



Not what I bargained for: when do defects during the course of a residential build amount to a breach of the building contract?

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All residential building contracts in Queensland for a contract price of over \$20,000 must expressly state the statutory warranties provided to the consumer in the Domestic Building Contracts regime.¹

The effect of this is that all residential building contracts contain the express terms that the building works will be carried out:

- in an appropriate and skilful way;
- with reasonable care and skill; and
- in accordance with all relevant laws and legal requirements, including for example the Building Act 1975 (Qld).

This express warranty as to workmanship is included in all residential building contracts, including those from the Master Builders, HIA and the QBCC.

Where a contract price is for less than \$20,000, the implied warranty is still applicable, but is not required to be expressly stated in the contract.



Case Study: Appropriate Skill and Reasonable Care

In *Stojanovski v Australian Dream Homes Pty Ltd*² a residential building contract required a builder to "carry out the works in a workmanlike manner".³

The homeowner terminated the building contract, alleging that the builder was in breach of the contract for failing to carry out the building work in a "workmanlike manner".

The Court considered whether defective brick work to a brick veneer home was a breach of the contract. Expert evidence of building consultants provided by the homeowner alleged that the defects to the brickwork were so serious that demolition and reconstruction of the exterior brick walls was required. The value of the rectification work was assessed to be in excess of \$67,000.

The building contract contemplated a regime where defects could be rectified. However, because the brick work was a major feature of the home, the Court upheld the termination of the building contract.

Justice Dixon observed that:

"It is irrelevant that the builder may later complete the works to the requisite standard...[t]hat the works are carried out in a proper and workmanlike manner will ordinarily be fundamental to the owner and failure to do so is what is contemplated as enlivening the power to serve a default notice".⁴

Case Study: Failure to Comply with Laws

Recently in Queensland, in the case *Mousa & Anor v Vukobratich Enterprises Pty Ltd and Anor*, the Supreme Court upheld a termination of a residential building contract by a homeowner on the ground, among others, that a

builder who undertook work which did not conform to the relevant Australian Standard was in breach of the building contract.

The Supreme Court reasoned that a builder not complying with an Australian Standard was in breach of the Building Code of Australia, which is given force by the *Building Act 1975* (Qld).⁵

Justice Henry observed that:

"It is difficult to think of a more fundamental requirement of a construction contract than that the works are to be performed in an appropriate and skilful way, with reasonable care and skill, in accordance with the plans and specifications and in accordance with relevant law".⁶

This decision should be noted by all builders and homeowners alike.

What does this mean?

Importantly, the Courts in these cases observed that there is a distinction between "completing" works to a relevant standard and "carrying out" works to a relevant standard.

Whether a building contract may be terminated due to the works not having been "carried out" in a skilful way, without reasonable care or not according to law will turn on the facts of each circumstance.

A building contract may be terminated for these reasons, even in circumstances where:

- The works have not come to "practical completion" under the building contract.
- There is a "defects liability period" under the building contract. While a "defects liability period" exists for residential building contracts in Queensland under the Domestic



Building Contracts regime, this only relates to minor defects and minor omissions, as opposed to serious defects.

Proving the works were not 'carried out' appropriately

Where a builder is alleged to have breached the contract by failing to carry out building works with appropriate skill and reasonable care, or according to law, the owner will need to prove that breach. The best proof is from an expert report by an experienced builder or engineer, detailing the condition of the works. This will be an added expense for a homeowner because the homeowner will need to meet the cost of such a report.

However, there are other options available. Nearly all residential building contracts have dispute resolution regimes. Such a regime might be utilised to tailor a result which is more efficient than termination and litigation.

Additionally, homeowners should make their own independent enquiries and take care in choosing the right builder before entering into a contract. A builder should not be chosen for a job only for the price it quotes.

Legal advice should be obtained where it has been alleged that a builder has not carried out the works in a manner required under the contract.

In our next article, we will look at termination of residential building contract for delay.

Should you wish to discuss any matters arising out of this article, please contact:

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¹ *Queensland Building and Construction Act 1991* (Qld), Schedule 1B, ss 14, 21 and 22.

² [2015] VSC 404; upheld in *Australian Dream Homes Pty Ltd v Stojanovski* [2016] VSCA 133.

³ *Domestic Building Contracts Act 1995* (Vic) s8(a) provides a similar protection as to that in Queensland, in relation to a builder warranting to "carry out" work to a specific standard.

⁴ [2015] VSC 404, [56].

⁵ [2019] QSC 49, [84] and [117].

⁶ [2019] QSC 49, [197].