

NCC 2022 NEW CONTENT & UPDATES

ASBC Hunter Region Meeting

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Topics

Are windows a major or minor defect?

What is a major defect?

Fitting and framing

Measuring damages for defective building work

What experience does a window expert need to have?

Fitness for purpose

Are windows a Major or Minor defect?

- When considering whether windows are a major or minor defect you need to determine whether it is likely that the defect relating to the window will:
 1. Make it impossible to inhabit the building; or
 2. Cause the destruction or threat of collapse to the building.
- Damage is often caused by one or more of combinations of the following:
 1. Scratching during installation;
 2. Scratching post installation;
 3. Weld splatter; and/or
 4. Cleaning of the glass
- *Holmes Construction Wellington v Vero Insurance New Zealand Limited*

What is a major defect?

- Section 18E(4) of the Home Building Act (HBA) defines a major defect to mean a defect in a major element of a building that causes, or is likely to cause, either:
 - i. the inability to inhabit or use the building (or part of it) for its intended purpose;
 - ii. the destruction of the building (or part of it); or
 - iii. a threat of collapse of the building (or part of it).
- “Major element” is relevantly defined under the HBA to mean:
 - i. an internal or external load-bearing component of a building that is essential to its stability;
 - ii. a fire safety system; or
 - iii. waterproofing.

Stevenson v Ashton [2019] NSWSC 1989

- The Supreme Court concluded that the defect was “likely” to have those consequences which meant there was a reasonable prospect of those consequences occurring (not that those consequences were imminent)

Fitting and Framing

Mohibbi v Wearne Builders Pty Ltd [2012] VCAT 1570

- Expert evidence finds that many of the window frames stuck, the margins between the window frames and the sashes were uneven and the frames themselves bowed inwards at the sides. Apart from difficulties of opening and closing the windows it was apparent that most of them did not seal and so permitted the ingress of air and dust.

Conclusion by Tribunal Member:

- Frames are distorted so that, although the sashes themselves are square, they do not engage as intended on the rubber gasket
- \$36,495.00 was awarded to the Applicant's for the cost of removing, straightening and re-installing the windows.

Measuring Damages for Defective Building Work

B & W Windows (Residential) Pty Ltd v Sibilis [2021] NSWCA 271

- The onus of proving the measure of damages lies upon the party seeking to recover damages. Proof requires more than submitting an invoice from a third party builder. Proof is required to demonstrate that all of the rectification work performed was required to ‘bring the work into conformity with the contract’.
- The Tribunal found the contractor liable for the reasonable cost of rectification of the leaking windows and awarded:
 - the amount of an invoice for the supply and installation of the replacement windows from a different manufacturer;
 - \$29,601.69 in respect of ‘loss and damage in connection with the removal and replacement of the windows’ reflecting three invoices issued by the builder; and
 - \$9,420 for the supply of scaffolding.

What experience does a Window Expert need to have?

- Engages in consulting and design work;
- Engages in testing and research, including;
 - Contract testing of glass, safety glass, aluminium, sealants, adhesives, etc. for safety, strength, weathering and aging.
 - Compliance testing of IG Units to ASTM & BS Standards.
- Experience in Failure Analysis, such as;
 - Site Investigations – glass fracture, water leakage etc
 - Field water testing
 - Rectification – design, detailing and monitoring.
 - Nickel Sulphide - failure analysis and identification
 - Thermal / Mechanical Fracture evaluation.
- Experience in preparing and giving expert evidence
- Preferably engineering background

Fitness for Purpose Test

- Fitness for purpose is a phrase used to describe the concept that goods or services must be capable of being used for the intended purpose for which they were purchased.
- In a construction context, a promise that something will be fit for a particular purpose or use may arise in three ways:
 1. Express Term in the Contract
 2. Implication of the Common Law
 - *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454; *Lynch v Thorne* [1956] 1 WLR 303
 3. Implication of Statute
 - Australian Consumer Law
 - *Home Building Act 1989* (NSW) implies warranties in every contract to do residential building work
 - The effect of the warranties is to incorporate into every residential building work contract those terms as if they were agreed at the time when the contract was signed.

Questions?

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