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STRUCTURAL DEFECTS GIVEN A LIMITED MEANING

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STRUCTURAL DEFECTS GIVEN A LIMITED MEANING

The Supreme Court has decided that structural defects under the old home building legislation do not extend to cover building elements such as waterproofing membranes and tiling attached to structural components of the building. This is bad news for owners corporations of residential buildings who made home warranty insurance claims or defect claims against builders and developers before 2015 that are still current because it will essentially limit the scope for them to argue that defects are structural defects that are covered by a six year warranty instead of the two year warranty for non-structural defects.

Introduction

The home building legislation requires builders and developers to give owners corporations warranties concerning the quality of the work they do when they construct residential buildings. These warranties relate to incomplete work and major defects and minor defects. Generally, the warranty period for major defects is six years from the date of completion of the relevant building work and for non-structural defects the warranty period is generally two years from the date of completion of work. The warranty periods generally relate to the period of time an owners corporation has to make a home building compensation fund insurance claim or start legal action against a builder or developer for major and minor defects.

Structural Versus Non-Structural Defects

Previously, the home building legislation classified defects as either structural defects or non-structural defects (instead of the current classification of major and minor defects). The warranty periods for structural and non-structural defects were essentially the same as the current warranty periods for major and minor defects. Up until 2015, the home building legislation defined structural defects to mean defects in a structural element of a building attributable to defective design, defective or faulty workmanship or defective materials and

that resulted in, for example, physical damage to the building. The legislation previously defined a “structural element of a building” to mean any internal or external load bearing components of the building that are essential to the stability of the building such as foundations, floors, walls, roofs, columns and beams and any component (including weatherproofing) that forms part of the external walls or roof of the building.



The Supreme Court's Decision

On 5 May 2017, the Supreme Court considered the proper meaning of the previous definition of a “structural defect” in the home building legislation: see *AAI Ltd t/as Vero Insurance v Kalnin Corporation Pty Ltd; Kalnin Corporation Pty Ltd v AAI Ltd t/as Vero Insurance* [2017] NSWSC 548 (*Vero case*). The Court concluded that:

- in order for a defect to be a “structural defect” it must be a defect in a “structural element” of the building;
- for a component of a building to be a “structural element of the building” it must be “load bearing” so as to be “essential to the stability of the building” or any part of it;
- building elements (such as waterproofing membranes, tiling and the like) attached to load bearing components will not themselves comprise a part of those components, unless they are designed or intended to, and in fact, promote the bearing of load;
- components of a building that form part of an external wall or the roof of a building that have a purely cosmetic or decorative function, such as paint or cosmetic render or a ventilation grill in the roof, are not a “structural element” of a building;
- therefore, in general, defects in building elements that are not load bearing components of a building, such as waterproofing membranes on bathroom floors, will not be structural defects.

Conclusion

The decision of the Supreme Court is bad news for owners corporations that are bound by the previous definition of a structural defect in the home building legislation because the Court has given a narrow meaning to that definition so that defects in waterproofing attached to structural components of a building, typically bathroom floors, are not themselves structural defects, meaning any claim in relation to them must have been made within two years of the date of completion of the relevant work.

However, there is some light at the end of the tunnel. This is because in 2015, the home building legislation was amended to replace the definition of a structural defect with a new definition for a “major defect” which is covered by a six year warranty. A “major defect” has been defined in a

broader way than a “structural defect” under the previous legislation and includes, for example, waterproofing and fire safety systems even if they are not attached to, and do not form part of, a structural or load bearing element of a building.

Unfortunately, however, the jury is still out on whether or not the new definition of a “major defect” will be given a broader interpretation by the courts than the old definition of a “structural defect”. This is because whilst a “major defect” can include defective waterproofing, the defect must have major or catastrophic results for the building, because it must result in the inability to inhabit or use the building for its intended purpose, the destruction of the building or any part of it or a threat of collapse of the building or any part of it.

The lesson to be learned from the *Vero* case is for owners corporations of residential buildings to lodge home building compensation fund insurance claims or start legal action against builders and developers for breach of the warranties in the home building legislation as to the quality of work done on their buildings within two years of completion of the work to ensure the claim is made, or the legal action is taken, in time.

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