

The Owners – Strata Plan No 66375 v King [2018] NSWCA 170

## FACTS

The Kings (**the Respondents**) owned a parcel of land fixed with a warehouse complex in Camperdown. In 1997 the Respondents engaged Bonus Architects to assist in a strata development which involved the conversion of the warehouse complex into a mixed residential and commercial strata development, known as ‘the Grace’.

The Respondents were directors of a company, known as Meridian, and executed a Development application under the Meridian name, assisted by Bonus Architects.

In 2000, a tender was accepted, and the works were completed, with an occupation certificate issued on 16 November 2001.

In 2007, the Owners – Strata Plan No 66375 (**the Appellant**) commenced proceedings against the Kings, and various persons and entities in relation to building defects, claiming breaches of the statutory warranties implied by s.18B of the *Home Building Act* (**the Act**).

The primary judge dismissed the application on the basis that the Kings were not developers as defined by s.3A of the Act, because they were not parties to the relevant building contract with the builder.

In addition, in finding the Kings not in breach of the statutory warranties, the primary judge further noted that, even if they were developers, they were not liable for certain design defects, as the builder was not liable for the certain design defects.

The Appellant appealed the decision on the basis that the relevant residential work, for the purposes of the s.18B warranty, is also implied into s.18C of the Act, as a notional contract between the Owners Corporation and the developer is in existence, and the defective design that causes the defects extends to the developer.

## ISSUES

- i. Whether the implied warranties in s.18B of the Act limits the liability of a developer to subsequent home owners (**the notional contract**) under s.18C based on the actual contract between the builder and the developer.
- ii. Whether a developer is liable under a contract for breach of a statutory warranty in relation to design defects.

## FINDING

In assessing the first issue of the notional contract between the developer and the subsequent home owner, Ward JA distinguishes the case of *MJA Group Pty Ltd*, where the court considered the actual contract between the developer and the builder, in determining the notional contract between the developer and the subsequent home owner.

Ward JA assesses the language of s.18C and takes on the purposive construction approach, which provides that the benefit of the statutory warranties extends to the developer's immediate successor in title as if the developer had done the residential building work himself, herself or itself and states "The *Home Building Act* seeks to provide a comprehensive scheme of statutory warranties which will ensure for the benefit of subsequent owners and close loopholes in situations where, for example, homeowners have been left with no recourse against a bankrupt builder" and it is not relevant to determine the actual contract between a builder and a developer.

In assessing the second issue of a designers liability under contract for design defects, Ward JA takes on the same approach as above when construing the Act in assessing its purpose, stating that 'under the actual building contract, Beach have impliedly warranted that the work will be done in accordance with the plans and specifications and will comply with the law and, as White JA has explained, the work done did not do so'. As a result, the Kings are also liable for the design defects as if the developer had assisted in the design itself.

## QUOTE

Ward JA held that:

*[317] After considering all of the above, I have concluded on this aspect of the appeal that a developer's liability pursuant to the notional contract contemplated by s 18C of the Home Building Act is not predicated upon, and limited by, the existence (or terms) of an actual contract between the developer and a particular builder. Provided that the work done by (or on behalf of) the developer is "residential building work", then, even if it is beyond the scope of the actual contract between developer and builder, the better view in my opinion is that it can nonetheless fall within the scope of the notional contract for the purposes of s 18C.*

*[328] The subject of the developer's notional contract with the immediate successor in title is all of the residential building work in fact done by the developer, and it may be assumed that the notional contract includes any plans and specifications which were in existence. However, the notional contract also includes all of the statutory warranties set out in s 18B, including a warranty that the work will comply with the law. White JA concludes that Beach breached the latter warranty and therefore that the Kings did; applying similar reasoning, but without an intermediate step relying upon the liability of Beach, I conclude that the Kings are liable under the notional contract for breach of the statutory warranty implied by s 18B(c). I have therefore concluded that these grounds of appeal are made good.*

## IMPACT

This case highlights that in assessing a breach of a statutory warranty under s.18B of the *Home Building Act*, the legislature will not narrow the liability of a developer in relation to a notional contract under s.18C, for the actual residential building work contract carried out on the developer's behalf.

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