Should a Builder be Given an Opportunity to Rectify its Own Defective Work?

In a recent case, *Ippolito v Cesco [2020] NSWSC 561* ("Cesco"), the Supreme Court shed further light on this question. Essentially, it confirms previous Supreme Court decisions, especially *The Owners – Strata Plan No 76674 v Di Blasio Constructions Pty Ltd [2014] NSWSC 1067* ("Di Blasio") and *The Owners Strata Plan 73162 -v-Dyldam Developments Pty Limited [2014] NSWSC 1789* ("Dyldam").

These cases suggest that:

- An owner may be required to give a builder an opportunity to repair its defective work.
- Whether an owner is required to do so will depend on what is reasonable in the circumstances of the particular case, i.e. an owner acting reasonably may say no or impose conditions.
- The builder may be able to have a damages award against it discounted if it can establish that the owner has acted unreasonably, but has the onus of establishing that.

The cases also give examples of the circumstances in which an owner may be acting reasonably in declining or imposing conditions on consent to the builder rectifying its defective work. For example:

- In Di Blasio, the Supreme Court found that an owners corporation acted reasonably in commencing proceedings, in circumstances where the builder had declined an opportunity to rectify the work conditional on acceptance of a scope of works proposed by the owners corporation's expert and subsequently agreed by the parties' experts to be fair and reasonable.
- In Dyldam, the Supreme Court in effect found that an owners corporation was acting reasonably in imposing a condition on consent to the builder rectifying its work, namely that the rectification work be carried out under the supervision of a superintendent appointed by the owners corporation. Specifically, the Supreme Court awarded costs to the owners corporation for the period from the date on which the owners corporation agreed to access and the date on which the builder accepted the condition regarding appointment of a superintendent, the builder's failure to accept that condition during that period having prolonged the proceedings.
- In Cesco, the Supreme Court in effect found that an owner was acting reasonably in commencing proceedings against a builder, without allowing the builder to carry out the required rectification works determined by the owner's expert, in circumstances where the builder failed to admit and address defects brought to his attention. Specifically, Ball J found that "The fact remains that although (the defendant) was alerted to water ingress problems as soon as they occurred, over an extended period of time, he denied that any of them were caused by defective workmanship on his part. Even when defects were identified, he has sought to minimise the work involved in correcting them. ..... In that context, it seems to me reasonable for (the plaintiff) to want someone else to carry out the repair work."

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Cesco also considers Section 48MA of the Home Building Act 1989 ("HBA") which came into force after Di Blasio and Dyldam were decided. The Court found that:

- Section 48MA provides that a court or tribunal determining a building defects claim "is to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome".

- As it applies to the Tribunal, which can make money orders or order the performance of rectification work, Section 48MA is to be understood as requiring that the latter type of order be preferred.

- As it applies to the Court, which cannot order the performance of rectification work, Section 48MA does not oblige the Court to make orders giving effect to the principle in Section 48MA. The plaintiff suggested a number of ways in which the Court could make orders giving effect to the principle, all of which were rejected, but the essential point seems to be that an award of damages is a remedy to which the plaintiff is entitled and which is not displaced by Section 48MA. Specifically, Ball J found that "(The plaintiff) has a right to claim damages for breach of contract and to an award of damages if that claim is made out. The Court has no discretion to refuse or delay that right. Nor is it appropriate to refer the matter to the Tribunal when the matter has been heard in this Court and (the Plaintiff) has otherwise made out the facts that entitle him to the relief that he claims".

There is another relevant provision of the HBA which came into force after Di Blasio and Dyldam were decided, Section 18BA, which was not considered by the court in Cesco, as the contract in that case had been signed before the provision came into force. Key points:

- Section 18BA obliges an owner (and a subsequent owner having the benefit of the relevant statutory warranty) to mitigate its loss and to give the builder reasonable access for the purpose of rectifying the defect.

- This appears consistent with the decisions in Di Blasio, Dyldam and Cesco, but there is a possibility of a future decision to the effect that this restricts an owner's ability to prevent rectification work by the original builder.

What does this mean in practice?

What the decisions mean in practice for owners corporations and builders is that:

1. A builder may be entitled to an opportunity to to fix its own defects and may be able to have a damages award against it discounted if it is not given that opportunity. However, this would be dependent on demonstrating that the owner had acted unreasonably in declining or imposing conditions on that opportunity to rectify the work before commencing proceedings against the builder.

2. Accordingly, bearing in mind the risk of the damages award ultimately obtained against the builder being discounted, the owner should be careful not to withhold or impose conditions on consent, where the builder may be able to establish that it is unreasonable for the owner to do so. That said, it is fairly clear from the decided cases that the owner would be acting reasonably in the following scenarios:

    - Where the builder is insolvent.

    - Where the builder's licence has been cancelled.

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- Where the nature of the defects and the builder's skills/experience are such that there is reasonable doubt as to the builder's ability to properly rectify the defects.
- Where the builder's performance of rectification works to date indicate that the builder is not making a bona fide effort to admit and address the defects.
- Where the owner's action amounts to imposition of a reasonable condition, such as acceptance of a reasonable scope of work or reasonable supervision.

3. Unless such a scenario is involved, an owners corporation should notify the builder of the building defects and give the Builder an opportunity to:
   - Inspect the defects.
   - Rectify the defects in a scope and manner determined reasonably necessary by independent experts.
4. In which case, the Builder should:
   - Agree to a reasonable rectification scope of work.
   - Agree to reasonable conditions, such as documentation of the scope of work and work terms (i.e. contract), supervision and insurance.
   - If agreement cannot be reached, make a reasonable counter-proposal, bearing in mind that:
     - the builder must be ready to prove by expert evidence that its position and particularly its rectification scope is reasonable.
     - failure to do this could expose the Builder to substantially higher damages awards and costs orders.

Where Bannermans Can Help

Bannermans can help in providing advice on:

- Whether the builder should be given an opportunity to rectify its work.
- What is and what isn't a reasonable rectification scope of work.
- Conditions of and drafting agreements to rectify.
- Limitation and liability issues.

These are important questions which may have significant adverse consequences on the assessment of damages and costs, Bannermans can therefore provide advice and draft agreements to assist in such matters.

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