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WERE STATUTORY WARRANTIES BREACHED?

THE OWNERS OF STRATA PLAN 76888 –V- WALKER GROUP CONSTRUCTIONS PTY LTD
[2016] NSWSC 541

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**THE OWNERS OF STRATA PLAN 76888 -v-
WALKER GROUP CONSTRUCTIONS PTY LTD [2016] NSWSC 541**

Introduction

The plaintiff owners corporation claimed damages from the defendant builder and developer for work undertaken in the construction of a residential apartment building in the Sydney suburb of Rhodes. The owners corporation alleged that the builder and developer breached the statutory warranties as to the quality of the work involved in the construction of the building implied into the contract between them by section 18B of the *Home Building Act 1989*. It sought to enforce those warranties against the builder and developer.

The Facts

The proceedings were referred to a referee for enquiry and report. Following a five day hearing, the referee delivered his report. The parties then sought to have various parts of that report adopted or rejected.

The case centred on the attempt by the owners corporation to have aspects of the referee's report dealing with two categories of defects rejected. Those defects related to waterproofing of bathtub and shower recesses in the residential units and the compliance with fire safety requirements for the building.

The dispute about the rejection of the referee's findings concerning the waterproofing defects related to the scope of works necessary to repair those defects. The referee concluded that the waterproofing of the bathtubs and shower recesses was defective and presented an "ongoing and uncontrolled risk of water penetration in all the bathrooms where the sealant [on the bathtubs] is subjected to water ponding during showers." The core controversy related to the appropriate method to repair that defect.

The owners corporation's expert proposed that the walls surrounding the bathtubs be demolished and the bathtubs removed and then reinstalled so as to comply with the applicable Australian standard. The builder's expert proposed that the defect be corrected by relining the back and side walls of the shower recess with villa board over the existing tiles and then re-tiling over the new villa board, or by fixing a glass splashback over the existing tiles on those two walls.

The parties' experts agreed that either of the two repair methods proposed by the builder's expert were acceptable. The referee considered that meant that the owners corporation's expert conceded that full demolition and reconstruction of each bath was not required.

The referee rejected the argument of the owners corporation that the repair methodology of the builder's expert would not achieve "contractual conformity" because they involved either two layers of tiles or the splashback being fixed over the tiled walls, and that it was not reasonable to adopt either of those alternatives as both would reduce the size of each lot by 3 or 4mm, something that could not be done without the consent of each lot owner.

Decision

The Court upheld the referee's findings concerning the appropriate method of repair of the waterproofing defects. The Court concluded that the contractual obligation of the builder was to construct the bathrooms so that they complied with the waterproofing requirements of the Building Code of Australia. The Court held that the referee correctly concluded that each repair methodology proposed by the builder's expert achieved compliance with those requirements. Further, the Court observed that there was no evidence that either option involved any substantial or significant compromise in terms of amenity, utility or value so as to suggest it was not reasonable to adopt it.

The Court then turned to consider the submission of the owners corporation that each of those options would involve, in the absence of the lot owners' consent, an unlawful or unreasonable expropriation of lot property. The Court rejected that contention. The Court concluded that the owners corporation was entitled, pursuant to section 65 of the *Strata Schemes Management Act 1996*, to enter each of the lots in order to maintain and repair the common property in accordance with its obligation under section 62. The Court held that the owners corporation was entitled to enter the lots in order to maintain and repair the common property "notwithstanding that the undertaking of the repair and rectification work may add to the common property" (at [42]). The Court concluded that section 65A of the *Strata Schemes Management Act 1996* "does not require the owners corporation be authorised by a special resolution of the lot owners in order to do repair work which has that consequence".

In other words, the Court held that the rectification of the waterproofing defects in the bathrooms would involve nothing more than the repair of common property (not the alteration or addition of common property which required authorisation under section 65A and that there was nothing wrong with

repairs to common property adding to the common property even if that meant the structures used during the repairs would encroach onto the lots.

The Court also rejected the owners corporation's challenge to the findings of the referee in relation to the fire defects.

Comment

The Court came to the surprising conclusion that an owners corporation is able to repair common property in a manner that will encroach on a lot without the consent of the owner of that lot. The rationale for this conclusion was that in the exercise of its statutory duty to repair common property, the owners corporation is able to add to the common property. That may be so. However, the unqualified conclusion of the Court that, in so doing, the owners corporation may erect a structure that encroaches onto a lot, without the consent of the lot owner, is, with respect, unconvincing.

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