

Australian Society of Building Consultants

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Overview of presentation - A Statutory Warranties Refresher

1 What do the statutory warranties cover

2 Time limits to commence proceedings – major defects and major elements

3 Case updates

The Statutory Warranties

- Implied in every contract to do residential building work – s18B *Home Building Act 1989*:
 - that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract;
 - that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
 - that the work will be done in accordance with, and will comply with, the Act or any other law.



The Statutory Warranties

- that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time.
- that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling:

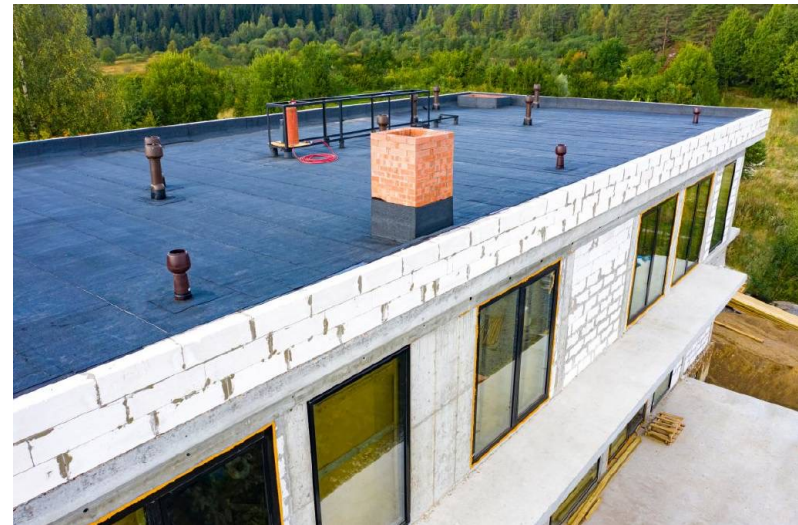


The Statutory Warranties

- that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.

Time limits to commence proceedings – major defects and major elements

- Found in section 18E
- 6 years for a breach that results in a major defect in residential building work or 2 years in any other case.
- starts on completion of the work
- if the work is not completed, the warranty period starts on the date the contract is terminated, or if the contract is not terminated—the date on which work under the contract ceased



Time limits to commence proceedings – major defects and major elements

- **major defect** means a defect:
 - in a **major element** of a building
 - that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code and
 - that causes, or is likely to cause:
 - the inability to inhabit or use the building (or part of the building) for its intended purpose;
 - the destruction of the building or any part of the building; or
 - a threat of collapse of the building or any part of the building.

Time limits to commence proceedings – major defects and major elements

- a **major element** of a building means :
 - an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it
 - a fire safety system
 - waterproofing

Case updates



What is a major defect?

***Ashton v Stevenson* [2019] NSWCATAP 67**

Facts

- On 28 June 2018 the Tribunal determined a Home Building Application concerning defects in the construction of alterations and additions to an existing terrace house in Darlinghurst.
- The Applicant was the purchaser of the Property, Phillip Stevenson (the Owner) and the Respondent, Jaqueline Ashton was the vendor of the Property (the Former Owner), who had undertaken the renovations of the Property under an owner-builder permit.
- The appeal involved consideration of the interpretation and application of section 3B of the HBA, concerning the Date of Completion of residential building work, and section 18E of the HBA concerning the determination of whether a defect is in fact a “major defect”.

What is a major defect? cont.

***Ashton v Stevenson* [2019] NSWCATAP 67**

The Appeal Panel found that:

1. the consequences of a major defect must be shown to have or to probably have a proven consequence for the habitation or use or integrity of the building;
2. evidence to prove the existence of the major defect would need to show more than an inconvenience, and could not be satisfied by speculation or assumption;
3. the plaintiff must establish causation by pointing to evidence which detail the consequences of the defect; and
4. evidence from the occupants or users of the building would be necessary to establish these major defect elements of the claim, rather than merely the evidence of an expert.

*analysis cited in recent cases, including *Ong v CTT & Son Constructions Pty Ltd* [2022] NSWCATCD 88 and *Dodd v Balmain Projects Group Pty Ltd* [2021] NSWCATCD 82

What is a major defect? cont.

Ashton v Stevenson [2019] NSWCATAP 67

Findings

- The Appeal Panel found that a number of the defects claimed in this case were not in fact major defects.
- One example was rainwater entry from a balcony floor. This issue was found to relate to the major element of “water proofing”, but was held not to be a major defect, because evidence relating to the factors in section 18E(4) – inability to inhabit, destruction or collapse of part or all of the building - was scant.



Sequence of analysis in assessing warranty claims

***Vella v Mir* [2019] NSWCATAP 28**

Sequence of analysis

- When does the statutory warranty period start? Generally, this is the date on which the work was completed as per sections 18E(1) and 3B of the Act
- If a statutory warranty has previously been enforced, does s18E(2) of the Act apply to exclude claims for other deficiencies?
- Are each of the claimed defects in a major element of a building?
 - *Section 18E(4) of the Act generally defines a 'major element' to be:*
 - a. an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it, or*
 - b. a fire safety system, or*
 - c. waterproofing, or*
 - d. any other element that is prescribed by the regulations as a major element of a building.*

Sequence of analysis in assessing warranty claims cont.

***Vella v Mir* [2019] NSWCATAP 28**

- Are each of the claimed defects in a major element a major defect?
 - *Section 18E(4) of the Act generally defines a major defect as one that causes or is likely to cause –*
 - a. the inability to inhabit or use the building (or part of the building) for its intended purpose, or*
 - b. the destruction of the building or any part of the building, or*
 - c. a threat of collapse of the building or any part of the building,*
- Has the application been made in time by reference to the:
 - a. date on which the statutory warranty period commenced;
 - b. date on which the statutory warranty period will end (or the date on which it ended); and
 - c. date on which the application to the Tribunal was lodged?

*analysis cited in recent cases, including *Ong v CTT & Son Constructions Pty Ltd* [2022] NSWCATCD 88

Time limits to commence proceedings

Parkview Constructions Pty Ltd v Owners – Strata Plan No. 90018 [2023] NSWCA 66

Facts

- The Owners Corporation (**Owners**) of a residential apartment building brought proceedings against the builder and developer of a 200-unit apartment building for alleged defects under section 18B of the HBA.
- The Owners discovered defects, and proceedings were commenced within the two-year limitation period.



Time limits to commence proceedings cont.

Parkview Constructions Pty Ltd v Owners – Strata Plan No. 90018 [2023] NSWCA 66

Supreme Court proceedings

- A total of 85 defects were particularised in the claim filed by the Owners, and they reserved the right to ‘provide further particulars of defects at the property’.
- At a late stage in the proceedings, the Owners sought to amend their claim to remove the originally claimed defects and to include three additional defects.
- The builder and developer opposed the amendment because it had raised new causes of action, which would be brought out of time because the limitation period under the HBA had expired.
- The Owners were able to amend their claim to include the additional defects because they formed part of the original cause of action, which has been brought within the limitation period.

Time limits to commence proceedings cont.

Parkview Constructions Pty Ltd v Owners – Strata Plan No. 90018 [2023] NSWCA 66

Appeal proceedings

- The issue on appeal was whether or not each defect gave rise to a new cause of action.

Findings on appeal

- The Court of Appeal found that “...an amendment which does nothing more than introduce further departures from the building as promised will not give rise to a new cause of action which would otherwise be out of time” (at [103]).
- If proceedings have been commenced within time, and additional defects are later particularised in a claim, a party is entitled to seek relief.
- The court found that a single cause of action will not apply where a claim was brought for minor defects within time, but a party later sought to amend to include major defects. This is because the limitation periods differ.

Questions





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