

WALTER CONSTRUCTION GROUP v FTAC; FTAC v OWNERS S/P 43551
2005 NSWCA 65
Supreme Court of New South Wales – 14 March 2005

FACTS

An residential strata apartment block was constructed by Walter Construction Group Ltd ('Walter') at 17-25 Spring Street, Bondi Junction. A series of defects appeared resulting in the owners lodging a series of claims against the Fair Trading Administration Corporation ('FTAC'). The claims were based upon FTAC's liability to indemnify losses reasonably incurred by a beneficiary in respect of residential building work in rectifying defects in insured building works. FTAC rejected the claims and the Owners appealed to the Consumer and Trading and Tenancy Tribunal. The Tribunal held that FTAC was liable. FTAC then appealed to the Supreme Court of NSW, which failed and was dismissed. Thereafter, FTAC offered an amount of \$852,598.00, in accordance with the Supreme Court's decision.

The FTAC then sought to recover the offered amount from Walter. Walter, however, refused to indemnify FTAC and persuaded FTAC to revoke its offer to the Owners. Consequently, the Owners instituted proceedings against FTAC in the Supreme Court seeking relief against the revocation of the offer. The Supreme Court held that FTAC was not entitled to revoke the earlier decision and that FTAC had engaged in misleading and deceptive conduct under the *Fair Trading Act* in its course of dealing with the Owners.

FTAC and Walter then appealed the decision, FTAC arguing that the offer was only provisional and therefore able to be revoked.

ISSUE

Whether FTAC was entitled to revoke its approval of the strata title Owners' claim against the builder for deficient work

FINDING

The Court of Appeal held that the appeal should be dismissed commenting that FTAC had brought the Owners to court now on four occasions, at an enormous cost and delay in rectifying defective building work for the Owners, and questioning whether FTAC was "a model litigant". The Court of Appeal also noted that the decision of the Supreme Court demonstrated that the FTAC scheme is to not be administered "irresponsibly or "lazily".

QUOTE

Santow JA at paragraph 85 and 87 stated: "[85]...the Owners would be at serious risk if they were to do that which they were required to do in order to receive settlement, were FTAC then free to revoke its approval in the manner it did. When one turns to the overall statutory context to test whether so onerous a result is congruent with it, such a result would be plainly inconsistent with the objects sought to be achieved by the Act as explained in the second-reading speech. Those objectives include to "promote and protect the interests of owners and purchasers of dwellings" and to provide a "centralized, simplified and logical one-stop shop" and to "address complications that have existed in the past..."

[87]...if, as the present case illustrates, the contention of FTAC were correct, even if FTAC were not of a mind to revoke its own decision, the builder could invoke the supposed jurisdictional fact, and force revocation on the ground that FTAC was wrong in its decision. The builder faces action under s98 of the Act [now the *Home Building Act*] for recovery of any amount paid by FTAC under the Scheme, so has every incentive to challenge an approval. Such a result would undermine any suggestion of a simplified and logical one-stop shop. It would not comport with the expertise expected to be exercised by FTAC as the authority in charge of administering the Scheme or of the specialized Tribunal in the event of appeal."

IMPACT

The purpose of the Scheme is a "one stop shop" designed to provide certainty of cover for building defects and FTAC was not able to revoke offers made as it had misled the Owners by its offer.

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