

**The Owners - Strata Plan No 76674 v Di Blasio Constructions Pty Ltd [2014] NSWSC 1067  
11 August 2014**

## **FACTS**

The plaintiff Owners Corporation sued the defendant Builder for breaches of the warranties implied by Section 18B of the *Home Building Act (NSW)* (the “Act”) on account of various building defects in a residential apartment building.

The Builder contended that the Owners Corporation failed to act reasonably in mitigating its losses when it (1) failed to pursue discussions with the Builder concerning the scope of works to be undertaken to rectify the defects, and (2) refused the Builder’s offer to perform the necessary rectification works.

## **ISSUE**

Whether the Owners Corporation failed to mitigate its losses

## **FINDING**

The Owners Corporation acted reasonably to mitigate its losses when it engaged an expert to identify the defects, provided the Builder with the defects report, requested the Builder to prepare a scope of works to remedy the defects, attempted negotiations with the Builder to agree on the scope of rectification works, and eventually commenced legal proceedings when it became convinced that no agreement on the scope of rectification works would be reached with the Builder.

The Builder, on the other hand, showed unwillingness to rectify the defects when it refused to identify which defects it was prepared to rectify, insisted on waiting until the defects manifested themselves before doing rectification works, and refused to take steps to investigate the defects so it could agree with the Owners Corporation on the scope of rectification works.

## **QUOTE**

Ball J held

- [44] “In the case of building contracts, it is...generally accepted that the owner must give the builder a reasonable opportunity to rectify any defects. Often...the building contract itself requires the owner to repair defects or sets out a procedure by which defects are to be made good...But, even if it does not, the owner is required to give the builder an opportunity to minimise the damages it 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...That obligation may be an aspect of the duty to mitigate, since it may be less expensive for the builder rather than a third party to rectify the defects...”
- [45] 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...”
- [46] It is for the defendant to prove that the plaintiff has acted unreasonably. It is not for the plaintiff to prove that it acted reasonably...”

## **IMPACT**

The decision is significant in that it discusses the reasonableness of an owner’s conduct in mitigating its losses after the builder breaches its building contract and the warranties implied by Section 18B of the Act, bearing in mind that such reasonableness depends on the circumstances of each case. It also guides builders on how to conduct themselves in the face of an owner’s attempts to obtain rectification of building defects.

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