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BUILDING DEFECTS – THE DUTY TO MITIGATE: WHEN DO YOU HAVE TO GIVE THE BUILDER ACCESS TO RECTIFY?

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**BUILDING DEFECTS – THE DUTY TO MITIGATE:
WHEN DO YOU HAVE TO GIVE THE BUILDER ACCESS TO RECTIFY?**

1. The duty to mitigate is a longstanding implied contractual obligation that has been made a statutory obligation in the *Home Building Act 1989* by section 18BA for contracts entered into from 1 March 2015¹.
2. Section 18BA imposes a duty on a person who has the benefit of a statutory warranty, such as your owners corporation, to mitigate its loss.
3. So, what does the “duty to mitigate” mean? The general duty to mitigate is a duty to take all necessary steps to limit or decrease the loss suffered from becoming greater over time.
4. For example, if a water penetration issue is detected and resolved early the overall loss will be considerably less compared with the situation if the problem is ignored for years before being addressed, by which time the problem has led to more extensive and widespread damage and loss.
5. The statutory duty to mitigate is an obligation to notify the builder and developer of the defects within six months of the defect first becoming apparent and to give the builder and developer an opportunity to rectify the defect.²
6. In complying with this duty, an owners corporation cannot “unreasonably” refuse access for the purpose of rectification.
7. By failing to comply with the statutory duty to mitigate, the builder or developer can use the failure to do so as a defence to minimise the damages for which they are liable in any claim against them.³
8. A failure to mitigate the loss will not be fatal to a claim for damages but will be a factor that the tribunal or the court may take into account when dealing with the claim for breach of statutory warranties and may result in the amount of damages being reduced.
9. The duty to mitigate can be discharged by providing the builder and developer with notice of the defects within 6 months of becoming aware of them and thereafter by providing the builder and developer with reasonable access and an opportunity to carry out the rectification work.

¹ Section 18BA of the HBA, which commenced on 1 March 2015 and applies to contracts entered into after that date (clause 125 of Schedule 4 to HBA).

² Section 18BA(3).

³ Section 18BA(5) of the HBA provides that the failure to mitigate is a matter that can be taken into account by a court or tribunal.

10. So, what is “reasonable access” and when can you refuse the builder and developer access to carry out rectification work, particularly where they have already attempted rectification work that has been unsuccessful.
11. In the recent decision of *The Owners – Strata Plan 89041 v Galyan Pty Ltd* [2019] NSWSC 619 (*Galyan*) it was held, per Stevenson J, that it is reasonable for an owners corporation to refuse the builder access where:
 - a) the owners corporation has reasonably lost confidence in the builder’s ability to do the rectification work; or
 - b) the scope of work proposed by the builder falls far short of what is needed to rectify the defects.⁴
12. The *Galyan* decision confirmed the earlier decision of *The Owners – Strata Plan No. 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067 (*Di Blasio*), and outlined the principles in *Di Blasio* (summarised below):
 - a) A plaintiff is not entitled to recover losses attributable to its own unreasonable conduct;
 - b) In building disputes, an owner must give the builder an opportunity to minimise the damages by allowing the builder an opportunity to rectify the defects, except where the refusal is reasonable;
 - c) Whether the refusal is reasonable depends on the circumstances, but one relevant factor is whether the builder has made attempts to rectify in the past and the owner has reasonably lost confidence in the builder’s willingness and ability to do the work;
13. In our view, it is not unreasonable for an owners corporation to require that any rectification work be carried out to an agreed scope of works, which should be either approved or drafted by your expert.
14. Before commencing proceedings, and not later than 6 months after obtaining a defects report, we recommend that a letter of demand be sent to the builder and developer attaching the defects report putting each of them on notice of the defects and requesting that they return to rectify the defects.
15. Once an agreed scope of works has been achieved, the builder and the developer must be given the opportunity to return to rectify the defects and the owners corporation has a duty to allow reasonable access.

⁴ *The Owners – Strata Plan 89041 v Galyan Pty Ltd* [2019] NSWSC 619, per Stevenson J at [89].

16. In taking these steps, an owners corporation can meet the obligation to mitigate its loss.
17. This process is tricky and often builders and developers are very pushy to be allowed back to rectify without an agreed scope of works or any scope of works at all. Owners corporations are usually very keen to let them back because they want the defects rectified. However, an owners corporation should be very careful in this process to make sure that any rectification work is done properly. An owners corporation has the right to refuse access if it is concerned that the rectification work that the builder proposes to carry out will not rectify the defects. This can only be reasonably determined with the involvement of your expert building consultant.
18. Overlaying this process are the ticking time limitation periods. An owners corporation only has two years to commence proceedings for minor defects, which can now be very substantial and costly given the current definition of a major defect. Therefore, even if negotiations with the builder and developer have commenced, the owners corporation should be careful to not miss the deadlines and commence proceedings before the limitation period expires.
19. This is complex area of law and in order to protect the interests of an owners corporation it is wise to seek legal advice on navigating this process.

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