

WHO IS ENTITLED TO THE BENEFITS OF STATUTORY WARRANTIES AND INSURANCE SCHEMES?

ACE WOOLLAHRA PTY LTD FORMERLY KNOWN AS REED CONSTRUCTION SERVICES PTY LTD V THE OWNERS STRATA PLAN NO 61424 & ANOR [2010] NSWCA 101

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IMPACT

This decision overturns the decision of Justice Einstein in *The Owners Strata Plan No 61424 & Anor v Reed Constructions Pty Ltd* [2009] NSWSC 692 which was the subject a case note in the November/December 2009 edition of the *Australian Construction Law Newsletter* (#129).

The substantial repercussions of that decision by Justice Einstein do not arise and a more narrow interpretation is restored to the extent and meaning of section 18D of the *Home Building Act* (HB Act) which entitles successors in title to the benefit of statutory warranties under the HB Act.

BACKGROUND

The case note in the above mentioned edition of the *Australian Construction Law Newsletter* contains a detailed summary of the facts and therefore they will not be repeated in full detail here.

In short, PRC Pty Ltd (PRC) and Wallis Street Developments Pty Ltd (Wallis) entered into a joint venture agreement for the development of land in Woollahra which was owned by PRC only. Wallis (the non-owner of the land) subsequently entered into a building contract with Reed Constructions Pty Ltd (now Ace Woollahra Pty Ltd) (Reed).

Upon completion of the building work, the subsequently created owners corporation (the Owners) was therefore a successor in title to PRC but not Wallis. However, on the face of section 18D of the HB Act, the Owners would not have the benefit of the statutory warranties from Reed as Wallis was not a predecessor in title to the Owners. While there was no question that Wallis was entitled to rely upon statutory warranties from Reed (pursuant to section 18B of the HB Act), the question before Justice Einstein was whether the Owners were able

to rely upon statutory warranties from Reed even though the Owners were successors in title to PRC not Wallis.

Justice Einstein held at paragraph 21 of his judgment that 'the circumstances which entitle a person to the benefit of the statutory warranty provided for in section 18D are satisfied when that work is done on behalf of that person within the concept expressed in those terms in sections 3A, 99 and 101 of the Act'. That is, the expression 'on behalf of' in Justice Einstein's decision was construed in such a way as to extend to a non-contractual relationship (being a relationship between the Owners and Wallis) in order to provide statutory warranties from Reed to the Owners.

The decision of Justice Einstein, if upheld, would have significantly increased the exposure of those involved in completing residential building work such that even those with minimal involvement in the construction process could be regarded as having provided statutory warranties to the holder of title or successor in title.

DECISION

The reasoning of the decision of the Court of Appeal is contained in the decision of Sackville AJA (with whom Tobias JA and McColl JA agreed).

Justice Sackville's decision may ultimately be split into two parts.

Firstly, Justice Sackville observed at paragraph 49 that the parties common approach that 'the basis that the expression 'a corporation on whose behalf residential building work is done' in s 3A and the equivalent expression in s 99 of the HB Act embrace not only a party to a building contract, but a corporation for whose benefit the work is being done under a building contract to which it is not a party' was flawed.

This conclusion was reached as the phrase 'on behalf of' was regarded as capable of many different meanings. At paragraph 51, Justice Sackville observed:

Taken in isolation the words 'on whose behalf' can describe non-contractual relationships. However ... it is significant that s 4 of the HB Act, which immediately follows s 3A, appears to use the expression 'on behalf of' to mean pursuant to a contractual relationship. ... It is true that the HB Act uses the expression 'party to the contract' or equivalent expressions from time to time But, as a matter of language ss 3A and 99 are capable of being read more restrictively

His Honour then went on to state at paragraph 52:

... there are good reasons for confining the expression 'on whose behalf' to the case where residential building work is undertaken by one party on a contractual basis for another party In my opinion, it is difficult to impute to Parliament an intention that a contractor contravenes the HB Act and is liable for criminal penalties (s 92) if the contractor takes out a contract of insurance but the policy does not insure every person on whose behalf, as a matter of fact, the work is being undertaken (s 99).

The conclusion from the above approach is contained in paragraph 54 which states that 'it cannot be said that the residential building work carried out by the Builder pursuant to the contract with Wallis ... was work carried out on behalf of PRC. Since the Builder had no contractual relationship with PRC it would follow that the contract of insurance the builder was required to take out under s 92 did not have to insure PRC against the risks identified in s 99.

Accordingly, there would be no basis for concluding that the Proprietor was a successor in title to a person entitled to the benefit of a statutory warranty for the purposes of s 18D of the HB Act'.

Secondly, even if the phrase 'on behalf of' meant what the parties assumed it to mean, Justice Sackville held that the outcome did not change. His Honour held at paragraphs 56 and 57:

The Proprietor can rely on s 18D only if PRC is a person entitled to the benefit of the statutory warranties. Only then can the Proprietor satisfy the statutory requirement that it must be a successor in title to a person entitled to the benefit of the statutory warranties. Mr Lynch ... submission was put on the basis that an implication must be made into s 18D in order to accommodate the requirement in s 99 that the contract of insurance must insure the person on whose behalf the work was being done against the risks there identified.

It is, however, a large step to move from the proposition that a contractor's insurance policy must insure a person on whose behalf the residential building work is being done (even if not a party to the building contract), to the proposition that the HB Act must be read as including within the expression 'person entitled to the benefit of a statutory warranty' in s 18D any person on whose behalf the work is in fact being done.

That is, PRC could only rely upon the statutory warranties for the purposes of section 18D only if section 18B or section 18C enables this.

His Honour then observed as an obiter dicta that the conclusion reached did not result in [a] the Owners not being able to rely upon the statutory warranties as

against PRC (noting that PRC was not a party to these proceedings) nor [b] the Owners being denied the benefit of HOW insurance [see paragraphs 60 and 61].

CONCLUSION

The Court of Appeal ultimately held that the Owners were not entitled under section 18D of the *Home Building Act 1989* to enforce the statutory warranty against Reed.

Those involved in residential building work can now manage their risk with more certainty.

From the point of view of purchasers of residential property, enquiry should be made as to whether the predecessor in title contracted with the builder in order to establish the existence of statutory warranties owed by the builder.