



Judgment Summary
Supreme Court
New South Wales
Court of Appeal

[Kazzi v KR Properties Global Pty Ltd t/as AK Properties Group \[2024\] NSWCA 143](#)

Gleeson JA, Mitchelmore JA, Basten AJA

The Court of Appeal has dismissed an appeal by Mr Kazzi and allowed a cross-appeal by KR Properties Global Pty Ltd and Calm Properties Pty Ltd (collectively, the Owners) against a decision of the Supreme Court of New South Wales ordering that Mr Kazzi pay the Owners the sum of \$277,579.50 in damages for defective and incomplete building works.

Mr Kazzi was the sole director, shareholder and nominated supervisor of Oxford (NSW) Pty Ltd (Oxford), a building company. The Owners contracted with Oxford to construct a six-unit apartment building on land in Gerringong. The date stipulated in the contract for practical completion of the building works was 4 July 2017. Oxford did not complete the works by that date. On 5 April 2019, the Owners terminated the contract.

In January 2020, Oxford commenced proceedings against the Owners to recover outstanding amounts pursuant to invoices it had served under the contract. The Owners brought a cross-claim against Oxford and Mr Kazzi, seeking damages from Oxford for breach of contract in relation to the costs they incurred to complete the building works and rectify defective works, and damages from Mr Kazzi for breach of the duty in s 37 of the *Design and Building Practitioners Act 2020* (NSW) (the DBP Act) to avoid economic loss caused by defective works. As part of their claim for damages against both Oxford and Mr Kazzi, the Owners sought the interest they incurred on borrowings as a result of the works not being completed by the date of practical completion, relying on *Hungerfords v Walker* (1989) 171 CLR 125; [1989] HCA 8 (“*Hungerfords*”).

The primary judge, Stevenson J, delivered four judgments in the proceedings. On 6 April 2023, his Honour handed down the first judgment, rejecting Oxford’s claims and upholding the Owners’ claims in part. His Honour found that Oxford had wrongly purported to suspend the works under the contract, which the Owners then validly terminated. His Honour concluded that the Owners were entitled to damages from Oxford for the costs to complete the incomplete works and to rectify defective works, and for *Hungerfords* interest albeit from 20 March 2019 (the date on which the Owners demanded that Oxford resume construction), rather than the date of practical completion.

The primary judge dismissed the Owners’ claim against Mr Kazzi. His Honour was not satisfied that the Owners had established a breach of duty on the part of Mr Kazzi personally, or proved what component of the expenses they had incurred related to rectifying the defective works, as opposed to completing incomplete works. As to the latter, his Honour

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rejected the evidence of Mr Mahedy, who was the architect who designed the building and whom the Owners retained to supervise the completion and rectification works following termination of the contract with Oxford.

Subsequently, the Owners raised with the primary judge that he had not dealt with their claim for *Hungerfords* interest against Mr Kazzi. In a judgment delivered on 21 June 2023, his Honour dismissed this claim on the basis that the Owners had not established how Mr Kazzi had breached his statutory duty and what consequences flowed from the alleged breach.

The Owners then raised with the primary judge that Mr Kazzi had in fact admitted, during the hearing, that he had breached his statutory duty in relation to two of the defects on which the Owners relied. On 28 July 2023, his Honour gave a judgment in which he concluded that he had overlooked Mr Kazzi's admitted breaches of duty, and awarded the Owners *Hungerfords* interest against Mr Kazzi from the same date (20 March 2019) as he had awarded that interest against Oxford.

Grounds 1 and 2 of Mr Kazzi's appeal alleged that the Owners had not articulated a claim for *Hungerfords* interest against Mr Kazzi in respect of the admitted defects prior to their reopening application. Grounds 3 to 5 challenged the primary judge's conclusion that those defects caused the Owners to continue to incur interest on their borrowings until July 2020 in circumstances where other works (in particular, incomplete fire safety works) precluded the issuing of an occupation certificate or a strata plan until late June or July 2020.

The Owners' cross-appeal sought judgment against Mr Kazzi in the sum of \$918,545.46. The Owners alleged that the primary judge erred in concluding that *Hungerfords* interest should run only from 20 March 2019, rather than the date of practical completion under the contract (ground 1). The Owners also challenged the primary judge's conclusions that (1) they had not established that Mr Kazzi breached his statutory duty under s 37 of the DBP Act in relation to 14 defects (ground 2); (2) that the Owners had not proved their loss (ground 3); and relatedly, (3) that Mr Mahedy's evidence should be rejected (ground 4).

In dismissing the appeal and allowing the cross-appeal, the Court found that the Owners had advanced claims against Mr Kazzi during the hearing for breach of the statutory duty under s 37 of the DBP Act, and for *Hungerfords* interest resulting from those breaches. The Court considered that Mr Kazzi had breached his statutory duty in respect of the defective work by making decisions, as nominated supervisor of the works, as to the progress and manner of the works that gave rise to the defects.

The Court held that the primary judge erred in taking the view that Mr Mahedy's evidence did not provide a sufficiently reasoned methodology on which to rely, particularly in light of his close involvement in project managing the Building after the contract was terminated.

The Court also found that *Hungerfords* interest should be awarded against Mr Kazzi from the date of practical completion under the contract. Whilst there were concurrent causes of the delay between 20 March 2019 and 30 June 2020, including the outstanding fire safety works, Mr Kazzi's negligence was a material cause of the delay which extended back to the date of practical completion.

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