

Building defects claim: strata scheme successful in recovering increased insurance premiums and costs orders

The owners corporation ('OC') filed a motion seeking summary judgment in relation to a Home Building Act 1989 ('HBA') claim under Uniform Civil Procedure Rules 13.1.

The OC was required to establish evidence of the facts of the claim and evidence that, in the belief of the person giving the evidence, the defendant had no defence to the whole or part of the claim nor to the amount of any damages claimed. The OC had to establish that it was entitled to the benefit of the statutory warranties in the HBA and substantiate the quantum of the damages sought.

Where the defendant has no positive defence to the claim, and its' List Response pleads only bare denials in relation to the claim, the court was satisfied that the defendant did not have a defence and could not succeed¹.

The usual measure of damages for defective building work is the reasonable cost of rectification, giving the plaintiff the "equivalent of a building ... which is substantially in accordance with the contract"². The OC's Consultant Project Manager (not a Quantity Surveyor) provided a cost breakdown relying on the tender submission of the preferred builder, which satisfied the court of the likely cost of the rectification work.

The OC was awarded pre-judgment interest, based on a calculation of interest on the ex-GST amount of each individual invoice making up the total of out-of-pocket costs, from the date of each invoice.

Insurance premium increase

In a first for Bannermans, the owners were awarded damages for the increase in their building insurance premium. The owners provided a report from their insurance broker on the likely costs of renewing the building insurance and the conditions attached, e.g. building defects to be rectified within the term of the policy.

¹ General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125 at 128-129 (Barwick CJ)

² Bellgrove v Eldridge (1954) 90 CLR 613 at 617 (Dixon CJ, Webb and Taylor JJ)

This could pave the way for future claims for increases in Owners insurance premiums related to the existence of defects, which have previously been uncertain.

Costs

The OC sought a gross sum costs order under s 98(4)(c) Civil Procedure Act on an indemnity basis.

An order for indemnity costs is not to punish an unsuccessful party but to compensate a successful party fully for costs incurred. The Court considers unreasonable behaviour or a relevant delinquency on the part of the unsuccessful party³.

The conduct of the Defendant, in filing a List Response denying the OC's HBA claim when it did not have a defence to the claim and then failing to file any evidence in the proceeding warranted an indemnity costs order. The Defendant's conduct has caused the OC significant delay and wasted cost expenditure.

The factors concerning the award of a gross sum costs order include:

- (i) the capacity of the unsuccessful party to satisfy any costs liability;
- (ii) the complexity of the proceedings in relation to their cost; and
- (iii) the desirability to avoid the expense and delay associated with a contested costs assessment⁴.

The OC also sought costs for unbilled work in progress and anticipated legal costs to the end of the matter. Applying a broad brush approach, the OC was awarded an appropriate amount for unbilled work in progress and future costs, noting the application was unopposed.

The Court considered it appropriate to award the OC its costs claim.

Key takeaways

- The owners corporation successfully claimed damages for increased insurance premiums due to building defects.
- The court awarded pre-judgment interest on the total out-of-pocket costs from the date of each invoice.
- Indemnity costs were awarded due to the defendant's unreasonable behaviour in denying the claim without a defence.
- The owners corporation was compensated for unbilled work in progress and anticipated legal costs.

³ Cabport Pty Ltd v Marinchek (No 2) [2013] NSWCA 131 at [6] (Meagher and Barrett JJA and Tobias AJA)

⁴ Hamod NSWCA at [816]-[817]

- This case sets a precedent for future claims related to insurance premium increases due to building defects.

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