

Champion Homes Sales Pty Ltd v Commissioner for Fair Trading [2018] NSWCATOD 114

FACTS

Champion Homes Sales (**the Applicant**) is a holder of a contractor licence under the *Home Building Act 1989* (NSW) (the Home Building Act). The Applicant carried out works at two properties and subcontracted a water proofer to carry out waterproofing works at the properties.

Following a leakage complaint, an inspection of the first property was conducted by a Fair-Trading Inspector, and it was reported that there was a failure in the waterproofing membrane which caused leakage.

At the second property, upon inspection by a Fair-Trading Inspector, it was reported that the flashings to the roof was not installed correctly which caused leakage.

The Commissioner (**the Respondent**) concluded that according to the evidence, the Applicant was guilty of improper conduct for breaching the statutory warranty under s.18B(1)(a) of the *Home Building Act* on two occasions, and in being satisfied that a ground on which disciplinary action may be taken against the builder, made a determination:

At [8] ‘*requiring the Applicant to pay to the Commissioner, as a penalty, an amount of \$3,000 pursuant to s62(c) of the Home Building Act*’.

The Applicant filed an application for review of the determination made by the respondent on the basis that the *Home Building Act* should not be interpreted so as to impose strict liability upon a builder for the work of its subcontractors and that a different approach and standards of liability should be applied in assessing a breach for a statutory warranty when applying the disciplinary provisions as they both serve a different purpose.

ISSUES

- i. Whether the *Home Building Act* impose strict liability upon builders for the work of its subcontractors
- ii. Whether a different approach and different standards of liability should be imposed when assessing breaches of statutory warranties which are being considered for the disciplinary provisions.

FINDING

In assessing the first issue of strict liability, Dr J Lucy considered the defences under s.18F of the *Home Building Act* to an action for breach of a statutory warranty and noted that the inclusion of the defences under the Act indicates that the legislature has considered a degree of liability that a holder of a contractor licence is subject to, and the Applicant had not proved its defence.

In assessing the second issue, Dr J Lucy considered s.51(1)(c) which provides that a holder of a contractor licence is guilty of improper conduct if the holder breaches a statutory warranty’ and found that the purpose

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of the warranty and disciplinary provisions are concerned with protecting the public and that the provisions are not subject to different standards of liability.

Dr J Lucy also noted that the Commissioner has a range of options to respond appropriately to a breach of a statutory warranty which has been established against the builder under the *Act*.

QUOTE

Dr Lucy held that:

[18] I do not accept the builder's argument that the Home Building Act requires a different approach to the statutory warranties, when they are being considered for the purposes of the disciplinary provisions, from the approach to be taken when they are considered as contractual provisions. Section 51(1)(c) clearly provides that a holder of a contractor licence is guilty of improper conduct if the holder breaches a statutory warranty. There is no basis for reading down the words "breaches a statutory warranty" or giving a different meaning to "breach" in s 51 to that which applies in Part 2C ("Statutory Warranties") of the Home Building Act (for example, in ss 18BA and 18E). A statute should be construed as far as possible to give the same meaning to words which occur in different parts of the statute, unless there is good reason to do otherwise: see, for example, Craig Williamson Pty Ltd v Barrowcliff [1915] VLR 450 at 452; Queensland v Forrest [2008] FCAFC 96; (2008) 168 FCR 532 at [41].

[21] The inclusion of limited defences to an action for breach of statutory warranty, and a complaint of improper conduct by breaching a statutory warranty indicate that the legislature has considered the degree of liability a holder of a contractor licence should be subject to and has provided accordingly.

[22] It should also be recalled that a finding that the holder of a contractor licence is guilty of improper conduct under s 51 of the Home Building Act, or another provision in Division 1 of Part 4, is only the starting point. This provides a ground for disciplinary action under s 56(c). The taking of such action is discretionary. If the Commissioner "is satisfied that any ground on which disciplinary action may be taken against the holder of an authority has been established in relation to the holder," the Commissioner has a range of options, including to "determine to take no further action against the holder" (Home Building Act, s 62(a)). There is thus ample provision to respond appropriately to breaches of a statutory warranty where the degree of fault, on the part of a builder, is minimal.

IMPACT

This case highlights that in assessing a breach of a statutory warranty under the *Home Building Act*, the legislature has imposed strict liability on a builder in relation to works of subcontractors and has allowed the Commissioner a range of options to respond appropriately to a breach of a statutory warranty. The builder's obligation to supervise its subcontractors remains strict.

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