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A WIN FOR OWNERS CORPORATIONS: MAJOR DEFECTS GIVEN A WIDE MEANING

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The Supreme Court has just handed down its first decision in which it has considered the meaning of “major defects” under the home building legislation. In a win for owners corporations, the Court has said that the definition of “major defects” in the legislation should be given a broad meaning. This case will make it easier for owners corporations to make claims for major defects that are covered by a 6 year warranty period.

Introduction

In 2015, the NSW Parliament amended the *Home Building Act 1989 (HBA)* to remove the category of defects known as “structural defects” and introduce the concept of a “major defect”. A major defect is covered by a 6 year warranty period. An owners corporation is able to take legal action against a builder or developer in respect of a major defect within that 6 year warranty period.

What is a Major Defect?

Section 18E(4) of the 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 (a) an internal or external load-bearing component of a building that is essential to its stability; (b) a fire safety system; or (c) waterproofing.

The Problem

The problem with the way in which the HBA defines a “major defect” is that, typically, many defects that affect a strata building do not fit neatly within the definition of a “major defect”. For example, a leaking shower or balcony door is certainly a waterproofing defect but often the defect will not cause an inability to inhabit the building for its intended purpose, or destroy the building or create a threat of collapse of the building.

The Case

In the case of *Stevenson v Ashton* [2019] NSWSC 1689, the New South Wales Supreme Court considered a claim made by a home owner against an owner builder for defects including defective balcony drainage and cladding in a terrace building in Darlinghurst, Sydney. NCAT’s Appeal Panel had concluded that those defects were not major defects because the owner could not prove that those defects had made it impossible to inhabit the building or caused the destruction or threat of collapse of the building (or part of

it) as a result of which the owner had run out of time to take legal action against the owner builder for the defects. The owner appealed against NCAT's decision to the Supreme Court.

The Court's Reasoning

The Court considered for the first time the proper meaning of the definition of a "major defect" in the HBA. The Court held that the definition cannot be interpreted narrowly but should be interpreted broadly.

The Court said that there is no need for a defect to have already caused an inability to inhabit part of a building or created an imminent risk of destruction or collapse of a building (or part of it) in order to be a major defect.

The Court said the Appeal Panel was wrong to conclude that in order to be a major defect, a defect must be one which had already made it impossible to inhabit part of a building or caused part of the building to be destroyed or put at risk of collapse.

The Court concluded that in order to be a major defect, it only needed to be established 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) and this was not a very demanding test.

The Court also said that evidence from owners to prove the consequences of defects in order to demonstrate that those defects are major defects (such as evidence that part of a building cannot be inhabited) is not absolutely necessary and it may well be that the evidence is better, or even exclusively, the subject of expert opinion.

The Court set aside the Appeal Panel's decision and sent the case back to NCAT to be determined according to law.

Conclusion

This is the first Supreme Court case that discusses the definition of a "major defect" in the HBA.

The Supreme Court has now confirmed that the definition of a "major defect" is not to be construed narrowly because that is not what Parliament intended. Instead the definition of a "major defect" should be interpreted widely.

Therefore, many defects which were previously considered by many to be minor can now be considered major which are covered by the 6 year warranty period.

This is a good outcome for owners corporations. It will make it easier for owners corporations to establish that many defects are major defects and give owners corporations more time to start legal action against builders and developers to make a claim for major defects.

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