A NEW PROBLEM UNDER THE HOME BUILDING ACT 1989 - WHO IS RESPONSIBLE FOR DEFECTS?

NEW ISSUES

The recent decision of the Supreme Court in *Owners Corporation SP72357 v Dasco Constructions Pty Ltd and ors[2010] NSW SC 1819* has far reaching implications for home owners who wish to enforce the statutory warranties provided under Section 18B of the Home Building Act 1989 and which are implied into all contracts for work undertaken under that Act.

The Dasco decision was handed down shortly after the recent decision of the Supreme Court in *Ace Woollahra Pty Ltd (formerly known as Reed Constructions Services Pty Ltd) V The Owners Strata Plan 61424[2010] NSW CA101* which resulted in the enactment of the *Home Building Amendment and Insurance Act 2010* to introduce Section 18 D(1A).

The Dasco decision has identified significant issues which subject to any Appeal may result in further amendments to the Home Building Act 1989.

THE DASCO DECISION

In Dasco, the Owners Corporation commenced proceedings against the builder for defective building work.

In support of its claim, the Owners Corporation relied upon Section 18D of the Home Building Act to extend the operation of the statutory warranties prescribed by Section 18B of the Act.

In paragraph 12 of the Builders List Response, the Builder maintained that it was entitled to raise the proportionate liability provisions contained in Part 4 of the Civil Liability Act 2002 in order to limit it's liability to the Owners Corporation.

The Owners Corporation applied to Court to have paragraph 12 of the Builder's List Response struck out on the basis that the defence of proportionate liability provided by Part 4 of the Civil Liability Act 2002 was not available to a claim for a breach of implied warranties under Section 18B of the Home Building Act 1989.

The case raised the interesting question as to whether the proportionate liability provisions of the Civil Liability Act 2002 applied to claims for breach of the statutory warranties implied by the Home Building Act.

His Honour Justice Einstein observed that there was no direct authority on point.

This newsletter provides a summary and general overview only. It is not intended to be comprehensive nor does it constitute legal advice.

Kreisson Legal Pty Limited ACN 113 986 824 is an incorporated legal practice under the Legal Profession Act 2004

His Honour however found that the *"ordinary natural meaning of Section 34 (of the Civil Liability Act 2002) was that proportionate liability applies."*

As to the further question of whether that there was an "apportionable claim" under section 34(1) of the Civil Liability Act 2002, as Honour Justice Einstein referred to the decision of Barrett. J, in *Reinhold NSW Lotteries Corporation. (NO2) [2008] NSW SC187* which supported the proposition that the appropriate time for a decision to be made as to whether there is an apportionable claim under Section 34(1) will apply is after the substantive causes of action in question have been determined.

Although his Honour did not ultimately determine the question of whether there was an apportionable claim, his decision now requires Home Owners and Owners Corporations to not only join the builder in any legal proceedings but also any other potential wrong doer, leading to both substantial costs and additional complexity in any proceedings commenced under the Home Building Act 1989 for defective building work.

THE CIVIL LIABILITY ACT 2002

To understand the Dasco decision within the legislative context and its effect some consideration needs to be given to the Civil Liability Act 2002.

The Civil Liability Act 2002 commenced operation on 1 December 2004.

Under the Act proportionate liability applies to claims for economic loss or damage arising from:

- a failure to take reasonable care (whether the claim is in contract, tortfeasors or otherwise);
- a contravention of Section 42 of the Fair Trading Act 1987.

The Civil Liability Act 2002 provides that the liability of a defendant who is a concurrent wrongdoer in respect of a claim will be limited to an amount that reflects the proportion of the damage or loss claimed that the Court considers just having regard to the extent of that Defendant's responsibility.

Section 34(1) of the Civil Liabilities Act 2002 defines "apportionable claim" as "a claim for economic loss or damage to property in an action for damages (whether in contract, tortfeasors or otherwise) arising from a failure to take reasonable care".

A concurrent wrong doer is defined under Section 34(2) of the Civil Liability Act 2002 as *"a person who is one of two or more persons whose acts of omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim…"*

Section 35 of the Civil Liability Act 2002 sets out the way in which proportionate liability is imposed by the Court.

This newsletter provides a summary and general overview only. It is not intended to be comprehensive nor does it constitute legal advice.

Kreisson Legal Pty Limited ACN 113 986 824 is an incorporated legal practice under the Legal Profession Act 2004

Level 30
201 Elizabeth Street
Sydney NSW 2000

E: excellence@kreissonlegal.com.au
P: 8239 6500
F: 8239 6501

www.kreissonlegal.com.au

In particular subsection 1(a) provides that the liability of a Defendant who is *"a concurrent wrong doer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the Court considers just having in regard to the extent of the Defendant's responsibility for the damage or loss…"*

Put simply a party liable in a damages claim in contract or negligence (which does not involve personal injury) only pays that percentage of the total loss or damage for which it was responsible.

Section 35(3) and 35(4) of the Civil Liability Act 2002, then enables the Court to carry out the process of apportionment having regard to the comparative responsibility of any concurrent wrong doer who is not a party to the proceedings.

To overcome the problem that a Plaintiff may not always be aware of the identity of all concurrent wrong doers, Section 35A of the Civil Liability Act 2002 places a duty on a Defendant to inform the Plaintiff of the identity of other persons that the Defendant on reasonable grounds believes may be a concurrent wrong doer in relation to the Plaintiff's claim and to inform the Plaintiff of the circumstances that give rise to that belief.

By requiring the Defendant to plead with some specificity the identity of the concurrent wrong doer the Plaintiff should be in a position to seek leave to join the concurrent wrong doer in any proceedings.

Section 38(1) of the Civil Liability Act 2002 enables the Court to give leave to join a non party concurrent wrong doer. Importantly however, there is no requirement in NSW for a concurrent wrong doer to be joined to proceedings for the Court to take into account their proportionate share of the Plaintiff's loss.

WHAT DOES THE DECISION MEAN

As a result of the Dasco decision, proportionate liability now applies to the enforcement of the statutory warranties by a building owner or a successor in title, pursuant to Section 18D of the Home Builders Act 1989.

The consequence of the application of the Civil Liability Act 2002 to Home Owners (including Owners Corporations) is significant for at least the following reasons:

1. Failure to Act can have adverse consequences.

2. A prospective Plaintiff being a Home Owner will now be required to undertake a thorough investigation on the identification of concurrent tortfeasors.

   This is because a Builder in answer to a claim by an Owner may identify by way of defence other concurrent tortfeasors who have contributed to the loss and/or damages suffered by the Owner.

This newsletter provides a summary and general overview only. It is not intended to be comprehensive nor does it constitute legal advice.

Kreisson Legal Pty Limited ACN 113 986 824 is an incorporated legal practice under the Legal Profession Act 2004

Level 30
201 Elizabeth Street
Sydney NSW 2000

E: excellence@kreissonlegal.com.au
P: 8239 6500
F: 8239 6501

www.kreissonlegal.com.au

In such a case the Owner will then have to make a decision as to whether the other commitment tortfeasors should be joined in any action. Failure to undertake such action would intentionally result in the Owner recovering from the Builder such sums as determined by the Court represent the Builders proportion for the loss and damage without recourse against any other tortfeasors.

LIMITED HOME OWNERS WARRANTY INSURANCE

3. If an Owner has a claim against a builder or developer for breach of statutory warranties the damages which may be recovered by the owner from the builder may be reduced under the Civil Liability Act 2002, if the Court decides to apportion liabilities.

4. The extent of any apportionment will not be known until after the end of the proceedings and after the court has heard all the evidence and submissions. Proceedings already commenced in the Consumer Trade and Tenancy Tribunal by owners of Owners Corporations against the builder may now need to be amended to join other concurrent tortfeasors in which case the proceedings will need to be transferred to a Court.

5. Currently under the Home Building Act, Building Contractors who undertake residential building work need to have Home Owner's Warranty Insurance. The Act does not require that sub-contractors to the building contractors also hold a Home Owner's Warranty Policy of Insurance.

   On any hearing, should the Court ultimately reduce the liability apportioned for the loss and damage and reduces the liability of the builder; the Home Owner will only be able to recover the loss for which the builder was responsible.

   Should it be the case that the builder of the Home Owners Warranty Insurance and builder either disappears, becomes insolvent or dies in relation to contracts entered into after xxx the Owner is entitled to make a claim for indemnity under the Home Owner's Warranty Insurance.

RISK OF INSOLVENCY TRANSFERRED TO OWNER

6. Home Owners do not however have the same protection in relation to any apportionment of loss determined by the Court against sub contractors who may be uninsured. In that case the Owner will have no recourse to any Home Owners Warranty Policy of Insurance in relation to loss and damaged determined by the Court to be the responsibility of the sub-contractor. In this way the risk of any death, disappearance or insolvency of an uninsured subcontractor is transferred to the Owner which defeats the Consumer protection objects of the Home Building Act.

INCREASED COSTS OF LITIGATION

This newsletter provides a summary and general overview only. It is not intended to be comprehensive nor does it constitute legal advice.

Kreisson Legal Pty Limited ACN 113 986 824 is an incorporated legal practice under the Legal Profession Act 2004

7. The application of litigation of the Act to Home Building Act 1982 would also result in potentially a multiplicity of proceedings, costs and complexity. In the case for example where an Owners settles its action against a builder for an amount representing the builder's responsibility for the loss and damage, the Owners would need to commence separate proceedings against other concurrent wrong doers for such amounts that the Owners Corporation was not able to recover against the builder.

INSURANCE CONSEQUENCES OF CONTRACTING OUT FROM THE CIVIL LIABILITY ACT 2002

8. Further Section 3A of the Civil Liability Act 2002 allows parties to contract out of the proportional liability provisions of the Act effectively reverting back to the common law obligations under Contract.

9. That being the case it is not uncommon for contracts to contain express provisions stating that the parties agree to contract out of the Civil Liability Act 2002.

10. Contracting out of the Act however creates the potential for greater liability for damages for contract and tortfeasors and would apply proportionate liability under Section 35 of the Act applied This fact and it's interaction with insurance policies and the terms can create the potential problem of inadvertent under insurance.

11. Insurance companies generally calculate their risks and premiums on standard risk profiles which may include the assumption that the Civil Liability Act 2002 and proportionate liability applies.

12. If contracting parties to a residential building contract agree to contract out of the Civil Liability Act standard policies of insurance may not cover any additional liability arising as a result of the Civil Liabilities Act 2002 being excluded.

13. Many insurance policies for example contain express exclusionary provisions for this effect or state that notification and approval must be obtained so must be provided to the insurers of any contracting out of the Act, otherwise the additional risk is not covered.

14. If as the Supreme Court has now said in the Dasco, the Civil Liability Act 2002 applies to Section 18B statutory warranties, any ancillary insurance policies held by the builder for example professional indemnity insurance for any design risk may not respond if the contracting party had agreed to contract out of the Act.

15. This issue is now particularly relevant in the regard to the recent decision of the Full Court of the Supreme Court of Tasmania in *Aquagenics Pty Ltd V Break-O-Day Council [T2010] Tas FC3* which concluded that it may be possible for the Civil Liability Legislation to be inadvertently excluded by a contract which provided that the Contractor was liable for the acts and omissions of it's sub-contractors.

This newsletter provides a summary and general overview only. It is not intended to be comprehensive nor does it constitute legal advice.

Kreisson Legal Pty Limited ACN 113 986 824 is an incorporated legal practice under the Legal Profession Act 2004

16. If that decision is followed in NSW; the effect of inadvertent contracting out of the Civil Liability Act 2002 which Dasco says now applies to the Home Building Act 1989 statutory warranties may mean that certain insurance policies may not respond.

CONCLUSION

17. The effect of Dasco again places the spotlight on the Home Building Act 1989. Although the Home Building Act 1989 is intended to protect the home owners rights to recover loss for defective work; the Dasco decision has significantly eroded those rights.

If you would like any further information on this topic, please contact David Glinatsis, Solicitor Director, on (02) 8239 6502 or email david.glinatsis@kreissonlegal.com.au

This newsletter provides a summary and general overview only. It is not intended to be comprehensive nor does it constitute legal advice.

Kreisson Legal Pty Limited ACN 113 986 824 is an incorporated legal practice under the Legal Profession Act 2004