

Millen v Skyview Homes Pty Ltd - Renewal Proceedings Case Analysis

The case of *Millen v Skyview Homes Pty Ltd* [2021] NSWCATCD 137 is an interesting case about a renewal proceeding under Schedule 4 Clause 8 of the *Civil and Administrative Tribunal Act 2013* (NSW), known as the NCAT Act. The Respondent is a licensed builder who also owned the property in question.

The applicant purchased the property from the respondent builder. The property, a residential dwelling, is located in South Western Sydney, NSW. A final occupation certificate for the property was issued on 25 September 2019.

The applicant purchased the property for \$703,662.45 around 27 September 2019. A Certificate of [Home Warranty Insurance](#) was obtained by the builder, but the contract amount listed was \$195,789, described as a "speculative project."

Defects and Rectification Order

The applicant complained about defective works, not compliant with [statutory warranties](#) under the Home Building Act 1989 (NSW). These complaints were taken to NSW Fair Trading. On 9 April 2020, a NSW Fair Trading Building Inspector issued a rectification order for the respondent to address identified defects by 14 May 2020. 53 items of defective work were listed, ranging from minor to potentially serious defects.

Further inspections revealed uncompleted work and disputes about the quality of completed work and reasonable access to the premises for rectification.

Legal Principles Applied

Remedial Orders and Statutory Warranties

Central to the case was the Tribunal's power under s 48O of the HB Act to order rectification work in cases of breaches of statutory warranties (s 18B of the HB Act). The homeowner had the burden of proving the breach and the scope and cost of necessary rectification work. At paragraph 66 the Tribunal expressed:

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“In proceedings involving the purported [breach of statutory warranties](#) under s 18B of the HB Act, the onus is on the homeowner to prove the breach; scope of works to rectify, and cost of rectification...”

Bellgrove v Eldridge Principles

The application of the principles from [Bellgrove v Eldridge](#) [1954] HCA 36; (1954) 90 CLR 613 at 617-618 was considered. Namely, the homeowner's intentions regarding rectification works as a factor in determining their necessity and reasonableness. Essentially the principle expressed that the homeowner's reluctance to undertake rectification work might reflect the unreasonableness of such works, particularly if the property remains functional and aesthetically pleasing despite the non-compliant work. This principle, affirmed in cases like *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] at 48 and *Cordon Investments Pty Ltd v Lesdor Properties* [2012] at 229, underscores a nuanced approach to assessing rectification necessity.

Damages for Inconvenience and Distress

Significantly, the Tribunal recognized the homeowner's entitlement to non-economic loss damages for inconvenience and distress caused by the breach of statutory warranties, as per the High Court's ruling in *Moore v Scenic Tours Pty Ltd* [2020] HCA 17; (2020) 286 CLR 326. This recognition does not hinge on the *Civil Liability Act 2002 (NSW)* threshold provisions. The damages are compensatory, not punitive, and are awarded for the [breach of contract](#), not for non-compliance with Tribunal orders.

In this uncommon decision, the Tribunal awarded \$2,000 for non-economic loss damages in favour of the homeowners reflecting the distress and inconvenience caused by the defects.

Builder's Rectification of Defects

Under s 48MA of the HB Act, the Tribunal generally prefers the builder who performed [defective work](#) to rectify the defects. However, the Tribunal may depart from this preference, considering factors like the likelihood of compliance with new orders and the history of the builder's rectification efforts. In this case, due to a breakdown in the relationship between the parties and previous non-compliance with orders, the Tribunal determined it appropriate to order damages instead of further rectification efforts.

If you are a homeowner that needs assistance with renewal proceedings and your claim exceeds \$30,000, then feel free to phone us for a free initial [consultation](#).

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