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BUILDING DEFECTS — DO YOU ALLOW THE BUILDER TO RETURN TO FIX THEM?

Adrian Mueller
Partner | Senior Lawyer
B.Com LLB FACCAL
[Email](#) | [LinkedIn](#)

BUILDING DEFECTS – DO YOU HAVE TO ALLOW THE BUILDER TO RETURN TO FIX THEM?

According to a recent survey, 85% of new strata buildings suffer from defects. Sometimes the builder responsible for the defects wants to return to repair them. But do you have to allow the builder back particularly if you don't want to?

Introduction

An owners corporation generally has an obligation to give the builder responsible for constructing its building a reasonable opportunity to return to repair any defects. This is because the law requires the owners corporation to minimise its loss and normally the builder will be able to repair the defects at much less cost to the owners corporation than another building contractor. This explains why an owners corporation should virtually always write to the builder and request that he return to fix any defects within a reasonable period before starting legal action against the builder.

But how far does this obligation extend? What happens when a builder is not prepared to provide the owners corporation with a scope of works for the repair of defects or is not willing to fix the defects in accordance with a specification prepared by the owners corporation's building expert? And what happens when the owners corporation has simply lost confidence in the builder's ability to fix the defects? Does the owners corporation still have to allow the builder to come back and repair the defects? A recent decision of the NSW Supreme Court clarifies that it is reasonable for an owners corporation to refuse to allow a builder to return when the owners corporation has genuinely lost confidence in the builder for good reason or the builder is not prepared to satisfy reasonable requirements for fixing the defects that have been set by the owners corporation.

Di Blasio Constructions Case

In *The Owners - Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067 a builder argued that a claim made by the owners corporation of a building it constructed should be dismissed because the owners corporation did not accept the builder's offer to return and repair defects for free. The NSW Supreme Court held that it was reasonable for the owners corporation to refuse the builder's offer and it ordered the builder to pay compensation to the owners corporation to cover the cost of repairing the defects.

Facts

Di Blasio Constructions Pty Ltd was responsible for the construction of a three storey, nine unit building with basement car park in Queenscliff. The building was completed in about March 2006 when the strata plan was registered.

Following occupation, a number of problems developed with the building, mostly relating to water ingress through the roof and windows and problems with the waterproofing in some bathrooms and planter boxes. The unit owners made some complaints directly to the builder and the builder returned and attempted to repair some roof leaks and water leaks in one bathroom.

However the problems persisted, and, in about July 2008, the owners corporation engaged an expert, who prepared a technical report concerning the defects in the building. The owners corporation's



lawyer sent the expert's report to the builder and asked the builder to agree to repair the defects in accordance with that report.

Negotiations between the owners corporation and builder continued for about 18 months with the builder meeting the owners corporation's expert at many site meetings to discuss the defect repairs. But ultimately the builder did not agree to repair all of the defects identified by the owners corporation's expert. The builder refused to accept that all of the defects identified by the expert needed to be repaired or that the expert's scope of work was suitable.

The builder offered to return to fix some of the defects but despite the owners corporation's request, the builder refused to provide his own scope of works for those repairs or a works programme outlining the order in which the repairs would be done.

As a result of negotiations breaking down, the owners corporation sued the builder to recover compensation to cover the cost of engaging another building contractor to repair the defects.

During the case the builder offered to repair all of the defects in accordance with the owners corporation's expert's recommendations for \$1. The owners corporation did not accept that offer. The builder argued that the owners corporation's refusal of its offer was unreasonable, that the owners corporation had not minimised its losses and that therefore the owners corporation's claim should be dismissed or reduced to virtually nil.

Court's Findings

The Court held that the owners corporation had acted reasonably and that its decision to sue the builder (rather than continue negotiating) and then reject the builder's offer to repair the defects was reasonable.

The Court reached these conclusions for these reasons:

- the defects were significant
- the Builder made some inadequate attempts to repair defects that were identified initially
- the owners corporation took the reasonable step of engaging an expert to identify the defects and to require the builder to repair the defects in accordance with its expert's recommendations
- the builder's response was inadequate. The builder never accepted the owners corporation's expert's recommendations, never took reasonable steps to investigate some of the defects particularly the leaking roof and never prepared an adequate scope of works for the repair of the defects.
- during the negotiations it became clear that the parties were miles apart as a result of which it was reasonable for the owners corporation to conclude that it was never going to reach agreement with the builder and that further discussion with the builder were pointless.
- in those circumstances, the only option available to the owners corporation was to start legal action against the builder



- before the owners corporation started legal action it obtained further expert reports, it gave those reports to the builder and it gave the builder an opportunity to indicate whether it was prepared to rectify the defects in accordance with those reports. The builder was not willing to do so.
- in all of those circumstances, by the time the builder offered to repair all of the defects, it was reasonable for the owners corporation to conclude that it no longer had confidence in the builder and that it wanted someone else to undertake the rectification work

Conclusion

There are several lessons to be learned from the Di Blasio case. First, an owners corporation should virtually always give the builder responsible for construction of its building (or any builder it has engaged to do work on the building) a reasonable opportunity to return and repair defects for which the builder is responsible.

Normally, it will be reasonable for this to be done by the owners corporation engaging an expert to prepare a report (particularly where the defects are significant) and then requesting that the builder repair the defects identified by the expert in accordance with the expert's recommendations. Further, it will usually be reasonable for the owners corporation to require the builder to provide a scope of works and works program or timetable for repair of the defects.

If the builder refuses to satisfy those requests within a reasonable period, or during any subsequent negotiations it becomes clear that the parties are miles apart, it will be reasonable for the owners corporation to start legal action against the builder even if the builder has made offers to return to repair the defects particularly where the owners corporation's expert's recommendations (which the builder will not accept) are reasonable.

And where the owners corporation sues the builder particularly after prolonged negotiations which have included unsatisfactory offers or failed attempts by the builder to repair defects, it will be difficult for the builder to show that the owners corporation's claim should be dismissed or considerably reduced because it did not accept an offer the builder made during the case to repair the defects (even for free). In those circumstances, the owners corporation will probably be entitled to lose confidence in the builder and desire someone else to undertake the rectification work and press on with the case.

Adrian Mueller

Partner I B.Com LLB FACCAL

adrianmueller@muellers.com.au





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JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for almost 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

02 9562 1266

enquiries@muellers.com.au

www.muellers.com.au



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