

# Do You Let The Builders Come Back To Fix Their Own Defects? It's All About Acting Reasonably

## Owners Corporations' Duty to Act Reasonably in Relation to Loss and Damage Arising from Building Defects

In two recent decisions concerning claims made by Owners Corporations against Builders for admitted defective work, the Supreme Court of NSW has considered and applied the old principles concerning mitigation of loss and the obligation to act reasonably, to present day strata building defects in:

- The Owners – Strata Plan No. 76674 v Di Blasio Constructions Pty Limited (“the Di Blasio Case”); and
- Owners Strata Plan 73162 v Dylam Developments Pty Limited (“the Dylam Case”)

These cases have held that:

- An Owners Corporation which suffers loss must act reasonably in relation to that loss in order for the loss to be recoverable and therefore is not entitled to recover losses attributable to its own unreasonable conduct.
- The question of what is reasonable depends on all circumstances of the case and it is for the Builder to prove that the Owners Corporation acted unreasonably.

In the **Di Blasio Case** the Supreme Court found that the Owners Corporation acted reasonably in commencing proceedings after:

- a. notifying the builder;
- b. giving the builder an opportunity to inspect the defective work; but
- c. refusing to allow the builder to rectify the defects unless it agreed to the Owners Corporations expert's rectification scope of work, in circumstances where the experts subsequently agreed that the rectification scope of work was fair and reasonable.

This resulted in there being no reduction in the Owners Corporation's award of damages against the Builder for the defect rectification costs.

In the **Dylam Case** the Supreme Court awarded the Owners Corporation costs of the additional year that the proceedings took, when the parties agreed on the Builder returning to rectify the defects and the rectification scope of work, but the Builder initially refused the Owners Corporation's condition that an independent Superintendent be appointed (at the Builder's cost) to oversee and sign-off on the rectification work to be performed by the Builder.

### What does this mean in practice for owners corporations?

What the recent court decisions mean in practice for Owners Corporations is that unless there is some valid and reasonable grounds for not allowing the Builder to rectify its own defects, such as if it is insolvent, its building licence has been cancelled or the defects are of such an extreme and possibly dangerous nature that the ability of the Builder to undertake rectification works is brought into question then:

1. The Owners Corporation should notify the Builder of the building defects and give the Builder an opportunity to:
  - a. inspect the defects; and
  - b. to rectify the defects in a scope and manner determined reasonably necessary by independent experts.
2. The Owners Corporation is entitled to require as a condition of the Builder returning to rectify its defects that the Builder:
  - a. sign a written agreement and provide necessary insurances; and
  - b. agree to the appointment of a building superintendent to oversee, provide quality control and sign off on the defect rectification work. And for the cost of the superintendent to be paid for by the Builder if the scope of the defect rectification or the facts of the case reasonably warrant such an appointment.

### New Amendments to the Home Building Act

The new amendments to the Home Building Act include:

- a. Section 48MA – which imposes rectification by the Builder as the preferred outcome – which came into effect on 15 January 2015. No details have been provided on which enforcement powers or how courts are to make and enforce such orders.
- b. Section 18BA – which imposes a statutory duty on Owners to mitigate their loss and notify builders and developers within 6 months of the defect being apparent – now proclaimed to commence for contracts signed after 1 March 2015.

These amendments impose a statutory obligation on Owners Corporation similar to the obligations imposed by the court in the Di Blasio Case and the Dyldam Case.

### Where Bannermans Can Help

These two cases and the new amendments to the Home Building Act should not necessarily deter an Owners Corporation from preserving its rights by commencing proceedings against the Builder.

The Owners Corporation should protect their rights so that they can maximise their chances of obtaining a satisfactory resolution and rectification of its common property in the most commercial manner.

Bannermans can help Owners Corporations in providing advice on:

- Limitation and liability issues;
- When to commence proceedings and when and how to negotiate with the Builder;

- What is and what isn't a reasonable rectification scope of work; and
- Negotiating and drafting conditions of and agreements to rectify.

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