

Legal Review

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Are unliquidated damages for breach of Statutory Warranties provable in bankruptcy?



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Unliquidated damages arising under a statutory warranty under the Home Building Act are provable in Bankruptcy

The Supreme Court of NSW in *The Owners – Strata Plan 80647 v WFI Insurance Limited t/as Lumley Insurance* [2015] NSWSC 1161 dealt with the issue of a claim by owners corporation against builder for damages for loss suffered by reason of breach of statutory warranties was provable in Bankruptcy or fell outside because it was a claim for unliquidated damages that was not “otherwise than by reason of a contract or promise” within section [82\(2\) Bankruptcy Act 1966 \(Cth\)](#)

In his judgment Justice Darke had cause to consider unliquidated damages in the context of proving such damages in bankruptcy. The significant of his judgment is that it may impact on claims for unliquidated damages and whether such damages can be proved by a creditor in the bankrupt estate of a person.

Section 82(2) of the *Bankruptcy Act 1966 (Cth)* provides, that “[D]emands in the nature of unliquidated damages arising otherwise by reason of a contract.... are not provable in bankruptcy”. An example of this is a demand for damages for personal injury would not be provable in bankrupt estate of an individual.

The Owners brought proceedings in the Supreme Court of NSW against the builder on the basis of defects and also against the Home Warranty Insurer under the *Home Building Act 1989 (NSW)* on the basis of the indemnity under the policy against loss or damage arising from breach of the statutory warranties for which the Owners Corporation could not recover compensation from the builder because of his insolvency.

The insurer, Lumley Insurance, denied the claim by the Owners on the basis that the claim was not provable in bankruptcy because it was a claim for unliquidated damages which did not arise by reason of a *by reason of a contract, promise or breach of trust*. If the insurer was successful then it would mean the Owners could technically still recover against the builder direct and the Insurer would not be liable to cover the claim.

The basis of the insurer's argument was that the claim by the Owners against the builder arose from a breach of a statutory warranty implied into residential building contracts by section [18B](#) of the *Home Building Act* (NSW) and thus a 'statutory claim' being a claim for unliquidated damages did not fall within one of the exceptions within section 82(2) of the *Bankruptcy Act 1966* (Cth), that is, it was not a claim in contract.

The contrary argument from the Owners was based on the logic that a statutory claim was an extension of the contractual claim which would in the usual course remain open to a developer and thus the claim was not lost to the Owners because section [18D](#) of the *Home Building Act* allowed the cause of action to pass to a successor in title, namely the Owners.

The Finding

The court considered the leading High Court case on the point, *Coventry v Charter Pacific* and found for the Owners. His Honour came to the view that the owners' claim was a claim provable in bankruptcy as the claim was a statutory variant of a contractual claim and stated at [46] that:

"The contract is more than mere background to the making of the claim. It provides the essential framework from which the rights and obligations, as between the Owners Corporation and Mr Crestani [the bankrupt], can be determined. In my view, the connection between the claim and the contract is strong enough to conclude that the claim arises by reason of the contract between Mr Crestani and Versace Developments Pty Limited [the developer in whose place the Owners were suing]. I do not regard that conclusion as involving any undue stretching of the language of section 82(2) of the Bankruptcy Act."

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