

Building Defects: How do You Prove Systemic Defects?

Introduction

It is an unfortunate reality that many strata apartment buildings contain defects. Many of those defects are widespread or systemic defects that affect most or all of the lots. But how far does an owners corporation have to go to prove the existence of systemic defects? Does the owners corporation have to organise for its experts to inspect each and every lot to prove that those systemic defects exist in each lot? A recent Supreme Court case provides the answer to that question.

The Case

There is a strata complex containing 45 townhouses in Tweek Heads South. The complex was built in about 2018 and 2019. There are defects in the complex.

In 2021, the owners corporation of the complex sued the builder for damages to (among other things) cover the cost to rectify defects throughout the complex. In the case, the owners corporation claimed that several defects were systemic and present in numerous townhouses. One of those defects related to waterproofing defects at the outer edge of balconies above garage doors of many townhouses.

The parties' experts agreed that the beam which spans the outer edge of the balconies on two of the townhouses suffered moisture damage due to the same waterproofing defect on the balconies of those townhouses. However, the owners corporation's expert did not inspect any of the other townhouses or carry out any investigations to prove that those

defects existed in them. The builder denied that those same defects existed in the other townhouses and claimed that the owners corporation had not proved its case in that regard.

Proving the Existence of Systemic Defects

The Court agreed with the builder and concluded that the owners corporation had not proven, on the balance of probabilities, that the waterproofing defects and moisture damage to the beams on the outer edge of the balconies existed in any of the other townhouses. In other words, the Court concluded that the owners corporation had not proven that those defects were systemic.

The Court relied heavily on an earlier decision in *The Owners – Strata Plan No. 62930 v Kell & Rigby Holdings Pty Ltd* [2010] NSWSC 612. In that case, the owners corporation of a block of 14 units argued that no water stops had been installed by the builder in the bathrooms of all 14 units. The owners corporation's expert evidence only proved that there were no water stops in the bathrooms of three units. But the owners corporation claimed that the lack of water stops was a systemic defect present in all of the bathrooms.

The Court held that it could not be inferred from the evidence that established that there were no water stops in three bathrooms that waterproofing work was incorrectly performed in other units and observed that the fact that the waterproofing contractor defectively performed work in a small number of units did not warrant a conclusion that it did so everywhere else. Importantly, the Court concluded that the burden of proof lay on the owners corporation and that it had chosen to carry out limited destructive testing in three bathrooms only when there was no reason why it could not have done so in all of the units.

In the case involving the townhouse complex in Tweed Head South, the Supreme Court followed the reasoning in *Kell &*

Rigby and concluded that there was insufficient evidence available to support the inference that the balcony waterproofing defect in two townhouses provided a basis for finding that the same defect existed in all 26 townhouses which have front first floor balconies.

Importantly, the Court held that it could not rely on the opinion of the owners corporation's expert that the defect was systemic due to similar construction details being present in all townhouses because it was not known whether the waterproofing defects that had been identified in two of the townhouses were caused by faulty design or shoddy workmanship. For all of these reasons, the Court rejected the owners corporation's claim that the defect on the outer edge of the balconies was a systemic one that affected all such balconies and instead only accepted that the defect existed in two of the balconies that had actually been inspected and tested by the owners corporation's experts.

Conclusion

The case provides a salutary lesson for owners corporations who wish to pursue a claim against a builder, developer or subcontractor for systemic defects. Typically, the owners corporation will need to go the extra mile and pay its expert to inspect more than just a handful of lots to ensure that adequate testing and investigations are undertaken to enable the expert to form an opinion that will allow the owners corporation to prove, on the balance of probabilities, that the defect in question is widespread and systemic. In some cases, this will require the expert to inspect and undertake testing and investigations in all of the lots, which in a large strata building, can be expensive. But that is the unfortunate price an owners corporation must sometimes pay in order to succeed in a claim with respect to systemic defects.

Case: *The Owners – Strata Plan 99960 v SPS Building Contractors Pty Ltd* [2024] NSWSC 687



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