A Win for Developers Under the NSW Building Bond Scheme

Case Note: *Peninsula Point Frederick Pty Ltd v Secretary, Department of Customer Service* 2026 NSWSC 476

Executive Summary

In what is understood to be the first reported judicial review of an internal review decision under the strata building bond scheme, the NSW Supreme Court has quashed a decision of the Department of Customer Service (Building Commission NSW) affirming the release of the whole of a $797,235.84 strata building bond. Construction Legal acted for the successful plaintiff developer, Peninsula Point Frederick Pty Ltd, instructing R Cheney SC.

The decision is the first authoritative judicial guidance on the nature of the Secretary's function under ss 209 and 209A of the Strata Schemes Management Act 2015 (NSW) (**SSM Act**) and on the scope of internal review under s 213.

Facts

Peninsula Point Frederick Pty Ltd (the **Developer**) was the developer of a 100-unit residential strata complex at 179 Albany Street, Point Frederick. It provided a strata building bond of $797,235.84 in August 2022 under the SSM Act.

An interim report and final report prepared by the appointed inspector identified extensive items of defective building work. In April 2025, the Building Commission appointed a quantity surveyor (QS) under s 209A(1)(b) (the **QS Report**), to estimate the rectification cost so as to determine whether the entire bond should be paid to the Owners Corporation. The QS determined the rectification cost at $1,329,820 plus GST.

On 25 June 2025 the Secretary's delegate determined under s 209(1A) that the whole of the bond should be released to the Owners. The Developer applied for internal review under s 213, supported by 20 pages of submissions and a 93-page competing quantity surveyor report (**Competing QS Report**), which valued the rectification work at between $120,829 and $552,668.

The Developer's submissions to the reviewer contended that the reviewer was required to be affirmatively satisfied, on the civil standard, that each item was a defect, was caused by the builder, breached a statutory warranty, and was accurately quantified. On 25 July 2025 the reviewer affirmed the determination. The Developer sought judicial review on six overlapping grounds, including misconstruction of the statutory task, failure to consider relevant material, denial of procedural fairness, and legal unreasonableness.

Supreme Court Decision

The Court declared that the reviewer had fallen into jurisdictional error by failing to accord procedural fairness, in that she did not consider whether the developer's submissions about the QS Report warranted a decision to release less than the whole of the bond, and in that respect conducted the review in a manner not contemplated by the Act. The decision was quashed and remitted for redetermination.

Reasoning

The statutory regime was designed to be quick, cheap, and non-determinative of final legal rights. Sections 205 and 215 confirm that the final report does not bind any court or tribunal, and that any substantive dispute about defects or rectification costs is to be litigated separately. The Secretary's function is to take the final report at face value and use it, together with any s 209A report, to determine an amount to be realised. The Secretary is not required to look behind the final report or to make precise findings as to liability or quantum.

It is open to the Secretary to determine an amount that represents the likely upper bound of any dispute, or that reflects the owner's corporation's prima facie case, rather than weighing competing quantification evidence. Where the upper bound exceeds the amount of the bond, releasing the whole of the bond is neither irrational nor legally unreasonable. Section 210 operates as a back-end check, requiring repayment of any amount not used for rectification.

Section 213(7) requires the reviewer to consider "any relevant material" submitted by the applicant, but relevance is determined by the nature of the underlying function. The reviewer is not obliged to weigh up a developer's competing expert report. To require this would either force a one-sided process (without the involvement and therefore to the detriment of the owner's corporation) or convert the review into a lengthy adversarial proceeding, both of which are inconsistent with the statutory purpose.

The Court held that the plaintiff's submissions to the reviewer included substantial, clearly articulated criticisms of the QS Report. These included the absence of any reasoning for the line items, double-counting of preliminaries and consultants' fees, and unjustified percentage uplifts for contingency and escalation. Those submissions called for active intellectual consideration in the sense explained in *Plaintiff M1/2022 v Minister for Home Affairs* (2022) 275 CLR 582. The reviewer's reasons did not grapple with them. That failure was a denial of procedural fairness and warranted the quashing of the decision.

Key Takeaways

Until now, developers have had limited authority to draw on when challenging a Secretary's decision under the SSM Act bond regime. This decision confirms that the Secretary and their delegates remain subject to public law constraints, including the duty to engage with substantial, clearly articulated criticisms of a s 209A quantity surveyor report. A developer who can identify concrete failings in the QS report (absent reasoning, double-counted preliminaries, unjustified percentage uplifts) now has a clear pathway to relief.

The Court rejected the suggestion that the reviewer must conduct a merits review of every defect, weigh competing expert reports, or apply the rules in Makita and Dasreef governing expert evidence in litigation. The bond regime is intended to be quick, cheap, and non-final. Developers and owners corporations alike should approach the scheme as a security mechanism, with substantive disputes about defects and rectification costs to be litigated in the Tribunal or a court.

More information

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