Accountability for Defective Buildings

This week's Four Corners report leaves no doubt that the legacy of Australia's 20 years of building boom is a high rise residential sector in crisis.

Strata schemes and lot owners are grappling not only with the inflammable cladding debacle but with widespread and systemic building defects, often to the structure of buildings or to their waterproofing or fire safety systems.

According to the ABS, since 2000 to date, 667,394 apartments have been built in Australia. NSW has 259,580 of those units.

A Deakin and Griffith universities study found that 97% of apartments built between 2003 and 2017 contained at least one defect, with waterproofing being the most common defect, followed by fire safety systems.

The Challenges

The challenges faced by OCs and measures mooted by the Government are discussed in my March newsletter. The OCs problems can be summarised thus.

- OCs come into existence after the construction of the strata block and do not rely on anyone during the construction process.
- The OC is not a party to the building contract so cannot sue the Builder directly for breach of the s18B warranties.
- Relief is potentially available—ss18C and 18D extends the reach of the statutory warranties to the Builder and Developer.
- Recovery is often thwarted by insolvency or complicated contracting chains with related entities.
- The statutory Home Building Compensation Fund insurance does not apply to the majority of residential developments.
- The two year non-major defect limitation period is far too short for many OCs to identify defects.
- Uncertainty around the classification of defects places more pressure on the identification process.
- Building standards have dropped due to an absence of accountability, cost cutting and pointless certification processes.

The Solutions?

There are simply not enough engineers and other building professionals to sign off each and every step in the construction process. Responsibility has to be sheeted home to those that profit from the projects.

- ♦ Mandatory insurance—HBCF insurance or other.
- ♦ The HBCF multi storey exemption must be repealed with immediate effect.
- ♦ If no insurance, then perhaps the directors of the developer/builder should accept personal liability?
- ♦ A 2 year limitation period is unworkable. One 6 year period, if not 10 years, should apply.

Defective work—Appeal Panel considers scope of 'major' defect

The Home Building Act

In Ashton v Stevenson; Stevenson v Ashton [2019] NSWCATAP 67 NCAT's Appeal Panel considered the vexed question of what is a 'major' defect under the *Home Building Act 1989* (**Act**).

The concept of '*major'* defect was introduced by the *Home Building Amendment Act 2014* and replaced the former, and arguably more liberal, definition of "*structural*" defect.

There has been little judicial guidance on the meaning of '*major'* defect, and whether the definition departs substantially from that of a 'structural' defect.

A 'structural defect' was a defect that "*prevented the continued practical use of the building or any part of the building".*

A major defect is one "*in a major element of the building that causes or is likely to cause: ... the inability to inhabit the building for its intended purpose or, the destruction of the building or a threat of collapse of the building".*

A 'major element' means a load bearing component that is essential to the stability of the building, a fire safety system or waterproofing.

Major defects attract a six year limitation period but all other defects just two. Time runs from completion of the work. For new strata schemes 'completion of the work' is the date of the occupation certificate.

Defective strata schemes are already under pressure to identify minor defects within the two year period. This difficult task may now be that much harder if defects in the waterproofing systems, often not discovered until past this date, are indeed non-major defects.

First instance

Ms Ashton renovated an 18th century terrace in Darlinghurst both under an owner builder permit and under contracts with others. She then sold the house to Mr Stevenson.

After the sale defects emerged. Mr Stevenson sued Ms Ashton for damages for breach of the Act's statutory warranties.

At first instance the Tribunal determined that there were 'major' defects in the waterproofing works associated with the construction of a balcony and the installation of wall cladding.

Ms Ashton was ordered to pay Mr Stevenson $42,317. Both parties appealed on numerous grounds.

Appeal Panel

The Appeal Panel disagreed with the Tribunal classification of the water ingress being a major defect. As a result, Mr Stevenson was out of time to claim for those defects. The Appeal Panel said:

'[69] ... The definition of "major element" includes "waterproofing". This inclusion does not, however, mean that any, or all, defects involving an imperfection in the system of waterproofing of a building is a "major defect"....

[72] Subsection 18E (4) (a) (i) ...requires that there be a proven, or probable, inability to inhabit, or to use the building. This requires proof of something more than inconvenience.'...'

This decision reinforces the necessity for applicants to obtain expert evidence not only supporting each of its alleged defect claims, but of the facts which diminish the ability to inhabit or to use the building.

Ashton v Stevenson highlights the vigilance required of owners in early investigation of potential defects. This not only includes commissioning a comprehensive defects report but most likely the issue of proceedings prior to the expiry of the two year period.

Manly long lease holders stranded high and dry as Court of Appeal dismisses Spring Cove appeal

In the *Owners—Strata Plan No 91322 v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2019] NSWCA 89 the Court of Appeal gave short shrift to the question of whether an owners corporation, holding a 99 year leasehold interest in common property, was entitled to enforce the *Home Building Act* statutory warranties.

The development under scrutiny was that of 16 luxury townhouses and apartments perched above Sydney Harbour, at Manly's Spring Cove.

This decision provides further food for thought for prospective purchasers of strata units.

Issue

The central issue on appeal was the construction of the phrase '*successor in title'* within the meaning of the *Home Building Act 1989*.

Facts

The trustees of the Roman Catholic Church for the Archiocese of Sydney held the freehold title in the land, part of the historic garden estate between Collins Beach and Little Manly Cove.

In 2015, the Trustees granted development rights to Spring Cove Developments Pty Ltd (**Developer**). The Developer contracted with SX Projects Ptd Ltd (**Builder**) to construct the luxury lots. The prospective lots were sold 'off the plan' and by agreement that the Trustees would, on registration of the strata plan, sell the leasehold in each lot to each purchasers.

In August 2015, the strata plan was registered. The Trustees retained ownership of Spring Cove and granted leases over each of the lots in the strata scheme. he Trustees also agreed to lease the common property in Spring Cove directly to the OC. All leases were for a term (including an option to renew) of 99 years. By February 2016 a liquidator had been appointed to the Builder. Defects later emerged in the common property.

First instance

In 2017, the OC sued the Developer and the Trustees seeking to enforce the statutory warranties.

It was accepted that the Trustees were a deemed 'Developer' under the Act and it was common ground that the interest acquired by the OC was a leasehold interest. However, to succeed on its claim the OC had to establish that it was a 'successor in title' under the HBA and therefore entitled to enforce the statutory warranties.

The OC argued that the question should be considered within the prism of the consumer protection intent of the HBA, which should be advanced to protect purchasers with unequal bargaining power.

In October 2018, ADCJ Cowdroy rejected those arguments.

Appeal

The OC advanced different arguments on appeal, including that s24 of the *Strata Schemes Development Act 2015* operated to vest the common property in the OC.

The problem was that the 2015 Development Act did not apply in August 2015, when the strata plan was registered, but the S*trata Schemes (Leasehold Development) Act 1986* and the *Strata Schemes (Freehold Development) Act 1973* did. Those acts distinguished between freehold and leasehold title.

The Court held that the nature of the title held by the OC must be determined according to the legislation in force at the date of registration. The repeal of the 1986 Leasehold Act could not effect a retrospective vesting of the common property. Thus, the common property remained a leasehold interest and the Trustees contained to own the freehold.

The practical point is that if you are an OC intending on suing a developer you need to check that developer had the same estate or interest as the OC to ensure that the OC is a successor in title. This decision further adds to the current woes of the Owners Corporation

Dividing Fences—the great neighbourly divide

The 'dividing fence' is often a hot topic for neighbours. Help however is at hand in the form of the *Dividing Fences Act 1992 (NSW) (***Act**).

The Act empowers both NCAT and the Local Court to resolve disputes about dividing fences. NCAT has an unlimited jurisdiction for these matters, but the jurisdiction of the Local Court is limited to matters involving a value of up to $100,000.

The first question to be considered is whether the structure is a 'fence' because it is only 'fencing work' that falls within the Act and can be judicially considered. The definition of a fence is broad and includes hedges, structures, ditches, embankments and natural water courses that extend along the boundary separating the adjoining land.

A fence does not have to be on the boundary and it is not either of:

* a retaining wall (unless it is part of a foundation or support necessary for the support or maintenance of the fence), or a

* a wall that is part of a house, garage or other building,

While the Act covers all fences defined as 'dividing fences', it does not cover common property fences which divide two lots within a strata scheme, or common property fences which separate a lot from communal property.

If there is no *sufficient* dividing fence then the general principle is that you and your neighbour are liable in equal shares for contributing to fencing work that would result in a sufficient dividing fence.

However, the Act does not define what is a *sufficient* dividing fence and herein lies the problem—because what is sufficient for one neighbour may not be sufficient for the other.