

# BANNERMANS FACT SHEET:

## Developments for preliminaries in building defect claims

### *Owners Strata Plan 70579 v Midwest Constructions Pty Limited & Ors [2011] NSWSC 429*

Obtaining adequate compensation for owners corporations in building defect matters is a specialised task.

In *The Owners Strata Plan 70579 v Midwest Constructions Pty Limited & Ors* the Supreme Court considered an owners corporation's request to vary a referee's report to make further allowance for superintendence fees, storage costs, protection of goods costs, a contingency allowance, an increased contract period and scaffolding.

Apart for the claim for the superintendence fees issues, where the owners corporation's evidence was uncontested, the owners corporation's arguments were rejected by the Court. Those remaining issues are explored below:

- (1) Storage of courtyard topsoil fee: The court found that the referee was correct to not allow this fee because there was no evidence that it could not be stored on site safely. Perhaps, if the scheme had a structural engineer's report to support the argument that the slab could not withstand the soil loading the referee or Court would have found that this fee would be recovered.
- (2) Protection of goods issue: The owners corporation sought costs for moving and storing goods whilst works in the unit were undertaken. The expert evidence from the defendants was that covers could

be placed on the goods and that whilst some may need more protection than others an allowance should be made for that. The referee made the allowance suggested by the owners corporation, but it wanted to subsequently change its position to seek a higher amount and was unable to do so. Expert evidence to determine why and how goods should be protected and how to best protect those goods in light of the anticipated scope and duration should be carefully considered.

- (3) Contingency: A contingency allowance only of 5% instead of the 15% sought was allowed by the referee.
- (4) Contract period: The scheme sought an increased contract period which partially determines the cost of various items including scaffolding hire. The owners corporation's evidence on the required contract period was considered to be not transparent or testable. The builder's evidence was based on a construction programme with a critical path analysis prepared by an experienced builder and was preferred by the referee and the court.
- (5) Mobile or standing scaffolding: The referee and court found that the cheaper option of mobile scaffolding was to be preferred. If the owners corporation had put on expert evidence that mobile scaffolding was not appropriate and that fixed scaffolding was, that outcome may have been different



This area of law is regularly evolving and the briefing of experts and consideration of expert evidence is becoming more and more specialised.

### Key Points

- (1) Expert evidence in building defects matters is critical to the success of the case.
- (2) Briefings to experts, the correct choice of expert and clear well considered evidence properly addressing all of the necessary issues is critical to the success of the various items claimed.