

THE BUILDER'S RIGHT TO FIX

By Tom Grace

Introduction

When a dispute over defective building work turns ugly, the owner is sometimes tempted to refuse the builder the opportunity of returning to rectify the defects. There are risks in this course. This Update considers a recent NSW Supreme Court decision on the topic.¹

If an owner engages a new builder to carry out rectification work, the new builder will be cautious on at least three accounts:

- The new builder will be concerned that the old builder was incompetent, and therefore be cautious as to work that has been covered over. The caution might extend to requiring destructive testing, or to rebuilding work that was perhaps adequate in the first instance.

- The new builder may also have concerns as to whether the owner is applying an exacting standard to the work, and whether they also will fail to measure up.

- The third vexed issue is that of warranty: which of the builders will be liable if a defect later emerges in the construction?

Anecdotal evidence indicates it is not unusual for the new builder to charge around 30% above the cost the first builder says it would have incurred in rectifying and completing the work.

In general, owners should be very cautious when considering excluding the builder from the opportunity of rectifying defective work.

Recently, the New South Wales Supreme Court again looked at this issue.



The background story

An apartment block was completed at Ettalong by the Builder in late 2013. The Owners Corporation ("the Owners") noticed defects in February 2014 and engaged a licensed builder to inspect and report. In November 2014 a complaint was lodged with the NSW Department of Fair Trading.

In late January 2015, a subcontractor of the Builder began remedial work at the cost of the Builder, with the stated goal of completing all the remedial work by May 2015. In March 2015, the site was inspected, and 30 remaining defects were identified. On a further inspection in May 2015, it was found that 19 of the 30 items had not been rectified.

The subcontractor performing the remedial work continued but when another inspection occurred in August 2015, even more defects were found, including that the ceiling spaces were not compliant with fire safety requirements.

The Owners gave the Builder a deadline of 18 August 2015 for a response, explaining how the rest of the defects would be fixed. The deadline expired without a response. On 19 August 2015, the Owners engaged lawyers. On 20 August 2015, the Builder wrote saying it was "*organising for the defects to be rectified*". By then, the Owners had decided to exclude the Builder from the site.

Litigation commences

The dispute then entered litigation, with both parties engaging legal teams. Approximately 2 years after proceedings were commenced, on the first day of trial in Court, the Judge decided to refer the dispute to an expert determination, reserving the issue of legal costs for a later time.

Both the Owners and the Builder brought evidence from independent expert consultants to the expert determination. A conclave of the consultants resulted in the Owners reducing their claim to \$1.442 million. The Builder's consultant conceded defects to the value of \$318k. The expert preferred the Owners' evidence and awarded the Owners \$1.282 million.

The only issue left for the Court was whether the Owners should get their legal costs paid by the

Builder. The Builder said it should not have to pay legal costs because it had been continuing to offer to come back and rectify the work, but the Owners had refused it access to the site. The Owners said the Builder had been too slow and unwilling to rectify all of the defects.

The legal principles

In reaching its decision, the Court set out the following legal principles that are to be applied in these situations:

- the overarching principle is that an owner is not entitled to recover losses attributable to its own unreasonable conduct;
- in cases involving building contracts, the owner is required to give the builder an opportunity to minimise any damages the builder must pay by rectifying the defects, except where its refusal to give the builder that opportunity is reasonable or where the builder has repudiated the contract by refusing to conduct any repairs;
- the question of what is reasonable depends on all the circumstances of the particular case – one relevant factor is what attempts the builder has made to repair the defects in the past and whether, in the light of the builder's conduct, the owner has reasonably lost confidence in the willingness and ability of the builder to do the work;
- it is for the builder to prove that the owner has acted unreasonably – it is not for the owner to prove that it acted reasonably; and
- once a builder puts in issue the reasonableness of the owner's conduct, all circumstances relevant to an objective assessment of the owner's position become examinable.

In relation to this last point, the owner is not limited to reliance on facts or circumstances known at the time. The owner may also rely on facts which come to its attention afterwards that shed light on the builder's conduct at the time.

Conduct and decision

In the saga that unfolded after the Builder was excluded from the site, the Builder's lawyers took an aggressive approach when writing to the Owners' lawyers. In their letters they used phrases such as "*blatant and false assertion as to the schedule of defective works*" and described the claims as "appear to be a bogus claim".

The Judge accepted the Owners had lost confidence in the Builder. The Judge said that Builder had not, since their exclusion from the site, proposed a "*workable scope of works*". The Judge criticised the hyperbolic language used by the Builder's lawyers describing it as "*unnecessarily aggressive*". The Judge noted the eventual proposal by the builder fell well short of work found by the expert to be required.

Ultimately, the Judge found that the Owners had not acted unreasonably in deciding to have the rectification works performed by another party. On that basis, the Owners were awarded their costs.

Conclusion

The overarching principle that the builder has the

right to rectify its own defective work remains unchallenged, even though in this instance the builder lost that right.

The owner must be shown by the builder to have acted unreasonably in making the decision to engage a new builder.

The builder's efforts to rectify are a relevant consideration as is whether the owner has reasonably lost confidence in the willingness and ability of the builder.

Courts continue to frown upon lawyers who adopt an unnecessarily aggressive approach. All letters written by lawyers should be viewed through the prism of the judge eventually presiding over a trial, even though all parties fervently hope to avoid the possibility. An early letter describing an ultimately successful claim as "bogus" or "frivolous" would no doubt be cause for regret.

End Notes

[1] *The Owners – Strata Plan 89041 v Galyan Pty Ltd* [2019] NSWSC 619

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