Article Information

Authors: Mario Esera, Warren Jiear
Service: Dispute Resolution & Litigation, Property & Development

Fewer Protections for Apartment Owners in Queensland: Why a recent decision of the Supreme Court of Victoria paints a grim picture for residential apartments in Queensland suffering from Building Defects

Queensland is currently enjoying a surge in the construction of residential apartments. Unfortunately, a recent decision of the Supreme Court of Victoria has underlined again why residential apartments in Queensland benefit from fewer statutory protections than their counterparts in Victoria and New South Wales. Why? It all comes down to the words "detached dwelling".

Burbank Australia Pty Ltd v Owners Corporation [2015] VSC 160 (29 April 2015)

On 29 April 2015, the Supreme Court of Victoria in *Burbank Australia Pty Ltd v Owners Corporation* held that the implied warranties contained in the *Domestic Building Contracts Act 1995* (Vic) applied to multi-apartment developments. Had this case been heard in Queensland, however, it is likely that the outcome would have been very different.

Background

Burbank Australia Pty Ltd constructed a multi-apartment development in Maribyrnong known as Waterford Towers. In November 2012, the Owners Corporation for Waterford Towers commenced proceedings against Burbank alleging that their common property suffered from building defects.

The Owners Corporation claimed that the works carried out by Burbank were subject to implied warranties contained in the *Domestic Building Contracts Act 1995* (Vic) being warranties that Burbank would (for example) construct Waterford Towers in a proper and workmanlike manner, with reasonable care and skill, and using materials that were good and suitable.

Burbank argued that the implied warranties contained in the Act did not apply to Waterford Towers upon the basis they only applied to "traditional dwellings" – being detached homes.

On 29 April 2015, the Supreme Court of Victoria disagreed with Burbank and held that the implied warranties contained in the Act did apply to Waterford Towers even though it was a multi-apartment development.

The Situation in Queensland

The Supreme Court of Victoria found in favour of the Owners Corporation upon the basis that the statutory definition of "home" did not expressly exclude multi-apartment developments.

Unfortunately, the same cannot be said here in Queensland.

Whilst the *Domestic Building Contracts Act 2000* (Qld) includes many of the same implied warranties contained in its Victorian counterpart, when it comes to the erection or construction of homes they only apply to a "detached dwelling" – similar the "traditional dwelling" advocated by Burbank.

But couldn't a "detached dwelling" also include a multi-apartment development? In Queensland, the short answer is no.

Indeed, the Queensland Court of Appeal considered this point in the matter of *C & E Pty Ltd v CMC Brisbane Pty Ltd (Administrators Appointed)* [2004] QCA 60. In that case, President Justice McMurdo found that Act and legislature only intended to protect consumers contracting to build a "single detached house or duplex".

Interestingly, in NSW they have the *Home Building Act 1989* (NSW) which is similar to the Victorian and Queensland Acts. Like the Queensland Act, the NSW Act applies to the construction of a "dwelling". However, in NSW the definition of "dwelling" is much broader and means:

*"…a building or portion of a building that is designed, constructed or adapted for use as a dwelling (such as a detached or semi-detached house, transportable house, terrace or town house, duplex, villa-home, strata or company title home unit or residential flat)." (*emphasis added)

Therefore, on the face of it, Owners Corporations of multi-apartment developments in both Victoria and NSW appear to be in a far better position than home owners in Queensland when it comes to enjoying the benefit of statutory warranties.

What can developers, home owners and bodies corporate take from this?

Had Waterford Towers been located in Maroochydore rather than Maribyrnong, it is unlikely that the implied warranties in the *Domestic Building Contracts Act 2000* (Qld) would have applied because Waterford Towers is not a detached dwelling or duplex.

So what can developers, home owners and Bodies Corporate in Queensland do to protect themselves when it comes to the erection or construction of multi-apartment developments?

For **developers**, they should ensure that all building contracts contain express warranties to properly address defective works should they arise. Most contracts nowadays do. However, building defects are often subject to a defects liability period of 12 months from the date of practical completion, which is significantly less time than the 6 years and 6 months otherwise available under the Act.

For **Bodies Corporate** and **home owners** the situation is often more difficult given that they are unlikely to have a contractual relationship with the builder at all. For Bodies Corporate and lot owners, the *Body Corporate and Community Management Act 1997* (Qld) provides some protection given that, on the establishment of their community titles scheme, they are automatically subrogated to the rights of the developer or original owner under any construction contracts pertaining to the construction of the common property or their lot. This means that they may have contractual rights against the builder as if they were the developer. Unfortunately, such rights can be difficult to enforce, particularly if you do not have copies of the relevant contracts and/or do not know what their terms and conditions are.

This is a complicated area. The key is acting quickly and, when necessary, taking expert advice from professionals who are equipped with the knowledge and experience to assist.

If your residential development, Body Corporate or home is suffering building defects and you require assistance, please contact Mario Esera or Warren Jiear or a member of our Property Team.