Supreme Court

New South Wales

Case Name:	The Owners – Strata Plan 89041 v Galyan Pty Ltd
Medium Neutral Citation:	[2019] NSWSC 619
Hearing Date(s):	12 April and 17 May 2019
Decision Date:	28 May 2019
Jurisdiction:	Equity - Technology and Construction List
Before:	Stevenson J
Decision:	Defendants to pay plaintiff's costs
Catchwords:	COSTS – party/party – general rule that costs follow the event – building dispute – allegedly defective building work – whole dispute referred to referee – referee's report adopted – agreement that defendants pay plaintiff's costs unless defendants can show it was unreasonable for plaintiff not to allow defendants to effect repairs BUILDING AND CONSTRUCTION – costs – whether it was unreasonable for plaintiff not to allow defendant back in to effect repairs
Legislation Cited:	Home Building Act 1989 (NSW) Legal Profession Act 2004 (NSW)
Cases Cited:	Hasell v Bagot Shakes & Lewis Ltd (1911) 13 CLR 374; [1911] HCA 62 Owners Strata Plan 78465 v MD Constructions Pty Ltd [2016] NSWSC 162 Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin (1997) 186 CLR 622; [1997] HCA 6 The Owners – Strata Plan No 76674 v Di Blasio Constructions Pty Ltd [2014] NSWSC 1067

Category:	Costs
Parties:	The Owners – Strata Plan 89041 (Plaintiff) Galyan Pty Ltd (First Defendant) ACH Clifford Pty Ltd (Second Defendant)
Representation:	Counsel: F Corsaro SC with R A Jedrzejczyk (Plaintiff) M G Rudge SC with R Freeman (Defendants) Solicitors: Chambers Russell Lawyers (Plaintiff) Christopher C. Freeman & Co (Defendants)
File Number(s):	SC 2016/75863

JUDGMENT

1 The plaintiff is the Owners Corporation in respect of a property comprising 14 residential units at Ettalong.

2 The first defendant, Galyan Pty Ltd, was the owner and developer of the property. The second defendant, ACH Clifford Pty Ltd, was the builder. I will refer to the defendants, together, as "the Builder".

3 The Owners Corporation commenced these proceedings on 20 August 2015 in the NSW Civil and Administrative Tribunal (NCAT). The proceedings were transferred to this Court on or about 8 March 2016.

4 The matter was set down for hearing before Hammerschlag J commencing on 11 September 2017. On the second day of the hearing, the proceedings were settled on the basis of the parties agreeing to appoint Ms Janet Grey as referee.

5 By Heads of Agreement made on or about that date the parties agreed:

(a) to appoint Ms Grey as referee to determine the existence of defective works, the necessary scope of work to rectify those defects, the cost of undertaking that work, and a detailed construction program;

(b) to waive any right to challenge the adoption of Ms Grey's report;

(c) that once Ms Grey's report was to hand, judgment would be entered for the Owners Corporation against the Builder in the

total amount found by Ms Grey (described in the Heads of Agreement as the "Provisional Verdict");

(d) that the Provisional Verdict would be stayed for a time to be identified by Ms Grey "for the total time required for all defects to be rectified plus a further 10 weeks";

(e) to appoint a "Remedial Builder" (identified in the Heads of Agreement as "Glew") to be contracted to the Builder to undertake all rectification works the subject of the Provisional Verdict and for the Builders to pay all costs of the rectification works; and

(f) that as to the costs of the proceedings:

> "…neither will raise a [*Re Minister for Immigration and Ethnic Affairs; Ex parte*] *Lai Qin* [(1997) 186 CLR 622; [1997] HCA 6] point, the only matter to be determined being that stated by his Honour Justice Hammerschlag in Court on 12 September 2017".

6 On 12 September 2017 Hammerschlag J said, in relation to the question of costs:

> "My understanding is, so that the transcript is entirely clear, that there will be left open a question for costs and the only question will be whether, in all the circumstances, the [Owners Corporation's] refusal previously to allow the [Builders] in to carry on work on the premises was unreasonable. If that is not established to have been unreasonable, the [Owners Corporation] will get its costs." (Emphasis added.)

7 Ms Grey published her report on 18 February 2019. Ms Grey awarded the Owners Corporation $1,282,486.59.

8 On 22 February 2019, by consent, Hammerschlag J made the following orders:

> "(1) The Court adopts the whole of the report of Janet Grey dated 18 February 2019 and the findings made therein.
>
> (2) Judgment for the [Owners Corporation] in the amount of $1,282,486.59.
>
> (3) Subject to further order, entry of the judgment is stayed until 1 November 2019."

9 The matter that now divides the parties is what orders should be made as to the costs of the proceedings, including the reference.

10 By the Heads of Agreement, the parties agreed that that question be determined in the manner described by Hammerschlag J on 12 September 2017. Thus the question is whether the Owners Corporation's refusal to allow the Builder back in to the site to remedy the defects, prior to the date of Hammerschlag J's order, was unreasonable.

Preliminary points

11 Mr Rudge SC, who appeared with Mr Freeman for the Builder, sought to raise two preliminary points.

12 The first was that a determination on costs at this point is premature because:

(a) "the orders of the Court required that the [Builder] return to site for the purpose of effecting remediation of defective work";

(b) "the orders made by the Court upon adoption of the report of Ms Grey were that judgment for a monetary sum was ordered in favour of the [Owners Corporation], but that order was stayed pending completion of the remediation work"; and

(c) "any hearing as to the costs of this matter should await completion of the work by the [Builder]" as, in effect, the manner in which the Builder carried out the remediation work was capable of being relevant to the Court's exercise of discretion concerning costs.

13 I do not accept this submission. The parties' agreement is that the only matter to be determined in relation to costs is that stated by Hammerschlag J on 12 September 2017; that is whether the Owners Corporation's refusal "previously" to allow the Builder back onto the site to carry on work was unreasonable.

14 The manner in which the defects in the building are remedied from now on is not relevant to that question.

15 The second point that Mr Rudge sought to make was that the reasonableness of the Owners Corporation's conduct, vis-à-vis allowing the Builder back on site, is now "foreclosed" because:

> "Before judgment, the parties resolved that the [Builder] should be permitted to return to site to effect remediation. The extent of the remediation was to be determined by a Court appointed referee Ms Grey."

16 But this is not correct. The parties did not agree that the Builder should be permitted to return to the site to effect remediation. They agreed that a "Remedial Builder" should, adopting the words in the Heads of Agreement, "undertake all defects rectification, including all necessary variations required to be undertaken to properly rectify the defects the subject of the Provisional Verdict".

17 The Builder agreed to pay all costs associated with the appointment of the Remedial Builder. But the work is to be undertaken by the Remedial Builder, and not by the Builder.

18 Further, by the Heads of Agreement, the parties agreed that the Builder engage a superintendent to "superintend and certify the works" and that "the Remedial Builder…strictly follow all directions of the superintendent". Originally, that superintendent was to be nominated by Mr Grey. Later, the parties agreed that the Builder nominate the superintendent. Nonetheless, the Remedial Builder was to act as directed by the superintendent; not the Builder.

19 I see nothing in these circumstances as "foreclosing" the question of the reasonableness of the Owners Corporation's conduct.

Did the Owners Corporation act unreasonably?

20 The effect of the parties' agreement in the Heads of Agreement is that the only issue that arises in relation to costs is whether, prior to 12 September 2017, the Owners Corporation acted unreasonably in refusing to allow the Builder back on site to rectify the defects.

21 The relevant principles were summarised in the submissions of Mr Corsaro SC and Mr Jedrzejczyk, who appeared for the Owners Corporation, as follows:

> "(a) [T]he overarching principle is that a plaintiff is not entitled to recover losses attributable to its own unreasonable conduct: *The Owners – Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067 (*Di Blasio*) at [42], citing *Hasell v Bagot, Shakes & Lewis Ltd* (1911) 13 CLR 374 at 388[; [1911] HCA 62];
>
> (b) in cases involving building contracts, 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: *Di Blasio* at [44];
>
> (c) 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: *Di Blasio* at [45];
>
> (d) 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: *Di Blasio* at [46]; and
>
> (e) once a defendant puts in issue the reasonableness of the plaintiff's conduct, all circumstances relevant to an objective assessment of the plaintiff's position become examinable – the plaintiff is not limited to reliance on facts or

> circumstances actually known at the time, but may rely on facts which come to its attention afterwards, but which pertain to the defendant's conduct at the relevant time: *Owners Strata Plan 78465 v MD Constructions Pty Ltd* [2016] NSWSC 162…at [30]."

22 Mr Rudge did not dispute the accuracy of this summary.

The course of events

23 The strata plan was registered on 26 November 2013.

24 Lot owners noticed defects in the building as early as February 2014.

25 The Owners Corporation engaged a licensed builder, Mr Rohan Coleman, to prepare a report in relation to the defects. Mr Coleman's report was to hand on 28 April 2014.

26 At an Extraordinary General Meeting on 2 August 2014, the lot owners resolved to adopt Mr Coleman's report and to refer the matter to NSW Fair Trading because of "numerous attempts" by individual owners to have defect works rectified.

27 On 19 November 2014 the Owners Corporation lodged a submission with the NSW Department of Fair Trading concerning the building defects.

28 On 15 December 2014 a "Joint Inspection" of the building was carried out by Mr Coleman and Mr John Worthington, an independent expert representing the Builder. Mr Coleman and Mr Worthington prepared a "Joint Report" setting out the defects they identified.

29 The parties agreed that Mr Michael Lebrocque, evidently a sub-contractor to the Builder, would "carry out the works as listed in the Joint Report", that the Builder would pay for that work, and that Mr Coleman would supervise the work.

30 Mr Lebrocque commenced work at the site in late January or early February 2015 and carried out defect rectification work until August 2015.

31 On 3 March 2015, Mr Steve Masters, a Building Inspector from the Department of Fair Trading, inspected the site.

32 On 9 April 2015 Mr Masters issued a Rectification Order requiring that 30 identified items of "Defective Work" be rectified by 8 May 2015.

33 On 12 May 2015 Mr Masters published a Building Inspection Report in which he reported that 19 of the 30 items identified in his 9 April 2015 Rectification Order had not been rectified.

34 Mr Masters recorded:

> "The [Builder] was contacted on 11 May 2015 for an explanation why these items were not completed. Trader advised that the work had been completed however they were working through the issues and endeavouring to rectify all items."

35 On 27 July 2015 the lot owners resolved that:

> "…the Strata Manager brief the lawyers to provide a fee estimate to commence proceedings against the original builders to ensure the time does not elapse for the rectification of 'minor' and 'major' defects reported."

36 On 11 August 2015 the Owners Corporation's strata title manager, Ms Jill Walshaw, wrote to the Builder "to notify you of further defects found within the complex and to seek clarification of the current rectification work". Ms Walshaw attached "three separate lists of defects" and continued:

> "The first issue on the list of **New Defects** is the Fire Compliance of the roof ceiling spaces. It has come to our attention that the ceiling spaces **may not be** fire compliant and therefore we request that you forward to us the Fire Certification for the roof.
>
> If the roof has not been properly fire certified, it is incumbent upon you to obtain a C10 Fire Engineers Compliance Report urgently.
>
> Can you please urgently review the attached document and confirm how you wish to proceed in the rectification of these items by close of business on Tuesday 18 August 2015." (Emphasis in original.)

37 The Builder responded to Ms Walshaw's letter on 20 August 2015 (two days after the deadline specified in Ms Walshaw's email) stating:

> "We are organising for the defects to be rectified."

38 In the meantime, on 19 August 2015, the Owners Corporation resolved to engage lawyers in respect of the building defects.

39 Mr Rudge asked Ms Gail Woodley-Page, the secretary of the Executive Committee of the Owners Corporation and the owner of two lots in the development, about this:

> "Q. At some stage, it was resolved by the owners corporation to commence proceedings in NCAT against the builder, wasn't it?

> A. Yes. That's after we didn't get much satisfaction from Fair Trading and from the, well, I mean, from the process and from the way the builders reacted to that process. Which was very, very slow.
>
> Q. But they were rectifying notified defects, weren't they?
>
> A. Well, that - yes, they were rectifying. But they were given until May to have all the defects fixed. In May, Mr Masters prepared us a report. He didn't come back to the building to inspect anything, but he did prepare a report after, I think, after a meeting with Mr Le Brocque. That's when the 19 points were tabled by him as still being outstanding and then we decided to give [the Builder] an extra month to try to get those defects fixed. So, we actually gave them till, I think it was, early August to try and get those defects fixed. There were still a lot of outstanding stuff in August and our 2 years was running out. We had no choice but to go to NCAT, because our 2 years was up in November".

40 Ms Woodley-Page said that she understood that "with minor defects, you were given two years to take legal action to get them rectified".

41 Accordingly, these proceedings were commenced in NCAT on 20 August 2015.

42 Mr Lebrocque was excluded from the site at around this time and the Builder has not since been permitted to return to the site to continue to rectify the outstanding defects.

43 The question is whether the Builder has established that it was unreasonable for the Owners Corporation to maintain this stance.

44 The Owners Corporation made clear that it was only prepared to allow the Builder back on site to rectify the defects if a scope of works could be agreed.

45 On 6 October 2016, at the first directions hearing at NCAT, the Tribunal noted:

> "The [Builder] also made an open offer to complete all rectification <u>within an agreed scope of works</u>. That scope may be agreed after the [Owners Corporation] has served its expert evidence on liability." (Emphasis added.)

46 On 12 October 2015 the Builder's solicitor wrote to the Owners Corporation's solicitor:

> "The open offer that was made in Court [on 6 October 2015] covers all reasonably notified defects…
>
> Our client requires a further Works Order or <u>an agreed Scope of Works</u> to deal with any new items of alleged defective works." (Emphasis added.)

47 On 12 October 2015 the Owners Corporation's solicitor wrote to the Builder's solicitor:

> "As previously advised, our client may be open to your client's returning to site to do works but an appropriate scope of works would need to be prepared, the work would need to be completed under a contract and the appropriate insurance would need to be in place. If that can be agreed, subject to our client's instructions, access would be granted to your clients to complete the works.
>
> We note your client's open offer to complete all rectification works within an agreed scope of works. Our client's experts are currently preparing that scope of works." (Emphasis added.)

48 On 29 October 2015 the Builder's solicitors replied to the Owners Corporation's solicitor:

> "…we have already made an open offer to attend to remediate all reasonably notified defects…
>
> Of greater concern is the blatant and apparent false assertion as to the schedule of defective works attached to your client's application.
>
> If those claims appear to be bogus claim [sic] which they appear to be than [sic] this claim takes on a completely different complexion and we bring to your attention s 348 of the *Legal Profession Act 2004* [(NSW)] and your obligations to ensure that no action is commenced and/or maintained which does not have reasonable prospects of success." (Emphasis added.)

49 The Owners Corporation's solicitor replied on the same day stating:

> "Our client is in the process of finalising its evidence, which will provide it with a scope of works as to what our client's consultants say will address all of the defective work issues in the strata scheme. It is entirely reasonable that our client defer discussions until such time as it has reports identifying the appropriate scope of work to rectify the alleged defects." (Emphasis added.)

50 The Owners Corporation's solicitor's letter continued, addressing the matters set out at [48] above:

> "What is disconcerting from our perspective is the unwarranted and adversarial correspondence that you continue to send us even though this has been put to you and your client multiple times. If your client genuinely wishes to resolve the matter then it should restrain from escalating this matter and provide our client a reasonable amount of time that it needs to finalise its evidence so that any discussions may be had."

51 On 4 November 2015 the Owners Corporation's solicitor wrote to the Builder's solicitor stating that "due to some administrative issues with getting instructions from our client" the Owners Corporation's "expert evidence on liability will be delayed by approximately 4 weeks".

52 That prompted this response from the Builder's solicitor:

> "You mentioned difficulties with respect to client instructions but this has nothing to do with the provision of expert reports which you should have

> obtained prior to commencing any action and certainly prior to putting our client to any expense in dealing with this NCAT claim.
>
> We will seek to have this matter relisted and your client's application dismissed as you are unable to inform NCAT or our client of any aspect of your client's claims and our client should not be put to any expense in this regard.
>
> If your clients intend to persist with these, apparent, frivolous claims, they should at the very lease [sic] withdraw all complaints they have made to the Department of Fair Trading and release our clients from the current work orders that our clients are currently subject to." (Emphasis added.)

53 The following year, on 2 February 2016, the Builder's solicitor withdrew the offer that the Builder had made to NCAT on 6 October 2015. He said:

> "Our client made an open offer on the first list date of this matter which had to be withdraw [sic] due to the uncertainties of what further claims were to be made…
>
> It is our instructions, once we are in possession of all reports, to put a formal open offer to you in this regard."

54 A short time later, on or about 8 March 2016, the proceedings were transferred from NCAT to this Court.

55 On 31 August 2016 the Builder's solicitor wrote to the Owners Corporation's solicitor complaining that the Owners Corporation had not adequately particularised its claim. The solicitor continued:

> "The delay my clients have suffered by what can only be considered a deliberate determination not to admit that as at 20 August 2015 your client did not have any claims at all but sought to put on a bogus set of claims and then took from 27 August 2015 to 1 April 2016 to provide the particulars requested on 27 August 2016.
>
> That is a deliberate delay of over 7 calendar months wherein what claims were pressed and maintained in NCAT were as we has [sic] said were bogus claims and were effectively abandoned.
>
> …
>
> What you failed to do and continue to fail to do is to admit that bogus claims were brought against our client and maintained throughout the entire time the matter was before NCAT and as a means of avoiding compliance with the *Home Building Act* [*1989* (NSW)] to bring all such claims with respect to insubstantial defects within the 2 year limitation period for brining such claims.
>
> …
>
> What we now call for is a complete Scott Schedule of all items of claim setting out the nature of each aspect of alleged defective work, where the defect is to be found on the apartment complex and what remedial scope of works is to be employed to remedy such defect and the cost of doing so with respect to the alleged roof frame defect." (Emphasis added.)

56 On 23 September 2016 the Builder's solicitor wrote to the Owners Corporation's solicitor:

> "We will provide you with the proposed scope of remedial works shortly which will address those items of defective works which our client will attend to remediate.
>
> We proposed at the outset to remediate all reasonably notified defects and these items of work fall within the terms of the original open offer made by our clients." (Emphasis added.)

57 The Owners Corporation's solicitor replied on 28 September 2016:

> "With respect to any proposed remedial works and the allegation that any works would be under a rectification order of the Office of Fair Trading, we have previously written to you regarding this issue. In our correspondence of 12 October 2015, we clearly set out that when the matter become [sic] the subject of a building claim (by virtue of the commencement of proceedings in the NSW Civil and Administrative Tribunal) the rectification order ceased to have effect pursuant to s 48F of the *Home Building Act 1989*. In that same correspondence, we indicated that in respect of any proposed remedial works, our client required an agreed scope of works, the work to be completed under a contract and the appropriate insurances to be in place. At this point, there has been no agreed scope of works and there is no proposed contract.
>
> We note that our client put this to your clients almost a year ago and has never received a response." (Emphasis added.)

58 The Builder's solicitor replied the same day stating, amongst other things:

> "We will proceed on the basis that a scope of works is to be submitted to your clients for their consideration and once agreed, a building program can be put in place." (Emphasis added.)

59 In the same letter the solicitor referred to "the wasted costs in dealing with spurious claims".

60 On 28 September 2016 the Owners Corporation's solicitor wrote to the Builder's solicitor:

> "To be clear, unless our client formally agrees to something then it will not be taken to have agreed or acquiesced to it. However, you can proceed on the basis that our client will seriously consider any proposal to return to undertake rectification work. For now, despite the noises your clients are making about offering to resolve the matter, it appears to us that your clients continue to heavily defend these proceedings."

61 The following day the Owners Corporation's solicitor wrote to the Builder's solicitor:

> "1. Our client agrees to grant access to the roof for the period of 5 days, that is, from 10 October 2016 to 14 October 2016. As previously discussed, the roof sheeting must be replaced each day.

> 2. As previously advised, our client does not consent to any remedial works occurring on this date or without its permission. Any proposal to complete remedial works would need to include an agreed scope of works, a contract between the parties and details of the appropriate insurances. Your client is welcome to put forward such a proposal for our client's consideration."

62 The Builder's solicitor replied the next day stating that those two matters were "noted".

63 The issue of a scope of works was not addressed in subsequent correspondence between the parties.

64 What was repeated was the Builder's assertion that the Owners Corporation was making "bogus claims". Thus, on 8 November 2016, he wrote:

> "The history of litigation will review that bogus claims were made at the outset and only belated claims for mostly general defects were made out of time and are now subject to potential strike out having regard to those claims being statute barred…".

65 This correspondence justifies, in my opinion, the submission made by Mr Corsaro and Mr Jedrzejczyk on behalf of the Owners Corporation that following the Builder's open offer of 6 October 2015, "no scope of works responsive to the open offer was ever provided to the Owners Corporation by the defendants". Indeed, the open offer was formally withdrawn on 2 February 2016 (see [53] above) and not repeated.

66 On or about 6 January 2017 the Builder served a report prepared by Mr Mark Seeto, from QS Building Economics Pty Ltd, entitled "Estimate of the Cost to Rectify Defects".

67 Mr Seeto expressed an opinion about the need to carry out each item of work specified in the Owners Corporation's Scott Schedule.

68 The total of the amount claimed by the Owners Corporation, including GST but excluding interest was $2,668,223. Mr Seeto concluded that work to the value of $318,078.06 was required.

69 Mr Seeto's report represented, in effect, the Builder's second offer to rectify the defects in the building.

70 Mr Corsaro and Mr Jedrzejczyk produced a schedule setting out the 174 defects complained of by the Owners Corporation and depicting, by use of colours, the outcome before Ms Grey compared to Mr Seeto's opinion.

71 I attach that schedule (Defect Analysis Document MFI 3 (454 KB, pdf)).

72 Column 3 identifies the alleged defects that Mr Seeto accepted were the Builder's responsibility by the colour green and defects that Mr Seeto did not accept were the Builder's responsibility by the colour red.

73 Column 4 identifies Ms Grey's conclusions. The items coloured blue are those Ms Grey found to be the Builder's responsibility.

74 As the schedule vividly depicts, Ms Grey upheld the Owners Corporation's claims in respect of almost all of the defects that Mr Seeto rejected as not being the Builder's responsibility.

75 As Mr Corsaro and Mr Jedrzejczyk submitted, that analysis demonstrates that "the offer to rectify contained in [Mr Seeto's] report was not reasonably capable of being accepted, or alternatively, that the [Owners Corporation] did not act unreasonably in rejecting that offer".

76 Thereafter, as a result of expert conclaves, the ambit of the dispute between the parties was reduced. By the time the matter was referred to Ms Grey, the amount claimed by the Owners Corporation had reduced from the figure referred to by Mr Seeto, $2,668,223 to $1,442,841.25.

77 Ms Grey awarded the Owners Corporation $1,282,486.59 exclusive of GST. Thus, the Owners Corporation was, in monetary terms, substantially successful before Ms Grey in relation to those matters which then remained in dispute.

Did the Owners Corporation reasonably lose confidence in the Builder's ability to do the rectification work?

78 As I have set out above, a factor relevant to whether the Owners Corporation acted reasonably is whether the Owners Corporation reasonably lost confidence in the willingness and ability of the Builder to do the rectification work: see *Di Blasio* at [45].

79 In her affidavit of 11 May 2017 the chairperson of the Executive Committee of the Owners Corporation, Ms Feehely, concluded by saying that, for the reasons set out in detail in her affidavit:

> "I lost all confidence in [the Builder's] willingness and ability to carry out the necessary rectification works".

80 Ms Woodley-Page expressed a similar opinion in her affidavit.

81 Ms Feehely and Ms Woodley-Page gave these reasons for having lost confidence in the Builder's ability or willingness to carry out the works:

(a) the failure by the Builder or Mr Lebrocque to provide a scope of work and other information;

(b) the poor quality, to their observation, of the rectification work that Mr Lebrocque and his assistants performed between February and August 2015;

(c) Mr Lebrocque's failure to attend the property and individual units at appointed times to carry out work;

(d) Mr Lebrocque's conduct in entering on the property without permission or authority; and

(e) Mr Lebrocque's attempts to persuade Ms Feehely and Ms Woodley-Page to sign off on a development application with respect to replacing the roof structure over the southern lobby.

82 Mr Rudge cross-examined each of Ms Feehely and Ms Woodley-Page but did not challenge the evidence they gave about these matters. I accept Ms Feehely's and Ms Woodley-Page's evidence. They were the chairperson and secretary, respectively, of the Executive Committee of the Owners Corporation and accept that their loss of confidence in the Builder is reflective of the loss of confidence of the Owners Corporation generally.

Conclusion

83 The question is whether the Builder has shown that, as at the date of Hammerschlag J's observations set out at [6], it was unreasonable of the Owners Corporation not to allow the Builder back on site to rectify the defects to the building.

84 The enquiry is directed to the Owners Corporations conduct prior to 12 September 2017: hence his Honour's use of the word "previously" in that passage.

85 Unless the Builder can establish that matter, it must follow from the parties' agreement, as set out at [5(f)] above, that the Builder pay the Owners Corporation's costs.

86 I am not satisfied that the Builder has shown that prior to 12 September 2017 the Owners Corporation acted unreasonably in not allowing the Builder to return to the site after August 2015.

87 Between the time of the Builder's exclusion from the site in August 2015 and September 2017 the Builder did not propose a workable scope of works.

88 Further, through its solicitor, the Builder adopted an unnecessarily aggressive approach to the Owners Corporation (describing their claims as including "bogus" and "frivolous" elements).

89 The rectification work ultimately proposed on the Builder's behalf by Mr Seeto fell far short of that which Ms Grey has now determined was needed. This points strongly to the conclusion that it was reasonable for the Owners Corporation not to permit the Builder to rectify the work on the basis proposed by Mr Seeto.

90 It also confirms my conclusion that the Builder has not discharged its onus of showing that, as at 12 September 2017, the Owners Corporation had acted unreasonably in not permitting it to return.

91 Accordingly I propose to make a costs order in favour of the Owners Corporation.

92 I invite the parties to confer and agree on the precise order that should be made.

****