



When a breach of warranty becomes “apparent”: The Owners v Raysons Constructions

The Owners – Strata Plan 87003 v Raysons Constructions Pty Ltd [2025] NSWSC 66

Introduction

Under s 18E(1) of the Home Building Act (HBA), if a breach of warranty becomes apparent within the last six months of the statutory warranty period, proceedings may be commenced within a further six months after the end of the statutory warranty period. A breach of warranty becomes apparent when any person entitled to the benefit of the warranty first becomes aware (or ought reasonably to have become aware) of the breach.

Primary Judgement

In November 2020, six years and some four months after the building had been completed, the plaintiff Owners Corporation (Owners) of a residential apartment building in Meadowbank commenced proceedings in the Civil and Administrative Tribunal (NCAT) against the developer Wekan Pty Ltd (Wekan) and the builder Raysons Constructions Pty Ltd (Raysons). The Owners maintained that Wekan and Raysons were liable for

alleged defects to common property that included cracks in concrete, water seepage, and pooling of water.

On first instance, the Senior Member found that some but not all of the Owners’ claims for breach of warranty were made out and in due course made a rectification order. Raysons appealed to an Appeal Panel of NCAT.

The Appeal Panel upheld the appeal, concluding that the Owners had not commenced proceedings in time, such that NCAT lacked jurisdiction. The Owners appealed to the Supreme Court.

Primary Judgment

In November 2020, six years and some four months after the building had been completed, the plaintiff Owners Corporation (Owners) of a residential apartment building in Meadowbank commenced proceedings in the Civil and Administrative Tribunal (NCAT) against the developer Wekan Pty Ltd (Wekan) and the builder Raysons Constructions Pty Ltd (Raysons). The Owners maintained that Wekan and Raysons were liable for alleged defects to common property that included cracks in concrete, water seepage, and pooling of water.

On first instance, the Senior Member found that some but not all of the Owners' claims for breach of warranty were made out and in due course made a rectification order. Raysons appealed to an Appeal Panel of NCAT.

The Appeal Panel upheld the appeal, concluding that the Owners had not commenced proceedings in time, such that NCAT lacked jurisdiction. The Owners appealed to the Supreme Court.

Supreme Court Decision

The key issue for the Supreme Court was whether the Owners could rely on the six month "window" in s 18E(1)(e) of the HBA which authorises proceedings to be brought six months after the warranty period ends. The Court upheld the appeal.

"Becomes aware or ought reasonably to become aware"

First, the Court held that there are two limbs to the test. On its face, it asks whether "any" person entitled to the benefit of the warranty has either (i) become aware or (ii) ought reasonably to have become aware of the breach. That is to say, there is both a subjective and objective element to the test.

Distinguishing between defect and breach

Second, the Court drew a distinction between "defect" and "breach", noting at [57] - [58]:

A defect or deficiency is a physical thing (or absence of a physical thing). A breach of warranty is a legal conclusion about the way in which residential building work has been performed (or not performed).

It does not follow from an awareness of a defect that there is an awareness of a breach of warranty... In many cases, depending upon the nature of the defect, the inference that there has been a breach of warranty may more or less readily be drawn, but all will depend upon the particular facts. Sometimes further investigation of a patent defect may be necessary in order to determine that there has been a breach of statutory warranty.

Who bears the onus of proof?

Third, the Court confirmed that the burden rests upon the plaintiff to establish its entitlement to rely upon s 18E(1)(e), noting at [69]:

...It is for the plaintiff... to establish that it falls within the indulgence granted by paragraph (e). That conclusion

is confirmed by the consideration... that it would be invidious for a defendant to bear the onus of negating the absence of subjective awareness of any breach of statutory warranty by the plaintiff, that being something which was peculiarly within the plaintiff's knowledge.

More information

For further details on construction law insights and legal case notes, visit [Construction Legal Insights](#).

The Owners' awareness of defects

Fourth, the Court found the Owners were aware of some defects during the final six months of the warranty period. However, it found that a key letter in evidence which informed the Owners that cracks in the concrete were not an issue for the adequacy or serviceability of the structural element of the building in the future to have misled the Owners. As a result, the Owners could not have reasonably become aware of the breach which formed the subject matter of the proceedings.

Takeaway

This case provides much-needed clarification for owners and strata managers seeking to rely on the statutory warranties provided under the HBA. To ensure that you are well-informed should there be a need to rely on s 18E(1):

1. Know when the warranty period for your residential building contract expires;
2. Record dates of when you discover defects; and
3. Seek legal advice well in advance of warranty periods lapsing.