

**STATUTORY
WARRANTIES AND
PRIVITY OF CONTRACT**

***OWNERS STRATA PLAN
61424 & ANOR V REED
CONSTRUCTIONS PTY LTD
[2009] NSWSC 692***

Christopher Kerin, Associate

Melissa Ramsay, Law Clerk

Andreones Lawyers, Sydney

IMPACT

This decision extends the circumstances under which a person is entitled to the benefit of a statutory warranty by virtue of section 18D of the *Home Building Act 1989* (NSW) ('the Act').

It provides a warning to consultants and other construction industry participants that they could be liable for a breach of the statutory warranties under the Act notwithstanding the fact that those statutory warranties go beyond what is otherwise in the contract between themselves and the developer.

BACKGROUND

On 21 March 1997, PRC Pty Ltd ('PRC') and Wallis Street Developments Pty Ltd ('Wallis') entered into a Joint Venture Agreement for the development of 38 strata title aged person units with basement car parking on land owned by PRC at the corner of Wallis and Nelson Streets, Woollahra, NSW ('the project').

At all material times, the works undertaken on the land owned by PRC fell within the meaning of 'residential building work' under the Act.

Section 18B of the Act states that various warranties are implied into every contract to do residential building work ('the statutory warranties'). The statutory warranties include inter alia a warranty that the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract.

In December 1997, Wallis entered into a design and construction contract with Australian Construction Enterprises Pty Ltd ('the builder') to complete the Project ('building contract').

During November and December 1997, Reed Constructions Pty Ltd ('Reed') entered into the following contracts:

- An early works deed with PRC and Wallis ('early works deed');
- A deed of guarantee with Adelaide Bank Ltd ('the bank') and Wallis ('construction guarantee');
- A construction management deed with Wallis ('construction management deed') for the project; and
- A tie-in-deed with the bank, Wallis, the builder and PRC ('building contract tie-in-deed').

In 1998 the building contract was amended to confirm that the statutory warranties provided for in the Act were incorporated into the building contract and in 1999, the building contract was terminated with the project having been partially completed.

After the building contract had been terminated, Reed assumed responsibility to complete the project in accordance with the terms and conditions of the building contract. Upon completion of the project on or around 15 December 1999, all dwellings were owned by PRC until the land was subdivided by the registration of strata plan No 61424 ('the owners') into common property and lots 1-39.

Following Reed's completion of the project, allegations arose that there were defects in the common property which arose by virtue of Reed's failure to comply with the statutory warranties ('the defects'). The residential building work was covered by an insurance policy held with HIH Casualty & General Insurance Ltd ('HIH').

The Building Insurers Guarantee Corporation ('BIGCorp') was established following the demise of HIH and FAI General Insurance Company Limited ('FAI') whereby

the NSW Government agreed to indemnify beneficiaries of FAI and HIH home owners warranty insurance policies, creating BIGCorp to assess claims and insurance payouts from the newly created Building Insurers Guarantee Corporation Fund.

The sum of \$520,241.55 was paid on account of the rectification of the defects to the first plaintiff, the owners, by the second plaintiff, BIGCorp. Following this payment, BIGCorp sought to recover the amount paid by it to the owners from Reed.

SECTION 18D

Section 18D of the Act states that a person who is a successor in title to a person entitled to the benefit of a statutory warranty under the Act is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty.

The owners are a successor in title to PRC but not Wallis. However, Wallis was entitled to the statutory warranties from Reed as Wallis was a party to the building contract.

The issue to be determined was whether PRC as land owner, but not a party to the building contract, was entitled to the statutory warranties. That is, PRC needed to overcome the privity of contract which existed between Wallis and Reed. If this could be established, BIGCorp argued that the owners would be entitled to recover damages from Reed as the owners would also enjoy the benefit of the statutory warranties as successor in title to PRC, under section 18D.

INTERPRETATION OF SECTION 18D

His Honour Justice Einstein dealt with the matter briefly and found in favour of the owners ordering that 'the first plaintiff was a person entitled to the benefit of a statutory warranty

enforceable against the defendant by operation of s 18D' of the Act.

In his reasoning, his Honour determined that section 18D avoids the privity of contract rule and should be read as meaning that 'regardless of the identity of whomever it is that is entitled to the benefit of a statutory warranty, someone else who is not privy to the contract obtains the benefit of that warranty'.¹ Therefore, his Honour determined that a person was entitled to the benefit of a statutory warranty when work is done on behalf of that person 'within the concept expressed in those terms in sections 3A and 99 and 101' of the Act.²

His Honour further concluded that the rights in section 18C and section 18D are cumulative and not exclusive.³ Therefore, where a statutory warranty was owed by Reed to PRC, that warranty also vested in the Owners as successor in title when the title was transferred.

His Honour held that other indicia to the same effect included the fact that there may be more than one builder who undertakes the same residential building work in that 'there may be persons involved in construction and persons involved in coordinating the supervising, both of whom will be builders of that work'.⁴

This decision is currently the subject of an appeal by Reed to the Court of Appeal. It is not expected that this appeal will be heard before mid-2010.

CONCLUSION

The repercussions of this case are substantial. It effectively exposes a range of previously innocent industry participants involved in residential building work to potential liabilities for breach of the statutory warranties notwithstanding the fact that their involvement in any given

residential building work may be minimal. This greater exposure to liability will no doubt come as some surprise to these industry participants in that regardless their role in a project, they may be regarded as having provided statutory warranties to the holder of title.

From the perspective of home owners, this case provides a new avenue for relief when seeking damages for the rectification of defects in residential building work and will, at least until the pending appeal is determined, require legal advisers to consider more widely those persons who might be regarded as potential defendants.

REFERENCES

1. Einstein J at 23
2. Einstein J at 24
3. Einstein J at 25
4. Einstein J at 27