payments all relate to building work the subject of the contract and that the work to which each payment relates was probably done at a time not long before the payments were made. The use of the term "supplementary construction cost" rather suggests the performance of additional work by way of variation to the original contract. To my mind the absence of any objective contemporaneous evidence of any payment by the homeowners to the builder for any building work after the 1 October 2004 is significant.
12. As the homeowners assert, work by the builder under the contract continued throughout 2004 and until June 2005. I would have expected that they could have produced some documentary evidence demonstrating the continuation of "progress payments" during that period. Given that the homeowners have retained the receipts I have referred to above, and had been prudent enough to obtain receipts for cash payments in the first place, had work continued as they assert, I would have expected to see cash receipts covering that work in the same way. There is no such evidence.
13. This makes it very unlikely that the assertion of the homeowners is correct. I have seen the homeowners and the builder give oral evidence and I can say that I formed the impression that the homeowners, on the one hand, were the type of people who would have insisted upon a receipt for payments made, and the builder, on the other hand, is a type of person who is unlikely to have continued to perform work over a period of some months without the continuation of progress payments in respect of the work done.
14. The explanation proffered by the homeowners for the absence of records evidencing any payments after 1 October 2004 is essentially that receipts were obtained but have been misplaced or lost. In circumstances where the hearing before me continued over many months, anything misplaced could have been found. I do not find it credible that receipts after 1 October 2004 were lost.
15. The homeowners are in business. The male homeowner conducts, what seems to be a successful import business, and has done for many years. The female homeowner is engaged in that business in an administrative capacity and is accustomed to creating and maintaining proper records. At least that is the impression I have formed from the evidence.
16. Even if receipts had been lost, one might expected other less direct evidence relating to the continuation of work under the contract, such as diary entries, bank records or photographs recording the progress of work.

17. There was no explanation as to why the homeowners did not call the parents to give evidence, with whom they were living up until they moved into their new home. This evidence may have assisted to determine the date by which the work was probably completed.
18. On the other hand, it is obvious from what I have written so far that I reject the builder's assertion that the work was virtually complete when the Certificate of Practical Completion was issued in April 2004.
19. I find it very surprising that the builder has been unable to produce records about when he was paid and in particular, when he was last paid for any work under the contract. Given the length of time during which builders may be exposed to claims for breach of statutory warranty, one would expect that he would keep records that would permit him to show with some certainty when work was done and detailing progress payments for work done.
20. Something like a site diary might have been retained. One would expect a man of business to keep bank records showing income and outgoings during the period of the statutory warranty. Again, no such records were produced by the builder.
21. Despite what I regard as the unsatisfactory way both parties have conducted their business, that some receipts have been lost, seems the most plausible explanation for the absence of contemporaneous documentary evidence supporting the continuation of work after 25 November 2004. But there is other evidence.
22. Importantly, the respondent tendered as exhibit "1", a letter to him from Sydney Building Approval Centre dated 6 May 2011. That letter establishes that on 14 December 2004 the builder requested the writer, an accredited certifier, to carry out a final inspection.
23. This was done on 17 December 2004. This fits in with the evidence of two building workers who performed work on the site, Mr Neou and Mr Dai.
24. In many ways, I found their evidence also to be unsatisfactory. But both of these men are adamant that they worked on the site until early to mid-December 2004, which consideration gives exhibit "1" added significance.
25. True, both say they worked directly for the homeowners. In a contractual setting where the homeowners retained responsibility for some aspects of the work and for the supply of some fixtures and fittings, the performance of the work by these men might be ambiguous.

26. For instance, Mr Neou, an electrician, says he completed electrical installations in April 2004 and returned later in the year to undertake work not covered by the contract, including the TV antenna, light fittings and electrical wiring for the air conditioning. But some extra electrical work was the subject of a variation under the contract referred to as "Extra Electrical Works (Details to be Supplied by the Owners)". Air conditioning appears to have been excluded.
27. Mr Dai, on the other hand, seems to have performed work which was covered by the contract, for instance labour for installation of the timber floor. The homeowners supplied the timber but the builder was responsible for the installation.
28. It is clear from the variation to the contract that the homeowners would supply internal furniture for internal doors, but installation was to be performed by the builder under the contract. Again, this was part of the work performed by Mr Dai up until December 2004. Likewise the internal painting formed part of the contract works and Mr Dai said he was doing painting up until December 2004.
29. Mr Dai says that all of this work was done directly for the homeowner, yet apparently he looked to the builder to recover payment for him. However that may be, a tradesman's opinion about the identity of the party with whom he contracts is not admissible to establish that fact, offending as it does the objective theory of Australian contract law.
30. There is no doubt that the retention of responsibility for some works by the homeowners and the long effluxion of time have complicated this matter. The latter because of the depreciation of the quality of the recollections of the various participants.
31. There have been numerous decisions concerning the meaning of the date of completion of the contract works. In the appeal from the judgment of Ward J. in *Owners Corporation Strata Plan 64757 v MJA Group Pty Ltd* [2011] 236 at [44] Young JA considered the meaning of the "date of completion". He said:

"Her Honour (at [50]) referred to a decision of the CTTT that the expression meant "when the construction of the building effectively came to an end"... Her Honour seemed to approve of the guideline, but also said that practical completion was a "relatively clear signpost" that the building works had reached completion."

At [47] Young J went on to say:

"The question of completion is one of fact which the primary judge decided after reviewing and considering the primary facts. No error in that approach and conclusion was demonstrated."

32. I appreciate that, in many cases, practical completion may provide a relatively clear signpost to the date of completion, but not in this case, given that it is obvious that substantial works, the subject of the contract, continued well beyond April 2004.
33. In any event, the expression "relatively clear signpost" is not an expression of a principle of law applicable or determinative in every case. Rather, it is a provision of more general guidance at a practical or factual level and, as such, and as here, may be displaced by the facts and circumstances of a particular case.
34. In the end, the date of completion of the work is a simple question of fact to be decided in all the circumstances of the case. That not all of the evidence points in one direction, is unremarkable. If it did, there would be no room for debate. Not without some degree of hesitation, because of the conflicting evidence, I have formed the firm conclusion, (for the reasons given) that the correct and preferable view that the residential building work, the subject of the claim, was not completed until 14 December 2004, when the builder requested the certifier to undertake a final inspection.
35. Accordingly, I find the work under the contract was completed within the time fixed by s 48 K(7) and the Tribunal does have jurisdiction in respect of this claim.
36. As the issue of jurisdiction has been determined separately and particularly, as this matter has taken some time, the costs should follow the event and, accordingly, I make an order for the respondent to pay the applicants' costs of the application in relation to determination of jurisdiction.

C Campbell



C Campbell
General Member
NSW Civil and Administrative Tribunal

28 February 2014