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RECTIFYING DEFECTS IN RESIDENTIAL BUILDINGS

INTRODUCTION

Builders have an obligation to carry out works and complete works in a specified manner and will be responsible to fix defects in residential properties, should they be found after the completion of the works.

SCOPE OF DEFECTS

A defect is a deficiency in the quality of the works which may be caused by the use of poor material or workmanship. Building contracts may provide that the contractor needs to repair or make good defects which are their fault, and, in some cases, all defects irrespective of their causes.

DEFECTS LIABILITY CLAUSES

In a residential building contract, defect liability clauses may also outline:

- the scope of defects the Contractor is required to remedy;
- parts of the contract sum retained by the owner as security for performance of defect rectification work;
- procedures for notifying the contractor of defects; and
- if the defects liability can be extended.

STATUTORY WARRANTIES

Statutory warranties are warranties provided by builders which are in place to extend the builder's obligation to repair or make good which appear in their works. Statutory warranties can be found in building contracts for residential building work where the work is \$5,000, provided the contract was entered after 1 March 2015 (clause 2, schedule 1 of the Home Building Act 1989).

The period in which statutory warranty claims must be brought are as follows:

- 6 years for major defects
- 2 years for other defects
- 7 years for contracts entered before 1 February 2012

The statutory warranty period commences on the date the works are completed. For an Owners Corporation, this is usually the date when an Occupation Certificate is issued. However, parties should be aware that different parts of the works may have different dates of completion.

INSURANCE

Insurance termed the 'Home Building Compensation Fund' must be obtained by the builder under part 6 of the *Home Building Act 1989*, unless the building is over three storeys. Such a claim can be made if builder is dead, insolvent, disappeared or not made a monetary order.

The period in which to make an insurance claim are as follows:

- 12 months for rectification of incomplete work
- 6 years for a claim concerning a major defect
- 2 years for a claim concerning a defect which is not a major defect

UNCERTAINTY OVER A "MAJOR DEFECT"

The test for determining a 'major defect' is two-fold. Firstly, the defect must relate to a major element of the building. The Act defines a 'major' element as:

- An internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it (including but not limited to foundations and footings, floors, walls, roofs, columns, and beams); or
- A fire safety system; or
- Waterproofing.

The second part of the test is that the defect must relate to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), 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; or
- 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.

EVIDENCE FOR DEFECT CLAIM UNDER INSURANCE

When making a statutory or insurance claim, claimants will need to engage an expert from the appropriate discipline to produce a report about the alleged defects.

Claimants should conduct thorough research into their chosen expert, and if the expert is deemed appropriate, should then provide them with all available information concerning the defect

OPTIONS FOR OWNERS

After becoming aware of a defect, home owners should:

- Inform the builder within 6 months of becoming aware and arrange for the rectification of the works; or
- Seek a rectification order from the Office of Fair Trading. However, this option is not available where the builder is unlicensed and the statutory warranty period is set to expire; or
- Commence legal proceedings in the appropriate Court or Tribunal; or
- Use alternative dispute resolution processes such as mediation and expert determination to obtain a payment of money or a rectification order; or
- Exercise common law rights and sue for damages and defects.

The first step however is to review the contract and identify the procedural steps relating to rectification of defects

For more information

For more information on issues relating to defects in residential buildings, contact our Principal Solicitor/ Director.

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