



NSW Supreme Court clarifies warranty periods under the *Home Building Act*

Case Note: Onslow v Cullen [2022] NSWSC 1257

Introduction

The statutory warranties provided under the *Home Building Act 1989* (NSW) (**HB Act**) allow principals/owners to enter residential building contracts with the confidence that their builder will carry out work to a certain standard. While these statutory warranties are implied in every contract for residential building work, some contracts seek to reinforce these statutory warranties by restating and extending certain provisions of the HB Act.

Onslow v Cullen confirms that such contractual provisions must be limited to the warranties already provided under the HB Act, reinforcing a builder's right to not be sued after the expiry of the statutory warranty period.

Facts

- Onslow (**Builder**) and Cullen (**Owners**) entered into a standard Housing Industry Association (HIA) form "NSW Residential Building Contract for Renovations and Additions" contract on 22 January 2016, whereby the Builder would perform certain building work on the Owners' property in Neutral Bay (Contract).
- The Contract included a provision which replicated the statutory warranties provided under section 18B(1) of the HB Act subject to a rider in the following prefatory words: "To the extent required by the Home Building Act, the builder warrants that..."
- The Builder failed to complete the works under the Contract. As such, the Owners commenced proceedings in the NSW Civil and Administrative Tribunal (**NCAT**), which was later transferred to the Local Court.
- The Owners claimed damages for breach of contract, including breach of the express warranties provided under the Contract. The Builder relied on section 18E(1) of the HB Act (as opposed to a breach of contract), which provided that proceedings for a breach of statutory warranty must be commenced before the end of the warranty period - being two years for defects, other than major defects.

Local Court's View (Hosking LCM)

The proceedings were heard at the Local Court by Hosking LCM, who expressed the view that by inserting the statutory warranties into the Contract:

- the Builder had lost the benefit of s 18E of the HB Act;
- the Owner was entitled to sue for damages for breach of the Contract, which allowed proceedings to commence within 6 years under the Limitation Act 1969 (NSW) (**Limitation Act**).

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Key Issue

The key issue on appeal was whether her Honour erred in construing the Contract (which incorporated the statutory warranties found in s 18B of the HB Act), by concluding that the limitation under s 14(1)(a) of the Limitation Act of 6 years applied instead of the 2 years for minor defects in the HB Act.

Supreme Court on Appeal (Adamson J)

On appeal, the Supreme Court held that Hosking LCM erred in her decision due to the following considerations:

- A competing statutory limitation period applies in lieu of the Limitation Act.

Adamson J at [52] stated: “Section 7(a) of the Limitation Act has the effect that, **if there is another limitation period specified in another “enactment”, the other limitation period will apply rather than the one specified in the Limitation Act.** Thus, if the owners’ claim is properly to be characterised as one for breach of statutory warranty, the limitation period of two years in s 18E applies and not the limitation period of six years in s 14 of the Limitation Act for claims for breach of contract.”

- The rights provided under section 18G of the HB Act may benefit both the Owners (in having a right to rely on the statutory warranties) and importantly, the Builder (in having a right to not be sued after the expiry of the statutory warranty period).

Adamson J at [59] stated: “Further, s 18G makes it clear that the parties cannot exclude the statutory warranty “to remove the rights of a person” and any provision which purports to do so, is void. It is significant that s 18G refers to “rights of a person”. The word “person” in this context includes not only the owners but also the builder. **The owners have a right to the benefit of the statutory warranties in terms but the builder has the right not to be sued in respect of non-major defects after the two year period has elapsed...**The owners might reasonably be thought to be the persons entitled to the benefit of a statutory warranty but “person”, without that qualification in s 18G, includes not only the owners but also the builder.”

- The Contract’s prefatory words serve to limit any warranty to the extent otherwise provided under the HB Act.

Adamson J at [56]-[58] stated: “It is important to read the contract in light of the Act. Clause 39 of the contract is plainly designed to comply with s 7(2)(f) and replicate the warranties in s 18B. The prefatory words of the clause, “[t]o the extent required by the [Act], the builder warrants that” (emphasis added) are, in my view significant because the warranties in sub-clauses (a)-(f) are given subject to the rider in the prefatory words. **Thus, the objective intention of the parties is that the warranties are given only in so far as they are required by the Act. The Act requires only warranties in respect of non-major works that are enforceable for two years.** In these circumstances, the builder ought not to be taken to have given wider warranties than those which the Act implied into the contract... **In the present case, the warranties in cl 39 did not lose their character as statutory warranties merely by having been expressed in the contract document.** As referred to above, s 7(2)(e) required that they be included in the contract.”

Key Takeaways

- A contract must be clear in relation to whether warranties provided are additional to the HB Act.
- For Owners: ensure that your contract specifies any additional warranties that are agreed to the provided by the Builder **separately, and in addition to**, the HB Act.
- For Builders, ensure that you rely on the rights provided under section 18G of the HB Act – this provision is in place to protect you as well!

For assistance with drafting contracts that clearly set out your rights, contact the team at Construction Legal.

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