



When Can an Owner Refuse Access? Rectification, Mitigation and Loss of Confidence in HBA Disputes:

Case Note: Ceerose Pty Ltd v The Owners – Strata Plan No 89074 [2025] NSWCA 235

Executive Summary

In HBA cases, builders have no automatic right to rectify defects; Owners Corps must only refrain from acting unreasonably in refusing access. The builder bears the full onus of proving that the other party has failed to mitigate any loss, and the courts will reject any “shifting” of that burden. A genuine loss of confidence can justify refusal to allow the builder a right to rectify defective works.

Facts

In 2010 and 2012, Ceerose Pty Ltd (the Builder) and Prisan Investments Pty Ltd (the Developer) entered contracts to construct an apartment complex known as The Eliza. The Owners Corporation (the Owners) of The Eliza, after discovering various bathroom and lift shaft defects, alleged that the Builder breached the statutory warranty under ss 18B-18BA Home Building Act 1989 (NSW) ('HBA'). The Builder initially accepted that some defects existed in the building but argued that the Owners had failed to mitigate their loss by refusing the Builder further access to rectify defects.

The dispute was referred to a referee under Pt 20 Div

3 UCPR. The referee found that the Owners did not act unreasonably in refusing further access, having lost confidence in the Builder. The main factors considered included:

- That defects existed in the building.
- The Builder had not established that the Owners' refusal to allow the Builder further access to perform rectification was unreasonable.
- The Builder was liable for the cost of proper rectification, assessed at approximately \$1.95

million (excluding GST).

- The Owners did not fail to mitigate their loss.

Rees J adopted the referee's report and awarded approximately \$1.95 million (excl GST) to the Owners.

The Builder appealed.

Issues to be Determined

On appeal, the Court was asked to determine the following questions:

1. Whether the referee relied on evidence contrary to earlier rulings, denying fairness.
2. Whether the referee misapplied principles by failing to find a "positive obligation" on the Owners to allow the Builder to rectify defects.
3. Whether the referee wrongly applied a superseded version of the BCA to a drainage issue.
4. Whether certain invoices should have been rejected as litigation costs or lacking proof.

Court of Appeal Decision

The Court held that the Owners are not necessarily bound to give Builders rectification rights to satisfy mitigation of loss requirements and dismissed the appeal.

Legal Reasoning

On the issue of mitigation, the Court reaffirmed that the onus of proof rests entirely on the defendant to establish that the plaintiff acted unreasonably in failing to mitigate its loss. Absent a contractual requirement or further evidence, there is no positive obligation on the Owners to give a builder an opportunity to rectify defects.

The test as to whether the plaintiff has failed to mitigate its loss is one of reasonableness in all the circumstances, and the defendant must prove that the plaintiff's refusal to allow the defendant to the site to undertake rectification works was unreasonable. The Builder's speculation in this case that the Owners had an ulterior motive for denying access did not amount to evidence capable of discharging that onus. Accordingly, the Court found that the referee and the primary judge were correct to find that the Owners did not act unreasonably in refusing the Builder further access (or, at least, that there was not evidence of unreasonableness).

The Court further held there was no procedural unfairness in the referee's reliance on correspondence exchanged between solicitors showing the Owners' loss of confidence in the Builder. The letters had been tendered by the appellants themselves, and the referee was not bound by the rules of evidence under r 20.24 of the Uniform Civil Procedure Rules 2005 (NSW).

Accordingly, the appeal was dismissed with costs.

Key Takeaways

1. Builders should be aware that builders have no automatic right to rectify defects in HBA cases. Builders bear the full onus of proving that the other party has failed to mitigate any loss, and the courts will reject any "shifting" of that burden.
2. Owners' Corp clients are reminded that they must only refrain from acting unreasonably in refusing access. A genuine loss of confidence can justify refusal to allow the builder a right to rectify defective works.

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