



KURT MICHAEL KONEMANN & REBECCA JANE
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**Application to the Tribunal concerning KURT MICHAEL KONEMANN & REBECCA JANE
KONEMANN - K+L CONSTRUCTIONS HARDEN PTY LTD T/AS GREEN HOMES
AUSTRALIA SOUTH WEST SLOPES**

Applicant: KURT MICHAEL KONEMANN and REBECCA JANE KONEMANN
Respondent: K+L CONSTRUCTIONS HARDEN PTY LTD t/as Green Homes Australia South
West Slopes

On 05-Mar-2020 the following orders were made:

1. K+L CONSTRUCTIONS HARDEN PTY LTD t/as Green Homes Australia South West
Slopes C/- K & L Constructions Harden Pty Ltd 324 Albury Street HARDEN NSW 2587 Australia
is to pay KURT MICHAEL KONEMANN and REBECCA JANE KONEMANN both C/- Birch
Partners PO BOX 532 HURSTVILLE BC NSW 1481 Australia the sum of \$185181.97
immediately.

Failure to pay any instalment in this order by the due date will result in the whole of the balance
being payable immediately.

Reasons:

- \$15000.00 Repayment of contingency fee.
- \$170181.97 Damages for rectification of defective building works.

2. The Tribunal orders that the respondent pays the applicant's costs of and incidental to
the proceedings, such costs on the ordinary basis as agreed or assessed.

3. Reasons for decision:

Application

1 This an application filed by home owner applicants with the Tribunal on 8 June 2019
seeking orders against a respondent builder, named in the application as, Luke Robert
Stevenson, for damages in regard to alleged defective home building work in the sum of
\$205,231.69.

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on the NCAT website at www.ncat.nsw.gov.au

Procedural

2 On 22 July 2019 both parties appeared by telephone at the first directions hearing. The Tribunal directed the parties to file and serve the expert and other evidence the parties relied upon. The Tribunal granted leave for both parties to be legally represented.

3 The Tribunal extended the time for compliance with the directions made on 22 July 2019. The applicants complied with the direction of the Tribunal and filed and served their material on which they rely in time. The respondent has failed to comply with the Tribunal directions.

4 On 11 November 2019 both parties appeared by telephone at a further telephone directions hearing. The Tribunal extended the time for the respondent to comply with the directions made on 22 July 2019 by 20 December 2019 and if it failed to do so, directed the respondent to show cause why any defence to the proceedings should not be dismissed.

5 The Tribunal also ordered that the respondents name be amended to K & L Constructions Harden Pty Ltd. Trading as Green Homes Australia South West.

6 In his statement of 2 October 2019 the applicant, Kurt Michael Konemann requested the Tribunal to make the following orders:

(1) A money order in the amount of \$170,181.97 or such other amount as the Tribunal determines for rectification of the defective works as detailed in the scott schedule attached to the expert report dated 27 February 2019 of George Pudja;

(2) A money order in the amount of \$17,237.10 or such other amount as the Tribunal determines on account of reimbursement for incorrectly claimed variations;

(3) A money order in the amount of \$15,000 as a refund for contingency monies that we paid for rock excavation which was not undertaken; and

(4) An order that the Builder pays the Homeowners' costs.

7 At the hearing the applicants sought and were granted leave to amend their application in terms of the orders sought in Kurt Konemann's Statement except for order (2) in regard to variations. The respondent was given notice of the intention to seek those orders since being served with the applicants documents on 4 October 2019 and no prejudice is suffered by the respondent because of such an amendment.

8 The respondent has not complied with the directions of the Tribunal made on 22 July 2019 and 11 November 2019 or at all.

Ex parte

9 The applicants appeared for and with their legal representative, Mr Michael Birch.

10 There was no appearance by the respondent.

11 The respondent was called by the Presiding Member three times within the precincts of the Court and there was no response or answer to the call.

12 There appeared on the Tribunal file a copy of a notice of hearing addressed to the respondent advising of the time and location of the hearing.

13 The Tribunal was aware of the Registrar's standard practices in notifying parties of the time and place of hearing.

14 The Tribunal was satisfied that in accordance with the Registrar's usual practices as the notice of hearing of the proceedings was emailed to the respondent and that the respondent had been given reasonable and proper notice of the hearing.

15 The respondent failed to attend without putting any explanation before the Tribunal and the applicants were prepared and ready to proceed.

16 Accordingly, the Tribunal was satisfied that the justice of the case required the matter to proceed in the absence of the respondent.

Legislative and jurisdictional considerations

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17 Section 28 of the Civil and Administrative Tribunal Act 2013 provides that:

(1) The Tribunal has such jurisdiction and functions as may be conferred or imposed on it by or under this Act or any other legislation.

(2) In particular, the jurisdiction of the Tribunal consists of the following kinds of jurisdiction:

(a) the general jurisdiction of the Tribunal,

(b) the administrative review jurisdiction of the Tribunal,

(c) the appeal jurisdiction of the Tribunal (comprising its external and internal appeal jurisdiction),

(d) the enforcement jurisdiction of the Tribunal.

(3) Subject to this Act and enabling legislation, the Tribunal has jurisdiction in respect of matters arising before or after the establishment of the Tribunal.

18 Pursuant to s 48K(1) of the Home Building Act 1989 ("HBA") the Tribunal has jurisdiction to hear and determine any building claim brought before it in which the amount is less than \$500,000.00.

19 S48KI (1) of the HBA provides that any person may apply to the Tribunal for determination of a building claim.

20 The Tribunal is satisfied that the applicants' claim is less than \$500,000.

21 Section 18E(1)(a) and (b) of the HBA provides that proceedings for breach of a statutory warranty under the HBA must be commenced within 6 years for major defects and 2 years for other defects after the completion of the building work.

22 An Interim Occupation Certificate was issued by Upper Lachlan Shire Council on 20 December 2017. The building works the subject of the owners' claim were completed by the respondent on or about 12 April 2018. Proceedings were commenced by the applicants on 8 June 2019. The Tribunal finds that the proceedings have been brought in time.

23 The Tribunal formally finds that it has jurisdiction to hear and determine the owner's claim.

Legislation

24 Section 18B of the HBA provides:

Warranties as to residential building work

(1) The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work:

(a) a warranty that the work will be performed with due care and skill and in accordance with the plans and specifications set out in the contract,

(b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,

(c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,

(d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,

(e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,

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(f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.

Evidence

25 The applicants rely on the following uncontested evidence:

- (1) Exhibit A1-
 - (a) Points of Claim
 - (b) The Statement of Kurt Michael Konemann dated 2 October 2019.
 - (c) The expert building report of George Pudja dated 26 August 2019; and
 - (d) The expert window, door and glazing report of Garry Attwood dated 3 September 2019
- (2) Exhibit A2- the application filed on 8 June 2019.
- (3) The sworn oral evidence of-
 - (a) Kurt Michael Konemann;
 - (b) George Pudja; and
 - (c) Garry Attwood

26 There was no material filed by the respondent and in its absence no evidence was adduced.

Facts

27 The Tribunal finds, on the uncontested evidence of the applicants the following facts:

- (1) The applicants entered into a contract with the respondent on 24 September 2016 for the construction of a single dwelling and associated works ("Works") on the applicants' property at 35 McGraw Road Crookwell for the price of \$371,000 inclusive of GST ("Contract").
- (2) The Contract was for designing and constructing a residential dwelling.
- (3) An email from the respondent to the applicant on 22 September 2016 alerted the applicant to the contingency fee being included in the Contract price. The Contract, as entered into, included a contingency fee of \$15,000 for potential rock excavation in the Contract price.
- (4) No rock was encountered and no excavation of rock took place during the construction of the dwelling.
- (5) The Works were completed on or about 12 April 2018.
- (6) The applicants paid to the respondent the full Contract price for the Works.

Contingency fee

28 The contingency fee included in the Contract price was not expended by the respondent, no additional excavation caused by rock was necessary.

29 The Contract does not permit the respondent to retain monies paid for specific works not undertaken or to be applied against other costs.

30 The applicant is entitled to an order that contingency fee is repaid to the applicants. The Tribunal will make such an order.

Variations

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31 Although the applicants do not press their claim in regard to variations, the Tribunal has considered how the respondent dealt with variations.

32 The uncontested evidence before the Tribunal does not show that the respondent dealt with any of the alleged variations in accordance with the Contract. Clause 18 of the Contract requires variations requested by either party to be in writing and signed by both the builder and the owner. There is no evidence of the builder's requests for variations or the owners agreement to the variations.

33 The Tribunal makes no orders in regard to variations.

Defective works

34 The applicants withdraw their claim in regard to Item 10 of the Scott Schedule prepared by Mr Pudja in regard to the supply and installation of the incorrect on site waste water sewage system.

35 The Tribunal is satisfied with the uncontested expert evidence of Mr Pudja and Mr Attwood that the defects identified by Mr Pudja with the building Works are defects that breach the statutory and contractual warranties. The Tribunal is satisfied that Mr Attwood has identified the defective windows and doors and that the method of rectification is replacement of the windows and doors as identified in Mr Pudja's report.

Section 48 MA

36 Section 48MA of the HBA requires the Tribunal to consider the principle of rectification of defective building work by the party responsible for the work is the preferred outcome to proceedings.

37 The respondent has failed to demonstrate a willingness to participate in these proceedings, by failing to comply with directions given to the respondent. The applicants have no confidence that an order for rectification will be complied with by the respondent.

38 Despite NSW Fair Trading intervention, the respondent has failed to rectify defective Works.

39 The Tribunal is not satisfied that the respondent has demonstrated a capacity to comply with a rectification order as it has not put to the Tribunal evidence of its ability to carry out the works.

40 In those circumstances the appropriate order is a money order.

Costs to rectify defective works

41 Mr Pudja's evidence is that he is a licensed builder with 23 years of experience and knowledge of the building industry. He has relied on that experience to determine the cost of the rectification works as follows:

Item	Description	Cost of labour	Cost of Material	Total
1	Replacement of defective windows and doors (see Mr Attwood's report)	\$31,335.00	\$31,709.00	\$63,044
2	Paint finishes	\$8,720.00	\$1,082.00	\$9,802.00
3	Burnished Concrete	\$10,000.00	\$11,760.00	\$21,760.00
4	Bathroom and En Suite	\$4,795.00	\$3,478.00	\$8,273.00
5	Roof fixing	\$3,130.00	\$2,522.20	\$5,652.20
6	Wood Heater Installation	\$4,780.00	\$1,939.00	\$6,719.00
7	Kitchen	\$2,475.00	\$806.00	\$3,281.00
8	Internal doors and locks	\$3,075.00	\$719.00	\$3,794.00
9	Northern Eave Width	\$8,250.00	\$3,956.00	\$12,206.00

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Total	\$76,560.00	\$57,971.20	\$134,531.20
	Plus Margin at 15%	\$20,179.68	
	Sub total	\$154,710.88	
	GST at 10%	\$15,471.09	
	TOTAL	\$170,181.97	

42 Mr Pudja's further evidence is that the amount he has calculated for the cost of rectification of the defective Works is current until at least 30 June 2020.

43 The Tribunal finds that the amount of the cost of the rectification work is a reasonable estimate of the cost of rectification of the defective works.

44 The Tribunal orders that the respondent pays to the applicant the amount of \$170,181.97.

Costs

45 The applicants seek an order that the respondent pays the applicants costs on the ordinary basis.

46 The applicants included in the statement of Kurt Michael Konemann on 2 October 2019 an intention to seek an order for costs.

47 The respondent was on notice of the applicants intention to claim costs, but has made no response to the applicants seeking an orders for costs.

48 Rule 38(2) of the Civil and Administrative Tribunal Rules 2014 provides:

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

(a) the amount claimed or in dispute in the proceedings is more than \$10,000 but not more than \$30,000 and the Tribunal has made an order under clause 10(2) of Schedule 4 to the Act in relation to the proceedings, or

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

49 The claim exceeds \$30,000. The Tribunal has the discretion to award costs under rule 38.

50 Normally, costs follow the event. The applicants say that they are entitled to costs as compensation for the cost that they have been put to in order to enforce their rights under the Contract and their statutory rights under the HBA. The respondent has failed to engage in attempts to resolve the matter and accordingly the applicants were in a position that they had no alternative but to bring these proceedings.

51 The Tribunal is satisfied that the applicants are entitled to on order that the respondents pay the applicant costs on the ordinary basis as agreed or assessed.

If you do not receive the money payable to you as directed by this order, you can get a certified copy of this money order from NCAT. You can then register it with the Local or District Court to enforce the order. For more information about enforcing money orders, visit the NCAT website www.ncat.nsw.gov.au.

Note: Failure to pay the money owed by this order in the time directed can result in enforcement action being taken in the Local or District Court. If this happens additional costs and interest can be added to the amount payable.

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P Boyce, Senior Member

07/03/20

WARNING FOR HOME BUILDING LICENCE HOLDERS

You must notify the NSW Fair Trading's Home Building Service in writing when you have complied with this order (for example, when you have done the work or paid the money). If you do not notify the Home Building Service, your public record will show that you have failed to comply with the order.

If you have an outstanding work order you may be unable to renew your licence when it expires. From 1 April 2009 if you have an unpaid money order, your licence can be suspended 28 days after the due date for payment. You can be fined up to \$22,000 if you falsely claim you have complied with this order.

Correspondence should be addressed to: Home Building Licensing, NSW Fair Trading, PO Box 972, Parramatta NSW 2124, you may also send an email to HBS_NCAT@customerservice.nsw.gov.au

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