Civil and Administrative Tribunal
New South Wales

Case Name:	The Owners-Strata Plan No 79417 v Trajcevski and ors
Medium Neutral Citation:	[2016] NSWCATCD
Hearing Date(s):	12 and 13 August 2015 Submissions closed 4 February 2016
Date of Orders:	12 April 2016
Date of Decision:	29 April 2016
Jurisdiction:	Consumer and Commercial Division
Before:	P. Boyce, Senior Member
Decision:	1. The application is dismissed. 2. Any application for costs by a party is to be supported by evidence and submissions and is to be filed with the Tribunal and served on the other party on or before 15 May 2016. 3. If there is no application made for costs by 15 May 2016 there will be no order as to costs. 4. Any evidence and submissions in response to an application for costs from the party opposing the application for costs is to be filed with the Tribunal and served on the other party on or before 30 May 2016. 5. The parties are to advise the Tribunal in their respective submission if they consent to the issue of costs being determined dealt with on the papers. 6. Alternatively the parties are to make submissions as to why such an order should not be made pursuant to section 50 of the *Civil and Administrative Tribunal Act* 2013.
Catchwords:	Jurisdiction, time of limitation, extension of time

Legislation Cited:	*Strata Schemes Management Act 1996* *Home Building Act 1989* *Home Building Regulation 2004* *Civil and Administrative Tribunal Act 2013* *Civil and Administrative Tribunal Rules* *Limitation Act 1969* *Consumer, Trader and Tenancy Tribunal Act 2001*
Cases Cited:	*Atkinson v Crawley* [2011] NSWCA 194 *Owners SP69050 v Glenzeil Pty Ltd* [2013] NSWCTTT 17 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [HCA] 36 *Labuschagne v Clarke* [2013] NSWCTTT 452 *Griffiths v Gates* [2013] NSWCTTT 302 *Sayegh v Vojodic* [2013] NSWCTTT 436 *Atkinson v Crowley* [2011] NSWCA 194 *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22 *Bryan v Maloney* [1995] HCA 17 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16 *Gallo v Dawson* [1990] HCA 30 *CFZ v Department of Education* [2015] NSWCATCD *Hawke v Chief Executive Officer, WorkCover* NSW [2008] NSWADT 4 *Aleksander Gvozdenic and Audrey Gvodzenic v Greig Sparling* [2015] NSWCATCD 33 (6 March 2015) *Owners Corporation SP53127 v Fair Trading Administration Corporation* [2005] NSWCTTT 230 *Kizas v Lawteal Pty Ltd* [2010] NSWCTTT257
Category:	Procedural and other rulings
Parties:	Owners Corporation Strata Plan 79417 (applicant) Michael Trajcevski, Snez Trajcevski and Traj Developments Pty Ltd (respondents)
Representation:	Counsel: Mr Carlos Mobellan (Applicant) Mr Michael Birch, Solicitor (Respondents) Solicitors: Prime Lawyers (Applicant) Hancock Alldis & Roskov (Respondents)
File Number(s):	HB 14/36424
Publication Restriction:	Unrestricted

REASONS FOR DECISION

1 On 5 February 2015 the Tribunal ordered that this matter be the subject of a preliminary hearing to determine if the Tribunal has jurisdiction to hear and determine the substantive claim by the applicant.

2 The preliminary hearing was heard over two days on 12 and 13 August 2015.

3 On 13 August 2015 the parties were granted leave to file further supplementary submissions after the transcript of the hearing became available. The last day for filing those submissions was 4 February 2016. The parties filed their further submissions within the time allowed by the Tribunal.

4 The issues for determination at the preliminary hearing are;

(1) Whether the Tribunal has jurisdiction to deal with an application filed on 17 July 2014 under the *Home Building Act* 1989 ("HBA") ("the substantive application") by reason of a time limitation; and

(2) Whether the Tribunal has jurisdiction to deal with the substantive application at common law.

5 In making its determination the Tribunal has considered and had regard to;

(1) The applicant's submissions dated 21 October 2014;

(2) The respondents' submissions dated 18 November 2014;

(3) The applicant's submissions in reply to the respondents' submissions, dated 11 December 2014;

(4) The evidence adduced at the hearing on 12 and 13 August 2105 and the transcript of that hearing;

(5) The applicants supplementary submissions dated 25 November 2015;

(6) The respondents' supplementary submissions dated 22 January 2016 and filed on 27 January 2016.

Background

6 The applicant is an owners corporation established pursuant to section 8 of the *Strata Schemes Management Act* 1996 ("SSMA") in respect of residential strata premises comprising two lots and common property located at 96 and 96A ******* ****, ********* ("96" and "96A" respectively) in New South Wales (the "Premises").

7 The respondents Michael Trajcevski and Snez Trajcevski were the registered proprietors of the land on which the Premises were erected.

8 Mr and Mrs Trajcevksi are directors of Traj Developments Pty Ltd (TDPL). TDPL is now the holder of a builders licence issued pursuant to the HBA, but it did not hold a builders licence at the time the building works were carried out to construct the Premises. The respondents' submissions contend that TDPL "was used as a vehicle to obtain finance to fund the project".

9 On 1 September 2005 Mrs Trajcevski was issued with an owner builder permit to construct the premises.

10 On 27 October 2005 a Construction Certificate was issued by a private certifier in relation to the works to build the Premises.

11 After October 2005 the respondents commenced building the applicant's Premises.

12 On 12 July 2007 purchasers entered into a contract to purchase 96A subject to the registration of the linen plan of strata subdivision ("Purchasers"). The Purchasers entered into occupation before completion of the contract on or about 21 August 2007.

13 An occupation certificate for the Premises was issued on 23 August 2007.

14 The strata plan was registered on 4 September 2007.

15 The contract for sale of the Premises was completed on or about 8 October 2007.

16 The applicant contends that the building works were not practically completed until 21 August 2007 at the earliest.

17 The respondents contend that the building works were completed by 11 July 2007.

18 On 17 July 2014 the applicant filed an application for orders under the HBA against Mr and Mrs Trajcevski for failure to comply with the statutory warranties in the HBA.

19 Subsequently the application was amended by the applicant on 28 July 2014 to join the TDPL as a respondent.

20 The respondents submit that the application filed was not a valid application because it did not comply with the *Civil and Administrative Tribunal Rules* ("Rules") as it did not disclose an amount of money, work order or other orders being sought by the applicant. The respondents submit that the application was rejected by the Tribunal. They further submit that the applicant filed a subsequent application on 8 August 2014 seeking orders that Mr and Mrs Trajcevski pay the applicant an amount of $400,000.

21 The applicant disputes that the subsequent application was anything other than an amended application.

22 The Tribunal is satisfied that the application was filed on 17 July 2014 despite it being subsequently amended. The Tribunal notes that the Registrar received the filing fee on that day.

Legislation

23 Section 3B of the HBA provides:

> (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.
> (2) 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 is completed except for any omissions or defects that do not prevent the work from being reasonably capable of being used for its intended purpose.
> (3) It is to be presumed (unless an earlier date for practical completion can be established) that 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 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,
> > (d) (in the case of owner-builder work) the date that is 18 months after the issue of the owner-builder permit for the work,
>
> (4) If residential building work comprises the construction of 2 or more buildings each of which is capable of being used and occupied separately, practical completion of the individual buildings can occur at different times (so that practical completion of any one building does not require practical completion of all buildings),
> (5) This section applies for the purpose of determining when completion of residential building work occurs for the purposes of any provision of this Act, regulations or a contract of home warranty insurance.

24 At the time that the building works were carried out section 18E(1) (prior to 1 February 2012) provided that:

> (1) Proceedings for a breach of a statutory warranty must be commenced within 7 years after:
> (a) The completion of the work to which it relates, or
> (b) 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

Previous proceedings about the Premises

25 The Purchasers have previously commenced proceedings in the CTTT against Mr and Mrs Trajcevski (file number HB 12/32193) on 19 September 2012. Those proceedings were settled on terms as set out in a Deed of Settlement, Release and Indemnity in accordance with a Notice of Order made on 23 April 2013. Part of those orders required Mr and Mrs Trajcevski to carry out rectification work to the Premises by 17 August 2013.

26 The Purchasers alleged that Mr and Mrs Trajcevski failed to comply with the orders and those proceedings were renewed on the Purchasers application on 13 December 2013 in this Tribunal.

27 Those proceedings were dismissed by the Tribunal on 24 March 2014 as the property owner was the Owners Corporation and not an individual lot owner in the strata scheme. The individual lot owner, the Purchaser, had no standing to bring the claim.

Jurisdiction

28 The first issue to be determined is whether the application has been filed within the time.

29 The applicant submits that to determine that issue the Tribunal must consider:

(1) The interplay between subsections 3B(2) and 3B(3) of the HBA. Specifically does s 3B(3) have paramountcy over s 3B(2);

(2) Do the owner-builder provisions of the HBA apply when premises are strata premises rather than dual occupancy;

(3) Does the Tribunal have jurisdiction to consider the applicant's claim at common law, giving consideration to *Atkinson v Crawley* [2011] NSWCA 194 and *Owners SP69050 v Glenzeil Pty Ltd* [2013] NSWCTTT 17;

(4) Are the applicant's claims at common law affected by *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [HCA] 36.

Interplay between subsections 3B(2) and 3B(3) of the HBA

30 The applicant contends that a key concept relating to *"completion"* in subsection 3B(2) are the qualifying words *"being reasonably capable of being used for its intended purpose". "Intended purpose"* is not defined. The subsection links the concepts in the words *"residential building work"* and *"practical completion".* Further, the applicant contends that *"practical completion"* is synonymous with the concept of "completion".

31 The HBA defines "residential building work" as "the construction of a dwelling" and defines "dwelling" as a "building or portion of a building that is designed, constructed or adapted for use as a dwelling".

32 The applicant submits that the logical interpretation of subsection 3B(2) is that *"completion"* can only be achieved when the building in question is *"reasonably capable of being used"* as a *"dwelling".*

33 The applicant contends that the Premises were not sufficiently complete prior to 21 August 2007 to allow the Purchasers to occupy the Premises and that the date of the Premises being practically complete should be on or after 20 or 21 August 2007. In support of this interpretation the applicant relies on materials that the applicant has included in its evidence including:

(1) A letter from the private certify dated 1 August 2007 about the installation of batts in first floor ceilings;

(2) A certificate of conformity dated 3 August 2007 issued for shower screens and on 13 August 2007 for window glass meeting Australian Standards;

(3) On or about 8 August 2007 engineers inspected stormwater drainage at the Premises;

(4) On or about 10 August 2007 a Smoke Detector compliance certificate was issued;

(5) On or about 21 August 2007 the TDPL provided the private certifier a certificate as to waterproofing and as to landscaping;

(6) On 23 August 2007 the private certifier issued the Final Occupation Certificate.

The applicant argues that the dates of the issue of these certificates supports its contention that work was still being carried out during August 2007.

34 The applicant says that subsection 3B(3) does not arise if the Tribunal is satisfied that the *"completion"* date is based on evidence tendered. The presumptions in subsection 3B(3) are to assist in determining *"practical completion of residential building work"* and their application when the date is evident when applying subsection 3B(2) would render subsection 3B(3) as paramount to subsection 3B(2) and render its operation ineffective.

35 In *Labuschagne v Clarke* [2013] NSWCTTT 452 Senior Member Bordon commented in relation to the interrelationship between subsections 3B(2) and (3):

> "The evidence of the respondent Mrs Anastasia Clarke is that practical completion in stage 2 of the works was not reached until 2004. As this was more than 18 months after the issue of the owner builder permit for the work the rebuttable presumption in 3B(3) is rebutted. The issue for determination then becomes when was the work completed except for any omissions or defects that do not prevent the work from being reasonably capable of being used for its intended purpose."

36 In *Griffiths v Gates* [2013] NSWCTTT 302 Senior Member Smith at [51] and [55] said:

> [51]If by application of the presumptions provided by s3B(3)(a)-(d)it was impossible to establish the date for practical completion (for example because they were inapplicable or through lack of evidence), then by application of the definition of practical completion provided by s3B(2) it would still be possible to determine a date for practical completion, and

> [55] ...I find the argument flawed. The plain interpretation to be placed on s3B(3) is that it does not provide for a rebuttal presumption. However, the wording of the section is that the presumption can only be rebutted by establishment of an earlier date

37 In *Labuschagne* and *Griffith* the applicant submits the members comments serve to emphasise the paramountcy of the determination in subsection 3B(2), not to diminish it. However, the preferable interpretation of s 3B is that in *Labuschagne.* The applicant further submits that Senior Member Goldstein in *Sayegh v Vojodic* [2013] NSWCTTT 436 followed *Griffith*, but from his reasons he was not taken by the parties to *Labuschagne* and made aware of the divergent views of s 3B in the CTTT.

38 The applicant contends the work at the Premises could not be owner-builder work because the work was a strata development and as such not a dual occupancy. The applicant helpfully sets out in its submission extracts of the relevant legislation which will not be reproduced in these Reasons. The applicant contends that for either or both of Mr and Mrs Trajcevski to avail themselves of the owner-builder provisions of the HBA they need to demonstrate:

(1) They were the owners of the land jointly or severally and entitled to an estate of freehold in possession (s 3-definitions of the HBA);

(2) The work they undertook was owner-builder work, namely residential building work:

(a) Reasonable cost of labour and material exceeds $5,000 including GST (s 29 (1) of the HBA and Cl.45 of the *Home Building Regulation 2004);*

(b) That related to a single dwelling house or a dual occupancy:

(i) That could not be carried out on the land concerned except with development consent under Part 4 of the

Environmental Planning and Assessment Act 1979 ("EPA") (s 29(1) of the HBA);

(ii) That was a complying development within the meaning of the EPA (s 29(1) of the HBA).

(3) The work undertaken pursuant to an owner-builder permit was work that could only be undertaken if it was undertaken by an individual (S 31(4) of the HBA).

(4) That the single dwelling house or one of the dwellings comprising the dual occupancy concerned would be occupied as a residence of the applicant for the owner-builder permit after completion of the work (s 31(c) of the HBA);

(5) The applicant for the owner-builder permit had completed any applicable education course or training approved by the Director-General 9 (s 31(2)(d) of the HBA);

(6) That during the 5 years immediately before the application for an owner-builder permit the applicant had not been issued with another owner-builder permit (s 31(3) of the HBA).

39 The applicant contends that Mr and Mrs Trajcevski had no intention of occupy one of the lots as their residence and the work done was not owner builder work as the premises were neither a single dwelling house nor a dual occupancy (distinguished by the applicant from strata scheme).

40 The respondents contend that the reasoning by Senior Member Smith in *Griffith* and accepted by Senior member Goldstein in *Sayegh* was correct in determining that the date for practical completion when an owner builder has constructed relevant building works was 18 months after the issue date of the owner-builders permit (s 3B(3)(d) of the HBA). Further *Labuschagne* was decided after *Sayegh* and was not available to Senior Member Goldstein.

41 The respondents say that with the issue of the owner-builders permit to Mrs Trajcevski on 1 September 2005, 18 months after that date, 1 March 2007 is the date of practical completion unless an earlier date can be identified. That is, it is the respondents' position that these proceedings had to be brought before 28 February 2014.

42 If the Tribunal does not accept the respondents' contention, then it must consider the evidence of Mrs Trajcevskis that the building works were completed no later than 11 July 2007. If so, then the last day that the applicant could bring the application would have been 11 July 2014. The application was filed on the 17 July 2014 and that date is after the expiration of the 7 year limitation period and the application should be dismissed as being filed out of time.

43 In relation to the owner-builder permit, the work to construct the Premises was residential building work. S3 of the HBA defines a *"dwelling"* as meaning *"a building or portion of a building that is designed, constructed or adapted for use as a dwelling (such as a detached or semi-detached house, transportable house, terrace or town house, duplex, villa-home, strata or company title home unit or residential flat"*. The owner-builders permit was issued by the Director-General. The Tribunal should be satisfied that the Director-General was satisfied at the time of issue of the owner-builder's permit that the applicant had the intent to reside in the dwelling. It is submitted that it is not for the Tribunal in these proceedings to go behind the issue of the permit. It is for the applicant on its burden of proof to rebut the presumption that the permit was not issued correctly.

44 The applicant submits that if the Tribunal determines that Mr or Mrs Trajcevski had no intention to retain the properties as owners, then the Tribunal can find that they had no intention to be owner-builders and the Tribunal then has no power to find the presumptive provisions of s 3B(3)(d) apply. The Tribunal cannot accept this argument. What the applicant is urging the Tribunal to find is beyond its jurisdiction.

45 The Tribunal has no jurisdiction under the HBA to review the decision of the Secretary to issue an owner-builder permit. The Tribunal accepts on the face of the issue of the permit that the Secretary (Director-General) was satisfied that the applicant was qualified to have the permit issued to her.

46 On that basis the Tribunal is satisfied that Mrs Trajcevski was the holder of the owner-builder's permit to carry out the building work at the premises.

47 Despite the urging of the applicant to reject the reasoning adopted in *Griffiths* and *Sayegh,* the Tribunal notes that Senior Member Smith comments in *Griffiths* directly relates to the point. That is "*the plain interpretation to be placed on s 3B(3) is that it does not provide for a rebuttal presumption. However, the wording of the section is that the presumption can only be rebutted by establishment of an earlier date* (emphasis added).

48 The date of practical completion was 18 months after the owner builders permit was granted to Mrs Tracevski, that is 1 March 2007 and seven years after date is 1 March 2007. The application was filed on 17 July 2014. The application having been filed more than 7 years after the completion date of the building work the application has been filed out of time and the Tribunal has no jurisdiction to entertain the application.

Common Law Claim

49 The applicant submits that its pleadings are summarised as follows:

(1) [Either or both Mr and Mrs Trajcevski] owed the applicant a duty or duties of care to take reasonable are to avoid reasonably foreseeable economic loss to the applicant in having to make good the consequences of latent defects caused by the building's defective design and/ or construction;

(2) Alternatively, the same duty was owed by [TDPL] to the applicant;

(3) By reason of the defective works, [either or both Mr and Mrs Trajcevski] breached that duty, caused the applicant loss and damage and was thereby, negligent;

(4) Alternatively, [TDPL] breached its duty of care by reason of the defective works, caused the applicant's loss and damage and was thereby negligent;

(5) The applicant claims loss and damage from the respondents at common law.

50 The applicant reminds the Tribunal of Senior Member Harrowell (as he then was) comments in *Owners SP 69050 v Glenzeil Pty Ltd (Home Building)* [2013] NSWCTTT 17 at [172]:

> If I am wrong on this interpretation, that is the Tribunal does ot have jurisdiction to determine this application, I would have exercised my discretion to transfer these proceedings to the District Court of New South Wales under Section 23 of the Consumer, Trader and Tenancy Tribunal Act 2001, unless satisfied that the claim in negligence was statute barred by reason of the Limitation Act 1969 or otherwise not a claim available at law.

51 The applicant contends that the applicant's claims at common law are brought within time in that they are not statute barred under the *Limitation Act 1969* and if the Tribunal forms the view that it does not have jurisdiction to determine applicant's common law claims, those claims are not struck out, rather, they are transferred to a court of competent jurisdiction, most likely the District Court. Further, Principal Member Harrowell's conclusions in *Glenzeil* are in line with the binding authority of the NSW Court of Appeal in *Atkinson v Crowley* [2011] NSWCA 194. In *Atkinson* Basten JA expressed the view that the CTTT had jurisdiction to consider questions of law, including questions addressing the existence of a duty of care at common law.

52 The applicant's position is summarized as the Tribunal has jurisdiction to consider the applicant's case against the respondents brought under the common law and that, if the Tribunal forms a different view, it should exercise its discretion to transfer the proceedings to the District Court.

53 The respondents' submit that the law on the issue of the Tribunal's ability to consider the common law claim has been settled since *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16 and certainly since *Brookfield* when the High Court held that the builder did not owe the Owners Corporation a duty of care.

54 The respondent submits that despite seeming to support the applicants contention, *Glenzeil* limits the common law claim, because Principal Member Harrowell conditioned his finding at [172] by the last phrase *"unless satisfied that the claim in negligence was statute barred by reason of the Limitation Act 1969 or* ***otherwise not a claim available at law*** *[emphasis added]."* That is the applicant's claim in negligence is statute barred and also not available at law because of *Brookfield.*

55 The applicant in its submissions dated 11 December 2014 addressed the respondents' reliance on *Brookfield* and distinguished it from the application before the Tribunal. The applicant submits that the circumstances of its application fall within the parameters of *Bryan v Maloney* [1995] HCA 17. Gageler J in *Brookfield* at [185] said: *"absent any application that Bryan should be overruled, and absent data which might permit the making of a value judgement different from that made in Woolcock, Bryan should be accepted as authority"* and that *Bryan ..should be confined to a category of case in which the building is a dwelling house and in which the subsequent owner can be shown by evidence to fall within a class of persons incapable or protecting themselves from the consequences of the builder's want of reasonable care".*

56 Notwithstanding that the Tribunal has found that the application is filed out of time, it considers the submissions made in respect of the common law claim. The law is now settled with the High Court decision of *Brookfield* and the builder owes no duty of care to the Owners Corporation. As to the applicants submission that if such a finding is made then the Tribunal should transfer the matter to the District Court. The Tribunal has found that it has no jurisdiction.

If it has no jurisdiction it is not able to make orders as sought by the applicants.

Section 41

57 The Tribunal must consider whether its discretion under section 41 of *Civil and Administrative Tribunal Act* 2013 ("CATA") can be applied to the application to extend the time for filing the application despite its failure to be filed and commenced in time.

58 At the hearing the issue was raised that section 41 of CATA permitted the Tribunal on its own motion or on the motion of any person extend the period of time for doing of anything under legislation in respect of which the Tribunal has jurisdiction even if the relevant period of time had expired.

59 Both the applicant and the respondents' made submissions in regard section 41.

60 The applicant submits that *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22 considered an extension of time in the context of an extension to file an appeal. The Appeal Panel noted that the discretion to grant an extension of time is unfettered, but must be considered judicially and also the discretion must be exercised having regard to the guiding principle of the Tribunal. Where the interests of justice dictated the Appeal Panel noted that the discretion should be exercised. In considering whether to grant an extension of time the Tribunal should have regard for the principles outlined in *Gallo v Dawson* [1990] HCA 30. The length and reasons for the delay; the appellants prospects of success, whether the applicant has a fairly arguable case and the extent of any prejudice suffered by the respondent.

61 In *CFZ v Department of Education* [2015] NSWCATCD Senior Member Molony set out at [9-11]:

> In Hawke v Chief Executive Officer, WorkCover NSW [2008] NSWADT 4 Judicial Member Montgomery identified 5 factors as applicable to the exercise

of the discretion to extend time in which to seek administrative review under s55 of the then Administrative Decisions Tribunal Act 1997
Explanation for failing to file in time;
Prejudice;
Timeliness and delay in the antecedent administrative process;
Apparent merits of the case
Public interest.

The applicant contends those considerations should apply to an extension of time under the HBA and addresses each criteria identified by Judicial Member Montgomery.

62 The respondent has made supplementary submissions in respect of the applicant's submission in respect of section 41.

63 Those submissions include:

(1) In *Aleksander Gvozdenic and Audrey Gvodzenic v Greig Sparling* [2015] NSWCATCD 33 (6 March 2015) at [18] General Member Sarginson relied upon *Myers v Vero Insurance Ltd* [2009] NSWCTTT698; *Owners Corporation SP53127 v Fair Trading Administration Corporation* [2005] NSWCTTT 230 and *Kizas v Lawteal Pty Ltd* [2010] NSWCTTT257 to hold:

> The Tribunal has no power under section 81 of the Civil and Administrative Tribunal Act2013 (the "NCAT Act"), to extend the limitation period under section 48K(7) of the Act [the HBA], as section 81 of the NCAT Act only operates when the Tribunal has jurisdiction, it does not give the Tribunal power to create jurisdiction when no jurisdiction exists.

(2) Section 81 of the NCAT Act provides:

> (1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following:
> (a) the appeal to be allowed or dismissed,
> (b) the decision under appeal to be confirmed, affirmed or varied,
> (c) the decision under appeal to be quashed or set aside,
> (d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,

(e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.

(2) The Appeal Panel may exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when varying, or making a decision in substitution for, the decision under appeal.

(3) The respondent submits that there is a commonality between sections 41 and 81 in that section 81(2) allows the Appeal Panel to exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance. However, if the Tribunal does not have jurisdiction because of the expiration of the limitation period (ie under section 18E of the HBA), then the Tribunal is not empowered to make an order extending the limitation period in section 18E.

(4) The respondents also submits that *Myers*, *Owners Corporation* SP53127 and *Kizas* supports their contention that time cannot be extended by the Tribunal for the purposes of giving itself jurisdiction.

(5) The respondents respond to the applicant's contention that the principles enunciated in *Jackson* apply is in error. The respondents contend that the discretion under section 41 is limited to circumstances only in which the Tribunal has jurisdiction already conferred upon it. Where there is no jurisdiction, section 41 does not accrue where it would not otherwise have jurisdiction.

(6) The Tribunal does not have power to extend the limitation period prescribed by section 18E of the HBA.

64 The Tribunal finds that for the Tribunal to have the powers conferred by section 41 of CATA it has to have jurisdiction under the conferring legislation. It does not. The Tribunal is unable to exercise its jurisdiction under section 41 to extend the time for commencing the proceedings.

65 The application is dismissed.

Costs

66 The Tribunal notes that there is no application for costs before it.

67 Any application for costs by a party is to be supported by evidence and submissions and is to be filed with the Tribunal and served on the other party on or before 15 May 2016.

68 If there is no application made for costs by 15 May 2016 there will be no order as to costs.

69 Any evidence and submissions in response to an application for costs from the party opposing the application for costs is to be filed with the Tribunal and served on the other party on or before 30 May 2016.

70 The parties are to advise the Tribunal in their respective submission if they consent to the issue of costs being determined dealt with on the papers.

71 Alternatively the parties are to make submissions as to why such an order should not be made pursuant to section 50 of the *Civil and Administrative Tribunal Act* 2013.

(signed)

P Boyce
Senior Member
Civil and Administrative Tribunal of New South Wales

29 April 2016