

AUSTRALIA / JUDGMENT

JK and K Pty Ltd v MoMA Pty Ltd

[2025] NSWCATCD 144**COURT**

Civil and Administrative Tribunal

DECIDED

25 September 2025

BEFORE

T Davy, Senior Member

CASE / FILE NUMBER

2025/00107224

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Source record

Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	JK and K Pty Ltd v MoMA Pty Ltd [2025] NSWCATCD 144
Hearing dates:	14 July 2025
Date of orders:	25 September 2025
Decision date:	25 September 2025
Jurisdiction:	Consumer and Commercial Division
Before:	T Davy, Senior Member
Decision:	(1) The landowner's claim for breach of the statutory warranties under the Home Building Act 2010 (NSW) is dismissed after hearing. (2) No order as to costs.
Catchwords:	BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW) — Statutory warranty — Due care and skill
Legislation Cited:	Home Building Act 1989 (NSW)
Cases Cited:	Grygiel v Baine & Ors [2005] NSWCA 218 Lawrence v Ciantar [2020] NSWCA 89
Category:	Principal judgment
Parties:	JK and K Pty Ltd (Applicant) MoMA Pty Ltd (Respondent)
File Number(s):	2025/00107224

REASONS FOR DECISION

Background

This is a claim, commenced under the Home Building Act 1989 (“the HBA”), for a breach of the statutory warranty by MoMA Pty Ltd (“the architect”) who was engaged by JK and K Pty Ltd, (“the landowner”) to prepare a DA submission for a subdivision of a block of land (“the work”). The land was located xxx, Pennant Hills (“the land”).

Material Facts While a formal written agreement was not entered into until 26 October 2023, the architect commenced the work on 14 September 2023, including site visits, consulting with the landowner, engaging consultants, drafting plans and preparing relevant documentation. The agreement included a scope of works and an amount to be paid for that scope of works. The scope of works constituted a summary of the steps required to prepare an application for the subdivision of land and included an initial site visit and client meeting, sketch design and planning, preparation of DA documents, which included drawings of the current and proposed dwellings on the land and design consultation with appropriate authorities and consultants. The agreement sought an initial payment of 40% of the total fee, being an amount of \$10,340.00 as a “project mobilisation fee”. A payment was made by the landowner to the architect on 27 October 2023 of \$10,340.00. The architect’s fee for the work did not include any allowance for any external consultants’ fees, which were to be paid separately. Both the architect and the landowner agreed that the landowner was unhappy with the amount that the recommended consultants put forward by the architect were going to charge for their work and from 9 November 2023, the landowner would engage his own consultants for those necessary reports. The landowner gave evidence that the architect stopped responding to his phone calls and text messages after he rejected the suggested consultants. The architect gave evidence that in the period 9 November 2023 to 2 December 2023, a draftsman, Jay Byun sent 13 emails to the landowner seeking information about the consultants and other matters relating to the work. The landowner unilaterally terminated the agreement on 18 December 2023. The architect accepted that termination and provided the documents he had prepared as at 18 December 2023, on 8 January 2024.

The landowner’s contentions The landowner argued that the architect had breached the statutory warranty of due care and skill by: Failing to respond to text messages requesting phone conversations, on 9, 14, 15, 20 and 30 November and 2 December 2023. The drawings provided on 8 January 2024 were not consistent with the landowners’ vision, including the use of brick veneer instead of FC sheet cladding and having a peaked roof not a flat roof. This claim was not repeated during oral argument; a subdivision plan did not require a shadow study or drawings including elevation, but only a footprint plan and so the documents prepared were not necessary for the subdivision application; The architect did not engage appropriate professionals to get an assessment of the bushfire risks for the land; The architect took the project mobilisation fee on false basis because he ought to have known that the project was not viable due to the bushfire risks. The landlord claims that he ought to be refunded an amount of \$6,504, being the amount he says he was overcharged in respect of the work done by the architect.

The architect’s contentions The architect contended that: He remained in contact

with the landowner through emails sent by his draftsman, Jay Byun during the period 9 November 2023 to 2 December 2023; He arranged for appropriate professionals to quote for the necessary work, but the landowner elected to obtain his own consultants; A preliminary bushfire report was prepared by an appropriate consultant, but the landowner terminated the agreement before the work was completed; Hornsby Council requires floor plans, elevation and section plans, a proposed site plan and a subdivision plan as part of a subdivision application; A shadow study is automatically generated by the software used by the architect and takes a maximum of half an hour of a draftsman's time and so was included for the landowner's benefit in the documents provided;

Issues

The following issues arise in respect of this application: Is this claim appropriately brought under the HBA? Does the work of the architect demonstrate a failure of due care and skill? Did the architect charge for unnecessary work? Has the landowner established a claim for damages? Should the architect remit any funds to the landowner? Relevant law Section 48A(1) defines a building claim as: In this Part— building claim means a claim for—

- (a) the payment of a specified sum of money, or
- (b) the supply of specified services, or
- (c) relief from payment of a specified sum of money, or
- (d) the delivery, return or replacement of specified goods or goods of a specified description, or
- (e) a combination of two or more of the remedies referred to in paragraphs (a)–(d), that arises from a supply of building goods or services whether under a contract or not, or that arises under a contract that is collateral to a contract for the supply of building goods or services, but does not include a claim that the regulations declare not to be a building claim. Building goods and services are defined in section 48A, which states: building goods or services means goods or services supplied for or in connection with the carrying out of residential building work or specialist work, being goods or services—
 - (a) supplied by the person who contracts to do, or otherwise does, that work, or
 - (b) supplied in any circumstances prescribed by the regulations to the person who contracts to do that work. goods, services and supply have the same meanings as in Part 6A of the Fair Trading Act 1987. “Residential building work” is defined in clause 2 of Schedule 1 to the HBA, as follows: Definition of “residential building work”
 - (1) In this Act, residential building work means any work involved in, or involved in co-ordinating or supervising any work involved in—
 - (a) the construction of a dwelling, or
 - (b) the making of alterations or additions to a dwelling, or

- (c) the repairing, renovation, decoration or protective treatment of a dwelling.
- (2) Each of the following is included in the definition of residential building work—
 - (a) roof plumbing work done in connection with a dwelling,
 - (b) specialist work done in connection with a dwelling,
 - (c) work concerned in installing in a dwelling any fixture or fixed apparatus that is designed for the heating or cooling of water, food or the atmosphere or for air ventilation or the filtration of water in a swimming pool or spa (or in adding to, altering or repairing any such installation). Given that the work done is in relation to subdivision plans, there is a question as to whether the application is properly brought under the HBA as building claims are limited to works “for or in connection with residential building work”. This question has been carefully examined by Basten JA in *Grygiel v Baine & Ors* [2005] NSWCA 218. The court in *Grygiel* was considering an appeal from a decision of the Tribunal to dismiss an application to join a solicitor (and his firm) to a building claim on the basis that advice given by the solicitor in respect of whether a builder was required to have insurance was in breach of the statutory warranties. The Tribunal had dismissed the application on the basis that the Tribunal did not have jurisdiction as the claim was not a “building claim” within the meaning of section 48A of the HBA. As identified above, a building claim, must arise from a supply of building goods or services. Building goods or services means “goods or services supplied for or in connection with the carrying out of residential building work”. This was the language Basten JA was considering in *Grygiel*. His Honour said (at [57]): “It is not necessary to determine whether, in relation to the first limb of the definition, services can be supplied ‘for or in connection with’ the carrying out of residential building work, for the purposes of the definition of ‘building goods or services’, where no residential building is in fact carried out. On one view, the definition of ‘residential building work’ is not limited to activities, such as laying foundations and painting a building, on site, but extends to work of a preparatory nature. Alternatively, preparatory work could be said to have a sufficient connection with the carrying out of building work because its purpose was to give rise to residential building work and it had a sufficient causal nexus with such work ... Accordingly, it is at least arguable that project management arrangements, of the kind addressed in both *Collings Homes* cases, would fall within the definition of ‘building claim’. Were that not the case, distinctions would need to be drawn which might have an arbitrary result, at least from the perspective of the homeowner. Thus, where an architect or project manager provides plans and designs, locates a builder and coordinates and supervises the actual building work, any loss suffered as a result of inadequate coordination and supervision would fall within the building claim, but other conduct would not.” Basten JA further opined that the relevant question was not whether actual residential building work eventuated as a factual pre-condition for a building claim, but the words should be understood adjectivally, such that a connection can be drawn between the work which is the subject of the claim and residential building work (at [58]), whether or not such work is ever undertaken. His Honour determined that the services provided in that case were in connection with residential

building work, in that they were advice to a builder, about services the builder was to provide in connection with residential building work. The decision of Grygiel was considered by the Court of Appeal in *Lawrence v Ciantar* [2020] NSWCA 89. The Court of Appeal was determining a claim by builder in relation to works to be completed to premises, after the granting of an application to subdivide the premises that would complete the works required by that subdivision application. Most relevantly the Court was not considering the meaning of a building claim, merely the definition of “residential building work” in clause 2 of Schedule 1 of the HBA. In that case Bathurst CJ, with whom Meagher JA and Gleeson JA agreed, held (at [129]) that work done in respect of variations to a manhole and drainpipe in relation to a subdivision was “too remote” to fall within the definition of “residential building work”. The work of the architect in the present case is significantly more remote from “residential building work” than that done in *Lawrence v Ciantar*. This is so because the work preceded an application for subdivision and could not have resulted in residential building work, even if the subdivision had succeeded. However, the question remains, were the services provided by the architect ones that were supplied “for or in connection with residential building work”? It is difficult to see how this could be so. No residential building work was or could have resulted from the services supplied by the architect. Clearly, the work was supplied for or in connection with a subdivision, which is nowhere included in the meaning of “residential building work” set out above. Even on the expanded definition propounded by Basten JA in *Grygiel*, work done by an architect in preparation for a DA in respect of a subdivision of residential land, are not services supplied in connection with residential building work and for those reasons, the Tribunal finds that the claim by the landowner is not a building claim within the meaning of section 48(1) of the HBA and therefore it does not have jurisdiction in respect of the landowner’s claims for a breach of the statutory warranties in the HBA. No alternative basis was put before the Tribunal under which the landowner’s claim could be maintained and given that the architect has had no opportunity to address the Tribunal in respect of any claim for breach of statutory warranties under the Australian Consumer Law, procedural fairness would require that the claim be dismissed.

Conclusion

The Tribunal orders that the application of the landowner be dismissed.

Orders

The Tribunal makes the following orders: The landowner’s claim for breach of the statutory warranties under the Home Building Act 1989 (NSW) is dismissed after hearing.

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 DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated. Decision last updated: 27 November 2025

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.caselaw.nsw.gov.au/decision/19ac2bcc4bf9c3498cb75939>

CASE PAGE <https://chat.esheria.ai/case-law/australia/jk-and-k-pty-ltd-v-moma-pty-ltd-2025>

Prepared on 27 October 2026 · Esheria