



The strata guide to...

Rectifying apartment building defects

By Michael Teys, TEYS Lawyers
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About this publication

This strata guide has been published by TEYS Lawyers to help strata managers and executive committee members properly and effectively perform their duties.

TEYS Lawyers are specialists in strata and community title management law. We do strata levy collection work, building defect claims, strata management disputes and strata title property law and by-laws. You can find out more about our approach to our work at www.teyslaws.com.au.

About the author

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On death dying and building defects

'At first I thought I was imagining things. I could hear the person in the apartment above me opening the drawers in what I guessed was her kitchen. When she moved a chair the noise was thunderous. Then I heard the car start and the roller door come up – this can't be right I can't sleep though this. So I started talking to my new neighbors. It seems as the buyer of the last apartment, I was the only person that didn't know that this place hadn't been built to specification. I thought, this can't be happening to me'.

With those few words, 'this can't be happening to me', my client entered the first stage of what the Swiss-born psychiatrist Elisabeth Kübler-Ross termed the five stages of grief in her ground breaking 1969 work, 'On Death and Dying'. These five stages were first applied to those diagnosed with a terminal illness but have since been recognized as a pattern of adjustment applicable to any major event of loss or grief. Purchasing an apartment that is un-livable due to major building defects certainly falls into this category.

In the context of apartment defects, the denial stage is fleeting. It's hard to deny leaks and cracks although for a moment we might kid ourselves that they are just part of the settling process and will be easily rectified by the builder when the building finds its level. Denial is a temporary defense to a tragedy or disaster. It allows us to catch our breath so we can move to the second stage and be angry.

As our thoughts turn to 'why me, this isn't fair' we quickly get to 'who's to blame'. This is anger – stage two. We generally start with those closest to us. Says a husband to his wife, or vice versa, 'I told you no good would come from selling the house – We didn't have to put up with this at Victoria St'. We start to make a list of others we can attack – the agent, the lawyer, the developer, the builder, the politicians – 'they shouldn't let this happen', the Master Builders Association – 'how can they represent these morally corrupt builders?' For a moment we feel better but the cracks are getting bigger and the noise is getting louder and the tiles, well they're starting to float every time it rains.

Understanding the reality of our situation takes some time and the third stage of grief, bargaining, allows us this opportunity. In building defects the bargain with ourselves might be, 'I will do something about this after Christmas, or when my exams are finished or when we have the annual general meeting of the owners corporation.' There are a million reasons not to face facts, but there is no rushing this third stage of grief – it will take as long as it takes.

When we are done bargaining with ourselves, come the black clouds of depression. We are now in full-blown stage four. Our thought processes become very negative – 'It's no good, I will never get the other owners to help me with this, especially those

with apartments that seem to be OK.’ Having checked out a few websites and spoken to a few mates who are solicitors we find the process for seeking justice is hard and expensive. ‘What’s the point’ we say to ourselves in this hopeless situation and we wallow in self-pity. Some of us never emerge.

For those of us that do, stage five is acceptance. ‘I can deal with this – I have no choice – I can’t in good conscience sell this apartment to some other unfortunate, so I will just have to find a way to get these defects rectified.’

At this point, and only at this point you have arrived at the very beginning of your pathway to rectification? It’s a pathway many go down, or at least attempt. A recent study of respondents surveyed whose apartments were built in 1997 or later, has shown two-thirds owned an apartment in a strata scheme with ongoing defects in the building.¹

It’s also a pathway not well defined. The same study that highlights the extent of the problem also finds confusion amongst survey respondents about who is responsible for the management of major repairs and maintenance in their strata scheme including building defects.² Respondent’s comments included –

- *‘There is no one taking responsibility - each is assuming someone else is responsible’*
- *‘They (the strata management firm) are totally disinterested in providing any assistance and keep saying its the owners corporation’s problem’*

That is why I have written this Committee Guide. It’s aim is to help those with or responsible for apartments with building defects, to get the right result for their owners corporation. The outcome for each owner’s corporation will be different. Some will want to go to court and others won’t. What is important is that every strata body gets to the right result fully informed about what’s wrong in the first place and fully informed about their rights and responsibilities.

Thanks to my colleagues Ross Taylor of Ross Taylor and Associates and Chris Kerin of Teys Lawyers for prompting me to write this and for shaping my thinking on some matters relevant to the topic.

¹ Easthope et al, (2009), *‘Managing Major Repairs in Residential Strata Developments in New South Wales’*, City Futures Research Centre, University of New South Wales

² Ibid

So good luck, and here are ten steps you should follow to rectify your apartment building defects.

Regards

A handwritten signature in black ink, appearing to read 'Michael Teys', with a large, stylized flourish above the name.

Michael Teys
Founder and Principal Lawyer
Teys Lawyers

Step 1 - Be aware of your responsibilities to fix defects

On your way to resolving your buildings defects perhaps the most difficult thing will be to determine who must accept responsibility for fixing the defect. Responsibility for this rests with the owners corporation but the executive committee and individual members of the owners corporation carry additional responsibilities as well.

Primary responsibility rests with the owners corporation

Responsibility for all forms of repair and maintenance including defects of the original builder and/or developer falls on the owners corporation. This is a statutory duty and arises from an absolute obligation expressed in strata laws that the owners corporation must repair and maintain its common property.

Jurisdiction	Act	Section	Obligation	Comment
NSW	SSM Act	62(1)	'must properly maintain and keep in a state of good and serviceable repair'	
Vic	OC Act	46	'must repair and maintain the common property'	
Qld	BCCM Act (Standard)	159(1)	'must maintain in good condition, including, to the extent that the common property is structural in nature, in a structurally sound condition'	Same for Accommodation Module (S 157(1))
ACT	UT Act	51 (3)	'must maintain...the common property'	

Table of common property repair obligations (mainland eastern seaboard states and the ACT, September 2010)

The owner corporation is of course made up of each of the lot owners from time to time and is a body which has unlimited liability. So, for example, if an owners corporation suffers building defects at the hands of the original builder, fails to take adequate and immediate steps to rectify the damage and a person suffers loss or injury, then the financial responsibility for this will be visited upon each of the members in their personal capacity if the owners corporation has no money or insurance to cover the loss.

The leading case on the nature of an owners corporations duty to repair and maintain common property is *Seiwa Pty Ltd v The Owners - Strata Plan 35042*³. The case is authority for seven basic principles:

1. the obligation is to keep common property in a state that enables it to serve the purpose for which it exists;
2. the obligation is to keep the common property in proper order by acts of maintenance before it falls out of condition;
3. the owners corporation is obliged not only to attend to cases where there is a malfunction, but also to take preventative measures to ensure that there not be a malfunction;

³ (2006) NSWSC 1157

4. the duty extends to require the remediation of original defects in the common property;
5. the obligation extends to do things, which could not be for the benefit of the proprietors as a whole or even a majority of them;
6. as soon as something in the common property is not working properly, or is falling into disrepair, there has been a breach of statutory duty; and
7. the duty of the owners corporation is owed to each lot owner and its breach gives rise to a private cause of action in which damages may be awarded to a lot owner.

Executive committee members also have responsibilities

Owners corporations are managed on a day-to-day basis by the executive committee. Members of the executive committee assume additional responsibilities under the common law and under the various state and territory laws dealing with strata management.

The relevant common law in this area is the law of negligence, which places a duty of care on executive committee members to protect users of the common property including even those that are uninvited. A trespasser on common property who suffers an injury because of the defective state of the common property (whether caused by the original builder or not) will recover damages from an owners corporation and individual members of the owners corporation who have failed in their duty.⁴

Some states and territories provide a form of statutory protection for the personal liability of members of the executive committee. Usually this will be protection where people act in good faith and without negligence⁵. Where negligence is involved, protection for executive committee members will come from directors and officers insurance if an owners corporation holds such insurance. There is no obligation for owners corporations to hold such insurance but in practice, most do. Even so, directors and officers insurance is not the panacea for all exposure on the part of executive committee members. Most directors and officers insurance policies contain significant exemptions. This will exclude cover for members where fines, penalties and punitive damages are imposed. Such consequences will only be imposed in the worst of cases where there has been gross negligence or recklessness approaching criminal behaviour.

⁴ *Inspector Aldred v Herbert* (2007) NSWIRComm 170 where directors of a hotel were found guilty of breaches to an employers duties to non-employees when a 13 year old trespasser was electrocuted when retrieving a tennis ball from a semi enclosed area near the hotel pool.

⁵ See Table of statutory protection of committee members from liability (mainland eastern seaboard states and the ACT, September 2010)

Jurisdiction	Act	Section	Provision	Comment
NSW	SSM Act	-	-	No statutory protection or limitation for executive committee members.
Vic	OC Act	118	A member of a committee or subcommittee is not personally liable for anything done or omitted to be done in good faith: (a) in the exercise of the power or the carrying out of a function under this act or regulations; and (b) the reasonable belief that the act or omission was in the exercise of the power or the carrying out of the function under this act or the regulations.	
Qld	BCCM Act	101A	A committee member is not civilly liable for an act done or omission made in good faith and without negligence in performing the <u>persons</u> role as a committee member.	Does not limit criminal liability Does not apply to anything out of scope of committee role
Act	UT Act	-	-	No statutory protection or limitation for executive committee members.

Table of statutory protection of committee members from liability (mainland eastern seaboard states and the ACT, September 2010)

Unit owners responsibilities

Unit owners, apart from their unlimited underlying responsibility as owners also have other responsibilities concerning repair and maintenance. In the ACT there are statutory implied warranties requiring a vendor to disclose latent and patent defects in common property to a purchaser where the seller knows or ought reasonably to know of those defects. A latent defect is a defect that is not visually obvious and a patent defect is one that is obvious upon visual inspection.

Whatever hat you may be wearing, be it as a member of the owners corporation, a member of the executive committee or merely as a unit owner you have a responsibility to fix defects to common property and the discharge of that responsibility waits for no one.

It is not good enough to say that you are doing all that is reasonably possible or all that you can afford. It is also not good enough to say you have lodged an insurance claim or pursuing litigation with the developer. These considerations are all irrelevant to the central obligation to your fellow owners and your duty to the world at large to keep your common property maintained even where the building defects are not your fault.

Step 2 – Stay within your authority only to deal with common property

An owners corporation has limited powers. Its powers are limited to looking after common property. It has no business being concerned with the property of individual owners. Responsibility for these defects must be left with each individual owner.

An owners corporation that gets involved in resolving defects beyond its powers to look after common property will come to grief. Firstly, if litigation is commenced, the owner corporation will have no legal standing to recover damages for defects within lots. Time and costs will be wasted by such misconceived actions. Secondly, if an owners corporation expends its financial resources on anything outside its powers, then to the extent that this relates to lot owners property, it will be an unlawful expenditure of money.

The rules about what is common property and what's not, therefore assume great importance in the orderly functioning of an owners corporation. The simple starting point is anything inside a unit is for the unit owner and anything outside the unit is the responsibility of the owners corporation. There is some common sense to this proposition. The owners corporation being the body concerned with the common good, must take overall responsibility for the outer perimeter and support structures and services to each of the lots because these things affect everybody. What occurs inside a lot impacts on everybody to a lesser extent and therefore is a matter for the individual. The exception of course is where activity inside a lot results in a nuisance to the outside but this is a matter for regulating behaviour rather than determining responsibility for repairs and maintenance and rectifying building defects.

In being more precise about the definition of common property, strata management legislation throughout Australia refers owners to their strata plans. Anything shown on the plan as a lot will be the owner's responsibility and everything else will be common property. Care should be taken with special notations that might provide for different results in different places.

The by-laws of a strata scheme may also be relevant for determining who is responsible for common property. The general rule that an owners corporation is responsible for common property may be displaced by special by-laws that create rights of exclusive use or special privileges for some owners over defined parts of the common property. These types of by-laws are common for balconies and courtyards.

Faced with serious obligations to repair and maintain common property including the rectification of building defects, owners corporations should confine themselves to their domain which is common property.

Step 3 - Evaluate all your options before setting your objectives

Having accepted responsibility for fixing defects, and determined that they relate to common property, the next step is to evaluate your options to have them remedied.

This is something of a fork in the road and before choosing one path over the other you should take a minute to evaluate all of your options and also to test the will of your fellow owners to the preferred option of your committee or leaders on these matters.

Essentially, any owners corporation with building defects to their common property has four choices.

1. Ignore the defects and necessary rectification works
2. Have rectification works done by the builder at the builders cost
3. Have rectification work done by a new builder at the builders cost
4. Have rectification works done by a new builder at the owners corporations cost.

Ignorance is not a satisfactory option

The first of these options, to ignore rectification is, put bluntly a breach of the law.

It will be a breach of a law by the owners corporation as a whole and each of the executive committee members individually. It is also possibly a breach of the law by each individual unit owner.

Ignoring the problem, even momentarily, may create liability for property damage and personal injury.

Builder rectifying works at builder's costs

The second option, rectification by the builder at the builders cost is the most usual outcome. This result may be achieved before or after legal representation.

At one end of the spectrum owners will want the builder to rebuild the entire development to a much higher standard whilst they are ensconced in a five star hotel with all expenses paid. At the other end of the spectrum the builder will send somebody around during a lull in new building activity to apply a bit of plaster and paint a few of the cracks. Somewhere in between, 95% of cases are settled.

Owners sometimes distrust the builder's workmanship believing that if they couldn't do the job properly in the first place, then it is unlikely that they will get it right on the second occasion. From the builders perspective sometimes they can be pushed too far. A builder's profit margin in unit developments can be as low as 4 – 5 %. It doesn't

take a lot of rectification work, which is usually difficult and tedious, to erode the profit margin on the job and lead to yet another building and construction insolvency.

There is a fine balance to be struck here but for many it will be an infinitely better result than ignoring the problem or engaging in full-scale litigation. The key to getting an acceptable result is to prepare for the worst – litigation – even though things may never get that far.

New builder rectifies works at builders cost

In cases where there is bad blood between the owners and the builder, a builder may be persuaded to pay for rectification works by a new builder.

This result is more likely to follow the death, disappearance or insolvency of a builder where an insurance company steps into the breach. Home building insurance schemes exist in most states and territories for some types of residential building. Buildings that must have this sort of insurance are usually limited to three storey unit blocks but where insurance is held and available, this option is a good one for owners to take.

New builder at owners corporation cost

The final option is rectification by a new builder at the owners corporation's cost. This is the most expensive solution but for some it is a better solution than years of frustrating litigation for an uncertain result.

Where the building is uninsured because it is a larger complex and building insurance is not compulsory, this is an option that has to be seriously considered. If the option is pursued for the benefit of time and money, then the earlier the decision is taken the better.

In evaluating your options an owners corporation will do well to collect data, come to a preferred position and then test the commitment of the rank and file members of the owners corporation to the preferred course. Invariably this type of matter will need to go to the owners in a general meeting for their support and funding. Nothing will be gained by embarking on a course of action, which has no support.

However in order for an owners corporation to arrive at its objective, it is important that there be one. Without a clear objective and strategies, and action items designed to achieve this objective, the owners corporation will be like a rudderless ship and prone to defeat at the hands of a builder who can be quite focused and ruthless in defeating or delaying the claims of owners corporations.

Step 4 – Know who to trust and avoid those with possible conflicts

Conflicts of interest are like back pain – easily alleged and hard to disprove.

In apartment developments conflicts of interest are many and varied. Conflicts of themselves are not necessarily bad, but it is only when they are not understood and not managed that they become the source of all evil.

Conflicts with the developer/builder

The most basic conflict in an apartment building is the conflict between the purchasers of units and their developer/builder.

Unlike routine vendor purchaser transactions, the developer of an apartment block owes a duty of care to the unidentified future members of the owners corporation to exercise good faith and not to profit secretly from the owners. This duty brings with it the inevitability of conflict when doubt is cast upon the standard of workmanship and design of common property.

Developers and builders are notoriously hard. The development process is tough and to participate in this market requires a fearless character. The very nature of development is adversarial. Developers and builders are used to getting their way. Faced then by an opponent, which is a newly formed group of owners with nothing in common but some property and without a leader they usually get their way with owners corporations as well.

The cliché, “Justice delayed is justice denied” is true of building defects cases particularly in larger complexes where there are many people dealing with the reality of their own situation in many ways and at different times. The opportunity for a developer or builder consciously or unconsciously to engage in delay and obfuscation is significant. Owners individually and collectively will grasp at any morsel thrown their way that they think might satisfy them rather than engaging in the hard work of properly resolving their defect case.

Owners corporations with defects should engage in open and frank discussions with owners and their builders and should never close the door on a discussion that might lead to settlement. However, the conflict must be recognized and managed by having other independent parties advising on resolution.

Conflicts of interest with real estate agents

Generally in business people behave the way they are paid. This is always true of real estate agents.

Two things flow from this. Firstly, developers pay real estate agents. Despite their affable and empathetic selling ways, real estate agents are on the other side and a healthy disregard for their representations and promises is warranted.

Secondly, real estate agents are paid upon a sale having been made and generally have no ongoing role in your affairs or in the affairs of your block. The better agents will see your property as a future listing and perhaps in that context will offer some general assistance to you and your fellow owners.

Conflicts of interest with strata managers

Strata managers in building disputes are the proverbial meat in the sandwich. They have conflicts as well and these conflicts are even larger if they or a related party has also acted as a real estate agent for the developer.

Strata managers win their work from developers by helping them with the planning and disclosure about the development. They prepare budgets and help with the design of the common property and sometimes prepare the by-laws and management contracts that will govern the owners corporation for some years to come.

Strata managers seem to like working for free and the work they do for developers is no exception. What the strata manager does get in return for this free work is a contract for the management of the strata block. As a developer owes a fiduciary duty to the future members of the owners corporation, this benefit that the developer receives in the form of free work from the strata manager is in fact something which ought to be declared to unit purchasers. It almost never is and accordingly contracts between newly formed owners corporations and their strata managers are tainted legally and morally by this non-disclosure.

Strata managers also suffer in the case of building defects because owners have an expectation that the strata manager will resolve common property defects but the management contracts under which strata managers serve usually do not require them to do this work at least not for the modest fees they are paid to do their work. Strata managers are notorious for getting involved in matters that are outside their paid duties and not sending a bill when they do this additional work. As a consequence of not being paid properly to undertake this work, more often than not they do it poorly. Even with the best intentions in the world this is a difficult area and it requires specialist skills and a degree of objectivity that simply cannot be had by a party who has worked for the developer and who hopes to work for the same developer again.

Strata managers should step aside from a direct involvement and should be paid additional fees by owners to the extent that they do administrative work to assist the solicitor and experts engaged to help the owners corporation with their defect case.

Conflicts with conveyancing lawyers

Unlike doctors, lawyers are not generous in the way in which they refer work to colleagues with different specialties.

The lawyer that you have engaged for your conveyancing work performs a very specialized task and usually does this for a modest fee given the impact of technology on this area of practice. Most conveyancing law firms are not equipped to undertake specialist work like building and construction law and most will not do so. If they do venture into this area there may also be conflicts of interest.

Conveyancing lawyers do not routinely give a comprehensive explanation your rights and responsibilities as a member of the owners corporation. They also tend to skim over your potential liability for common property defects or problems that may flow from buying into a development where there is no homeowner warranty insurance. While it might be that clients deserve the service for which they pay, seldom will a conveyancing lawyer discharge all of these responsibilities in such a way they can say with confidence they are free from conflict.

Conflicts with building industry bodies

Dispute resolution services offered by various building industry bodies will appeal to some because they are free and easily accessible.

It is true that such services are free and easily accessible compared with the court system but it is equally true that the industry groups offering these services are both horribly conflicted and utterly toothless.

Associations for industry groups such as developers, builders, plumbers and painters are unions. Their role is to protect and enhance the rights of their members and they will do so passionately and to the best of their ability. They are not effective in resolving disputes because they are not impartial.

Suggestions by developers, builders and trades to engage in mediation or other dispute resolution facilitated by these industry bodies should be avoided.

Step 5 – Ask the right questions of your experts

If you want the right answer to any question, you must first know the right question.

As new to building defects as your owners corporation will be, it will be almost impossible for you to know the right questions to ask. Your only defence therefore is to find the right people who will do the asking for you and get you the right answers to the right questions.

In rectifying building defects you will need two if not three types of experts on your team. The first is a consultant or project manager to run your rectification program as if it were a new project. The second is an expert in the field of your particular defects that will advise you on cause and effect and repair options and costings. Thirdly, you will need lawyers with experience in both strata management law and building and construction law.

Project and consultant managers

Building defects can take anything from one to ten years or more to resolve and in determining whether you are at one end or the other of this spectrum, the size or complexity of your particular defects is not usually the issue. The issue will be the advisors you have appointed and their approach to the problem.

If properly viewed and understood as a process in itself, the rectification of defects in an apartment building ought to be run as a discrete project by the project manager. Project managers have skills in compressing the time frame for the delivery of particular outcomes. They are highly detailed people but also must have an ability to motivate and manage others in order to get the right result on time and on budget.

The issue of costs of the consultant or project manager will be a difficult pill for an owners corporation to swallow early in their grappling with the problems they face but almost without exception, it will be a self funding appointment because of the time and cost saved by having a professional in this field from the very outset.

In appointing a consultant or project manager an owners corporation should look for demonstrated experience in managing apartment defect cases and must also look for a consultant that respects your objectives. If your objective is to settle early, even if this requires some out of pocket expenditure by the members, then your project manager must accept that this is your decision. Consequently, it is best to appoint your project manager or consultant early so that they are part of the process and may lead you through the process of evaluating your options and determining your particular objectives.

The appointment of experts

In apartment defect cases the role of an expert is to identify the real cause of the damage rather than the symptoms and to advise on repair options. A trap for young players in building defect cases is to jump to early conclusions about the cause of particular damage rather than looking more analytically at the problem and delving more deeply into the building process and history to identify real causes and effective solutions.

In identifying solutions there will often be more than one path. A degree of lateral thinking is often required to come up with a range of solutions, some of which may be less than perfect, but which on a cost/benefit analysis are nevertheless worthy of your consideration.

Most disputes will be about water, cracks, roofing and guttering, tiling and defective services such as air conditioners and lifts. There will obviously be different experts required for different fields but due to the commonality and recurring nature of these matters a good expert in one field will almost certainly be able to refer you to someone equally as good operating in another field.

A good consultant or lawyer working on your behalf will ensure that experts are asked to list all of the repair options and costings rather than just one and will also prompt suggestions about any temporary works worth considering to minimize further risk or damages.

Appointing lawyers

Like all disciplines, the legal profession consists of general practitioners and those who are very specialized. In apartment defect cases you need two legal specialties. The first relates to strata management and the second relates to building and construction law.

The strata management lawyer will be able to interpret the strata plan and by-laws and advise who has the responsibility for fixing the particular defects in your case. This work will happen early in the piece. Later when a solution has been identified the strata manager lawyer will again be called upon to advise upon the appropriate method for documenting the solution and having the owners corporation endorse the settlement in a way which is compliant with strata management laws. The strata lawyer role will be particularly involved where there are two or more owners corporations. This is increasingly common in larger and mixed-use developments.

The building and construction lawyer will advise on the different causes of action available and the prospects of success of each different cause of action. Building defect causes will turn on the careful selection of defendants and pinning a breach of appropriate law on a wrongdoer who is in a position to pay the damages.

A building and construction lawyer will be the lead lawyer in a building and construction case and the strata management lawyer should take a supporting role.

Step 6 – Pursue wrongdoers with money or capacity to rectify defects

Early in one's legal career you are taught that there are two types of wrongdoers – those with money and those without. Fortune favors the lawyer who develops an ability to find wrongdoers with money.

Small buildings

Buildings that are three storeys or less generally have the benefit of a home owner warranty insurance policy protecting unit owners from building defects for an initial period in particular circumstances.

Governments throughout Australia have taken the view that it is likely developers of larger developments – deemed for no particular reason at all to be more than three storeys will be of substance and make good any building defects in their buildings because of their brand consciousness.

Unfortunately this faith in larger development companies is generally misplaced. Most developers, large and small, undertake their developments in project specific companies, which are isolated from the assets of the development group as a whole and certainly isolated from the assets of the person behind the development company. The reason for this is quite simple, if something goes wrong with the development, including an abnormal number of defect claims, the company is simply liquidated without causing the whole development group to fail.

Since the introduction of the GST, another reason for development companies to be holding development companies in separate companies will be to avoid their GST obligations. At the end of the development, rather than paying the GST an unscrupulous developer will simply put the company into liquidation.

Against this background where owners have not received what they bargained for a lawyer must find a defendant with the capacity to pay the claim and costs when the litigation process has run its course.

The starting point is to sue the developer or builder and to access different forms of builders insurance it may be that a group with defective common property has to extinguish all of their rights against the developer /builder before they can claim against the insurance company. Some insurance policies are only available where the developer/builder is “dead, insolvent or has disappeared”. If this type of policy applies, then getting to death, insolvency or disappearance should be done as quickly as possible.

To the extent that developers/builders are difficult, insurance companies are no better. Insurance companies know only too well that faced with the prospect of years of litigation and legal bills along the way, many a claimant will tire or weaken and will accept less than they are entitled to in order to avoid the legal process.

Like all choices in this field pursuing a small builder and or its insurance company requires decisive action.

Large buildings

Where there is no home owners warranty insurance because the building is more than three storeys, owners with defects will need to satisfy themselves that the fight against the builder will be worthwhile because there is money to be had upon winning. In one of these matters a competent lawyer will undertake a range of searches and investigations at the very outset of the matter to determine the prospects of recovery if the case is won.

Often even where a development is undertaken in a project specific company without other assets, the unsold units at the tail end of the development may represent a significant asset capable of satisfying a judgment for defective work. This unsold stock may have course be mortgaged for part of the construction debt and there is no sure way of finding out the extent of this mortgage. However, a large developer/builder with a number of projects under way at any one time will not want to suffer a judgment that may upset their financiers and this may motivate a settlement.

Some developers/builders are conscious of their brand and they may have spent considerable amounts of money on developing some brand awareness in the marketplace to attract a following from development to development. These companies generally have a social or community awareness that will drive them to at least attempt a settlement before letting a matter proceed to court where a finding against them may be embarrassing. Where a development is being staged, it is more likely a developer/builder will want to address genuine concerns so that their reputation in the marketplace where they are active is not tarnished.

Development consultants

In some cases the building problems may be a question of design rather than construction. In these cases the designers be they architects, engineers or other construction specialties may be the sole or primary wrongdoer.

In these cases an action for negligence may be the answer. To win a negligence case you must prove a duty of care was owed to the owners corporation by the wrongdoer, breach of that duty and that damage has been suffered as a result. Most development professionals and consultants will carry their own insurance against

major claims and this may lead you to a source of funding for the payment of judgment for defective works.

Step 7 – Make your claims with legal timeframes

A fundamental principle of our civil law is that after a period of time all claims must be extinguished so people can move on with their lives. This principle finds expression in laws about the limitation of actions and each state and territory will have its own rules.

In building defect cases there are three types of actions, which might lead to recovery for defective work: rectification orders, negligence actions and insurance claims. There are different time limitations applicable to each.

Rectification

In some jurisdictions there will be a government body or semi government authority with power under legislation to order rectification of works on the part of the builder. The sanction for not doing so might be the revocation of building licenses held by an individual who is behind the building company and/or a fine.

This is a way of piercing the corporate veil designed to protect individuals from the failure of their companies. Without a license the person who is the driving force behind the builder may not be able to easily set up another business without fulfilling previous obligations.

Negligence

Typically the limitation period for a negligence case is six years from the date upon which the cause of action first accrues.

The key issue here where building defects emerge gradually will be when did those defects first manifest and secondly whether later defects are merely further manifestations of earlier defects or new causes of action. In apartment cases where owners corporations and bodies corporate can be quite slow to act and where the personalities involved may change from year to year it is easy for time to be lost and for these limitation periods to quietly slip by leaving claimants high and dry with only themselves or their lawyers to blame.

In approaching time limitations generally and particularly in negligence cases where the beginning of the time period may be less than clear, owners need to be conservative and diligent to protect their rights.

Insurance

Insurance claims against builders who are dead, insolvent or disappeared are generally open to claims for six years from completion of the work (for structural

defects) and two years from completion of the work (for non-structural defects) (in the ACT - five years from the day after the certificate of occupancy is issued).

Step 8 – Work to realistic milestones and budgets (20 unit example)

Building defect cases are factually complex and require realistic timeframes and budgets in order to reach a successful outcome.

Assessments

The starting point is for a proper assessment to be made of the case. This will involve at least a lawyer and a team of experts on various components of the case.

Before legal advice can be given about who is to blame and how much will be recovered, the expert reports will need to be done and considered. Some of the experts might need to do some testing. This might be invasive and involve cutting and drilling. All of this takes time and money.

In a reasonably complex dispute involving two or three major defects you should expect a complete assessment phase to take 4 - 6 months and cost between \$30,000 and \$50,000. The initial cost of \$1,000 or so per owner is best covered by the owners corporation which has a process for levying owners rather than being run outside that structure but of course only common property issues can be addressed using these funds.

Negotiations

With an assessment in hand you may wish to open negotiations with a view to settlement before deciding on rectification applications or court cases for damages.

Court cases tend to settle early or late and seldom midway through the court process. This is probably because at the outset of a negotiation people are keen to avoid the time and costs of court proceedings. If these negotiations fail, then matters tend to drift until brought to a conclusion by some defining event like the making of a rectification order or the awarding of damages at the end of a trial.

Negotiations should be approached in a very focused way. They should not be begun until an assessment is at hand and perhaps more importantly until you know what you want. Going into a negotiation not knowing where you want it to end is pointless and will simply waste time and money.

A serious negotiation may take six months from start to finish and cost anything between \$20,000 and \$50,000.

Rectification

If a proper assessment has been made at the outset of a case and some issues are being refined during the negotiation phase, the making of a rectification application, where such a remedy is available, will probably take more time and not a lot more money. Depending upon the level of negotiation with the rectification authority, costs in our example might vary between \$10,000 and \$50,000 and the timeframe might be nine to twelve months.

Damages

If all else fails and you have to proceed to court, costs might vary from \$150,000 to \$250,000 and the timeframe might be two to three years.

It is best to face this reality early in the piece. Be wary of people who try to “candy coat” this news. If you hear what you want to hear, then you will be hurt in the process. There are some things that you can do to minimize costs and speed up the time that the case takes to resolve.

1. Appoint one person to liaise with your lawyer and stop all other owners from dealing directly with the law firm. Lawyers charge for time spent on the case and the less people they have to deal with the better in terms of costs;
2. Appoint a project manager to run the rectification project. In a major case this should not be the lawyer. Lawyers are generally not good project managers. Project managers have different skills;
3. Gather evidence in a methodical and thorough way. Take photographs, keep notes and journals and document this in a way, which will be useful in future years to tell the story; and
4. Assemble documents – Very few owners corporations have a full set of working documents and specifications despite laws in all states and territories obliging developers to hand these across at the first general meeting of the owners corporation. Whether or not you have defects all new owners corporations should exercise their rights to obtain this information and there will never be a better time than before lawyers are involved. There will also be documents in the hands of individual owners that might be helpful. Letters and emails, drawings and photographs used in the sales process might become quite relevant to defect cases and the earlier they are found, catalogued and briefed to the lawyers, the better.

An organized group with different duties divided according to their individual skill sets will be able to work with an expert legal team to keep costs to a minimum and minimize the time involved.

The upside of a well-run building defect case is that it can unite communities who sometimes need a common enemy for this to happen.

Step 9 – Communicate effectively with your co owners

There are just three rules to residing over a happy owners corporation – communicate openly, communicate frankly and communicate often.

Open communications

There will be a temptation to “hush up” defects. Someone will say that it is in the interest of the owners that this problem be kept quiet and that a settlement needs to be negotiated quickly before property values plummet. This is a naive and dangerous practice.

If apartments leak, so do owners corporations. You simply cannot make the investigations that you need to make in order to resolve your problems properly and at the same time keep the problems quiet. It is better to communicate openly with members and educate them about two things. Firstly, this happens to more than two thirds of modern strata schemes⁶. Secondly, outline the steps you were taking to resolve the problems. This is a mature approach and one, which will instill confidence in your community. When times get tough in the dispute resolution process, as they inevitably will, you will need some credit in your relationships with owners.

Frank communications

Most executive committees fall for the curse of the assumption. They assume that owners understand the difference between common property and lots and assume that everyone is as interested in the detail as they might be. Nothing could be further from the truth. The majority of unit owners are apathetic as indeed are the majority of people in most organizations. The Pareto principle applies to strata living. Twenty percent of the people will do eighty percent of the work.

The way to deal with this is again to understand that there is nothing unique about this to your particular block and to continually explain and reinforce the collective responsibility for fixing these problems. Never underestimate the need for this.

Open communication

In the time that it takes to resolve these defects some things will go well and some things wont. Executive committee members should never hide the truth but equally they should celebrate small achievements along the way. For example, if your assessment phase is set to take six months and cost \$50,000 and you get to this point in four months for \$40,000, then remind your members of this small victory. The

⁶ Easthope et al (2009)

going will be easier if the task can be broken down to small steps and every now and then there is an acknowledgement of reaching a significant milestone.

The unity of your community both during and after the resolution of this defining episode will depend upon the way in which you manage expectations.

Step 10 – Close the settlement carefully

Most road accidents happen close to our homes. In familiar territory and near the end of a journey we tend to relax and forget the task at hand. This is true of the closing of settlement defect cases.

Obviously the settlement needs to be documented. A skilled lawyer with the input of the experts should do this. This is also the time when the building and construction lawyer needs to call back the strata lawyer to make sure that the deed of settlement complies with the laws and processes set out in the strata management legislation.

Settle subject to OC approval

One of the odd features of strata management is that the elected representatives have very little power to bind the body they represent.

In a company, shareholders elect the board of directors and the directors have all of the powers necessary to make decisions and bind the company to particular arrangements. The only power of shareholders is to remove the board.

This is not true in strata land. The owners elect the executive committee but in most places their powers are severely curtailed and they cannot bind an owners corporation without a meeting and particular types of resolutions being passed.

An executive committee that enters into a settlement of a defect case without the approval of the owners corporation will probably be acting outside of the scope of their powers and be open to personal liability.

Accordingly, all settlements should be expressed to be subject to approval in order to bind all parties to the outcome.

Deal with what ifs

A good settlement deed will deal with things that go wrong.

What if new and different defects emerge in the future? Are these covered by the settlement or do new rights emerge?

What if the timeframes imposed for rectification works are not met? Are the owners stuck merely with the right to enforce the settlement agreement or do they revert to their original position with their right to pursue all of their losses.

Insurance

In documenting a settlement, the rights of insurers should be taken into consideration.

Any party with whom you are settling will want to know that your insurance company will not come after them following settlement. Generally speaking this will require the owners corporation to undertake to withdraw its insurance claim.

Independent certification of work

As owners have suffered at the hands of bad workmanship, owners will be particularly sensitive to how work is certified if the settlement involves an undertaking to complete work (rather than the payment of monies).

The best way to alleviate concerns in this regard is to provide in the settlement for the independent certification of rectification work. Of course, this will come at a cost and the sooner this is put on the table as a mandatory requirement of the owners, the better. If raised at the last minute it will be harder to secure the builders agreement to this important step.

