

Finding your way through the Building Defects Maze



Institute of Strata Title
Management Ltd

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Section 1

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Introduction

Some things to consider when helping with building defects:

- The various parties
- Typical liabilities of parties
- Key risk issues



Usual Parties

- Owners corporation
- Owners
- Developer
- Architect / design engineer & consultants
- Builders / subcontractors
- HOW insurers (not covering Fair Trading Administration Corporation)
- BIGCorp (Govt. rescue package for HIH)
- Council / Private certifiers



Some of the various parties possible liabilities

- **Breach of statutory warranties** – possibility, must commence proceedings within 7 years of completion as provided in the Home Building Act 1989*
- **Home warranty insurance** – possibility, there are many types of insurance policies and the scheme may not have any – ensure compliance with all requirements of which there are many and which vary from time to time
- **Negligence** – possibility, must commence proceedings within 6 years from when cause of action accrues*



Some of the various parties possible liability issues cont'd

- **Misleading and deceptive conduct** – possibility, must commence proceedings from when cause of action accrues within:
 - 6 years under Cth legislation; and
 - 6 years under NSW legislation if cause accrues after 25 August 2003; 3 years if cause accrues before 25 August 2003 *.



HOW Insurance – Changes (1)

Recent legislative activity has resulted in many significant insurance changes, three of which are below (there are many further important changes):

1. 1 May 1997 - 30 June 2002

- Permitted 7 years period of cover from completion* / end of building contract + first resort*.

*See provisions of the insurance / definitions in the HBA and Home Building Regulations 2004 (“HBR”)



HOW Insurance – Changes (2)

2) 1 July 2002

- Permitted 2 year non-structural* and 6 year structural* period of cover from completion* / end of building contract + last resort*.

*See provisions of the insurance / definitions in the HBA and Home Building Regulations 2004 (“HBR”)



HOW Insurance – Changes (3)

3) Works commenced after 31 December 2003

- Work re: construction of 4 or more storeys**, exempt from the need to obtain HOW Insurance, but still may be obtained.

** See definitions in the HBR



Key risk issues when helping with building defects

- Complex, changing and limited time periods including without limitation, 10 years, 7 years, 6 years, 2 years, 1 year, 6 months, 90 days, 45 days to immediately.
- Legislation and cases often change prior and future legal positions.
- Inadvertent acts or omissions causing or contributing to the owners corporation not being able to pursue a party responsible for the loss or rectification of the defect.



How can the managing agent help?

- At FAGM obtain from the developer all of the development documents e.g. building contract, plans, specifications, consents, certifications, insurance certificates and policy.
- Be wary of obligations acting under or outside of agency agreement.
- Be wary of time limitation issues.
- Develop internal risk management procedures, such as, when to suggest to engage professionals.



Disclaimer

- This is not a legal advice and you should seek legal advice regarding any time limits or issues referred to.
- This area of law is regularly amended or new cases decided, requiring updated information.
- This presentation does not include:
 - Fair Trading Administration Insurance Scheme claims;
 - claims where the insurance contract was entered into before 1 May 1997; and
 - all possible steps, remedies, defences and time limitations.



Legal advice should be sought in relation to any matters relating to the contents of this presentation or these slides.

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Section 2

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Background

- Assumed knowledge of old HOW laws
- A progressive winding back of HOW protections
- A surprise Supreme Court decision in October 2008
- Urgent HBA Regulations changes in December 2009
- Patch up HBA Act & Regulation changes in May 2009
- More owner protections & rights altered
- Retrospective effects
- Uncertain effects
- Open ended application
- More changes to come



The SP 57504 Case

- NSW Supreme Court decision
- HIH Policy administered by BIGCorp
- Referee finds over \$2.0 million in defects
- Disputed when Court considers adopting referee decision
- BIGCorp argues that some claims excluded
- Rely on clause about notice 7 years from completion
- Difference between 2003 & 2005 notifications
- OC argues the clause is invalid
- Supreme Court has to decide



The SP 57504 Case

- Court decides that –
 - residential building work needs contract & insurance
 - insurance must indemnify for loss for breach of statutory warranty
 - insurance must be for 7 years
 - 7 years runs from work completion date
 - any contrary policy provision is invalid and/or ineffective
- If notified of claim within 6 months then insurer cannot rely on 7 year exclusion
- The HH policy clause excluding liability was invalid
- The OC claim was within time on all defects
- The decisions is on appeal



December 2008 Changes

- 19 December 2008
- OFT introduces Clause 63A to the HBA Regulations
- Limits the time for making claims
- Becomes the earlier of –
 - 6 months after awareness or when should have been aware, or
 - 6 months after period of insurance
- For incomplete work is 12 months after work ended or should have started
- Could have (and did) exclude many claims



May 2009 Changes

- 19 May 2009
- OFT introduces changes to the HBA Act & Regulations
- Changes the period of cover for insurance policies to –
 - the actual period in policy, and
 - where loss becomes apparent in last 6 months of period for 6 months from the date it became apparent
- The provisions about insurance time limits & coverage for losses during the insurance period are removed
- Specifies that insurance coverage is the amount that applies when the insurance was contracted



May 2009 Changes

- Insurers can reduce liability if OC does not take and/or delays action to enforce statutory warranties
- Reduction must fairly represent insurers' prejudice
- Changes don't apply to –
 - paid claims
 - agreements made before 19 May 2009
 - un-appealable decisions
 - final court determinations
- Changes apply to –
 - existing claims
 - existing proceedings
 - new proceedings if are consequence of earlier proceedings



May 2009 Changes

- OFT can make regulations further reducing liability and/or introducing limits on liability
- Saving provisions for Clause 63A 2008-2009 issues
- If claim prevented by Clause 63A a 'period of grace' from 19 May 2009 for the same time that claim was prevented
- If claim refused under Clause 63A a 'period of grace' from refusal for the same time as refusal prevented claim
- Period of grace varies in each case
- A refusal under Clause 63A does not prevent further claims being made



Questions

???



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Section 3

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The importance of the selection process

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What you need to look for...

- Home Owners Warranty claims are complex
- They require the utilisation of experts, who have experience in the field of Home Owners Warranty insurance claims/litigation
- But what makes an expert in this field? Who can be an expert?
- An expert must abide by the Expert Code of Conduct (refer to the expert requirements set out in [Makita \(Australia\) Pty Ltd v Sprowles \[2001\] NSWCA 305 \(14 September 2001\)](#), which is the leading authority on the form of evidence required for an expert report. It states:
- *'In short, if evidence tendered as expert opinion evidence is to be admissible,*
 - *It must be agreed or demonstrated that there is a field of "specialised knowledge"*
 - *there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert ; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"*



Expert Evidence Guidelines

- *so far as the opinion is based on facts “observed” by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on “assumed” or “accepted” facts, they must be identified and proved in some other way*
- *it must be established that the facts on which the opinion is based form a proper foundation for it*
- *and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert’s evidence must explain how the field of “specialised knowledge” in which the witness is expert by reason of “training, study or experience”, and on which the opinion is “wholly or substantially based”, applies to the facts assumed or observed so as to produce the opinion propounded.*
- *If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert’s specialised knowledge.*
- *If the court cannot be sure of that, the evidence is strictly speaking not admissible, and so far as it is admissible, of diminished weight.*



Reports & Evidence

- There are various types of reports that are written and presented but do these stand up in court?
- Types of reports include:
 - Building Defects Report
 - Insurance Claim Report
 - Negligence Claim Report
 - Breach of Statutory Warranty Claim Report
- Importance and weight of the evidence gathered and presented to the insurer or used in litigation.
- One solicitor's report requirement will differ from another. Consider the importance of pairing up the expert with the solicitor at the start of the process.



Expert Evidence Summary

- In summary an expert is considered an expert:
 - If the expert meets the principles of Makita v Sprowles
 - When their paramount duty is to the court
 - They must not be an advocate to any party
 - They are impartial and independent
 - They must show reasons as to how an opinion is formed
 - They have formed their own opinion/s on the issues contained in their report



The Strata Manager's role

- In my experience, it is strongly recommended that a Strata Manager (Owners Corporation) should never be engaged in the lodgement and management of a Home Owners Warranty claim.
- **Why?**
 - **The Strata Manager is not a qualified person/s to advise on legal matters (Legal Professional Act 2004)**
 - **Most Strata Managers would not hold the required expertise to manage insurance claims or properly instruct experts**
 - **The provision of advice, and/or management of Home Owners Warranty insurance claims process may not in all cases be covered by your professional indemnity insurance and the quantum could exceed the coverage.**



The HOW Process

- There are 2 components to a Home Owners Warranty insurance claim.
 - The claims management/litigation process
 - The expert evidence process (for presentation to the insurer or court by your nominated and experienced solicitor/claims manager)
- Appoint a solicitor to determine the **WHY**
- Appoint an expert to carry out the inspections and determine the **HOW** and **WHEN**



Checklist for Engagement of an Expert

- When appointing an expert, you should consider the following:
 - Are they a true expert in the field of Home Owners Warranty claims?
 - Are they a qualified and experienced expert? [Makita \(Australia\) Pty Ltd v Sprowles \[2001\] NSWCA 305 \(14 September 2001\)](#),
 - Have they been appointed by any court as a court expert?
 - Upon review of their report, is it in litigation format?
 - Is this report compliant with the Expert Code Of Conduct? Not a bandaid report.
 - What does their CV reveal about their expertise for the defects at hand?



Checklist for Engagement of a Solicitor

- When appointing a solicitor, you should consider the following:
 - What is their historic level of experience in dealing with Home Owners Warranty claims?
 - What is the quality of their outcomes in such an area?
 - What is their relationship status with the appointed expert? Have they worked together on Home Owners Warranty claims?



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If you have any further questions or queries regarding this matter, please feel free to contact Integrated for further discussion.

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