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Instructions or it did not happen: practical implications regarding s. 18F of the *Home Building Act 1989* (NSW)

BlueSky Property Builders Australia Pty Ltd v Dey [2023] NSWCATAP 153

The NSW Civil and Administrative Tribunal (**NCAT**) Appeal Panel (**Appeal Panel**) recently delivered a decision in *BlueSky Property Builders Australia Pty Ltd v Dey* [2023] NSWCATAP 153.

The Appeal Panel, confirmed:

a) what is required to successfully bring a defence under section 18F of the *Home Building Act 1989* (NSW) (**HBA**), which provides a defence where instructions have been given by the person who work is being completed for, or reliance was given to instructions given by a professional;

b) further demonstrated when it will be inappropriate to award a rectification order for defective work; and

c) provided a useful summary of the legal principles to be applied in an application for a party to pay costs on an indemnity basis.

THE FACTS

BlueSky Property Builders Australia Pty Ltd (**the Builder**) completed various works at the respondent's (**the Homeowner**) property, namely renovations and additions to a residential home.

In the first instance, the Consumer and Commercial Division of NCAT found against the Builder, awarding the Homeowner $218,441.78 in respect of the rectification of defective works and for accommodation costs, specifically:

a) rebuilding the balcony and columns;

b) remediation of the rear alfresco slab; and

c) rectification of the falls to floor wastes in the bathroom, ensuite and first floor bathroom.

The Tribunal, after considering section 48MA of the HBA (which states that rectification of the defective work by the responsible party is the preferred outcome) did not make an order for rectification works.

This decision was primarily due to a finding that the Builder had failed to comply with the private certifier's instructions to rectify the rear alfresco slab so to bring it in line with the contract, and so the Tribunal had little confidence that the Builder would comply with the terms of the Contract.
The Builder appealed the decision.

In doing so, the Builder raised 3 grounds of appeal.

Ground 1: Instructions

There were three aspects of the works which were found to be defective:

a) the front balcony;

b) the rear alfresco slab; and

c) fall to floor wastes in the bathrooms.

Front Balcony

In relation to the front balcony, the Builder asserted that he was required, by the drawings included with the Contract which identified the scope of works, to build the balcony contrary to the requirements stipulated by the Building Code of Australia (**BCA**).

The Builder argued that section 18F of the HBA excused it from complying with the BCA as he complied with instructions provided by the drawings attached to the Contract.

Section 18F of the HBA provides:

(1) In proceedings for a breach of a statutory warranty, it is a defence for the defendant to prove that the deficiencies of which the plaintiff complains arise from--

(a) ***instructions given by the person for whom the work was contracted to be done*** *contrary to the advice of the defendant or person who did the work, being advice* ***given in writing*** *before the work was done, or*

(b) ***reasonable reliance by the defendant on instructions given by a person who is a relevant professional acting for the person for whom the work was contracted to be done*** *and who is independent of the defendant, being instructions* ***given in writing*** *before the work was done or* ***confirmed in writing*** *after the work was done.*

[emphasis added]

The Appeal Panel referred to its previous decision in *RBV Builders Pty Ltd v Chedra* [2021] NSWCATAP 56, which confirmed that, to be an "instruction" for the purposes of section 18F of the HBA, the instruction is to be given after the contract has been signed.

The Tribunal reminded the parties that the reasoning behind this construction is to avoid a situation where a builder second guesses instructions given that are based upon the expertise of other construction professionals.

As the drawings were provided with the Contract (and not after), they did not constitute an instruction and as such the defence provided by section 18F was not available to the Builder.

Rear alfresco slab

As for the rear alfresco slab, the Builder asserted that the Owner gave an oral instruction to construct the slab contrary to architectural and engineering plans.

The Appeal Panel quickly dismissed this argument, pointing out that section 18F clearly requires that the relevant instruction is given in writing.

Fall to floor wastes

In regard to the fall to floor wastes, it was found that the tiling work completed by the Builder was not compliant.

The Builder did not produce any evidence of any instruction to not comply with the BCA and as such, the Appeal Panel found that the tiling was inexcusable defective work.

As such, the Builder was unsuccessful in relying upon the defence provided in section 18F of the HBA.

Ground 2: Accommodation costs

The Builder argued in summary that, had the Homeowners not moved in 14 weeks early, it would have had time to rectify the defects and as such it should not be liable for accommodation and relocation costs.

The Appeal Panel disagreed, finding that the need to relocate was "*clearly a consequence flowing naturally from the builder's breach of contract in carrying out work which is defective*".

The Appeal Panel went on further to say that the Homeowners moving in early would not have affected whether the Builder would have rectified the defects.

The Appeal Panel summarised the legal principles associated with a claim for accommodation costs as follows:

a) in circumstances where the dwelling is not habitable whilst rectification works are carried out, it will be found that accommodation and relocation costs are an appropriate consequential loss;

b) accommodation and relocation costs are payable under the first limb of *Hadley v Baxendale* (1854) 9 Ex 341, which allows damages to be recovered where the loss arises naturally, in the normal course of things, or where those losses were reasonably contemplated when entering into the contract; and

c) that accommodation and relocation costs were necessary to place the Homeowner in the position they would have been in had the works not been defective.

Ground 3: Incorrect application of s. 48MA of the HBA

Finally, the Builder contended that the Tribunal erred in making a monetary order over a rectification order, stating that it had failed to properly consider section 48MA of the HBA.

S. 48MA requires the Tribunal to consider a rectification order as the preferred outcome to an order requiring a payment of money.

The Appeal Panel found that the Tribunal had correctly ordered a monetary order, as the facts showed that the Builder had previously failed to follow plans and instructions and as such could not be trusted to properly carry out rectification works.

Indemnity costs

The Homeowner sought a costs order on an indemnity basis (being those costs relating to legal fees and litigating the matter at a higher rate than the 'standard' rate or 'ordinary basis').

The Appeal Panel did not award indemnity costs.

The Appeal Panel summarised the circumstances in which indemnity costs may be awarded as follows:

a) where a party has unreasonably refused a genuine offer of settlement;

b) where the proceeding was commenced or continued where there is no chance of success;

c) where the proceeding amounts to an abuse of process (for example, where the proceeding was commenced other than in good faith or for a separate, collateral purpose);

d) where a party has displayed unreasonable conduct (for example, unnecessarily prolonging the proceedings or making unfounded allegations of fraud); or

e) where a party has displayed misconduct of a serious nature, such as fraud, perjury, contempt or dishonesty.

The Appeal Panel did not award indemnity costs in the current matter, as the Homeowner failed to provide any elaboration or evidence in support of the order.

Rather, the Homeowner simply asserted in its submissions that the proceedings appeared to have been "*initiated in abuse of process*".

KEY TAKEAWAYS

1. To be protected by section 18F of the HBA (which excuses defective building works in circumstances where those works were completed subject to a written instruction received from the homeowner or a professional), the relevant instruction must be received after the contract has been entered in to;

2. Any instruction a builder seeks to rely on must be given in writing – it is not enough that the builder was orally instructed to amend the works that consequently does not comply with the BCA; and

3. Although section 48MA of the HBA provides that rectification orders are preferable in defect matters, they will not be when a party has demonstrated an inability to comply with the contract or the relevant standards. In this case, the Tribunal will prefer an order requiring payment in relation to the rectification costs.

CONTACT US

For further information, please do not hesitate to contact **Kreisson** on **(02) 8239 6500.**