SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

STONE v CHAPPEL

[2017] SASCFC 72

Judgment of The Full Court
(The Honourable Chief Justice Kourakis, The Honourable Justice Doyle and The Honourable Justice Hinton)

22 June 2017

APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES

CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH

TRADE AND COMMERCE - COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION - CONSUMER PROTECTION - MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS

DAMAGES - MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT

The appellants (plaintiffs) contracted with the respondents (defendants) to construct the shell and framework of an apartment in a retirement village in Leabrook. The respondents built and operated the retirement village.

The parties entered into a Residents Agreement on or about 22 December 2009 by which the plaintiffs acquired a licence to occupy apartment 107. Under the terms of the contract the defendants were to construct only the shell and framework of the apartment. The

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On Appeal from SUPREME COURT OF SOUTH AUSTRALIA (THE HONOURABLE JUSTICE STANLEY) [2016] SASC 32

First Appellant: DEAN HENRY STONE Counsel: MR R J WHITINGTON QC WITH MR A LAZAREVICH - Solicitor: OUWENS LAWYERS
Second Appellant: CAROLE JULIA STONE Counsel: MR R J WHITINGTON QC WITH MR A LAZAREVICH - Solicitor: OUWENS LAWYERS
First Respondent: SIMON WALLMAN CHAPPEL Counsel: MR J KARKAR QC WITH MR C GOODALL - Solicitor: CRAWFORD LEGAL
Second Respondent: DAVID ARNOLD SMALLACOMBE Counsel: MR J KARKAR QC WITH MR C GOODALL - Solicitor: CRAWFORD LEGAL

Hearing Date/s: 03/08/2016

File No/s: SCCIV-12-1690

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plaintiffs were to fit out the apartment at their own cost. The plaintiffs paid the sum of $1,853,254 for their apartment.

The plaintiffs alleged that the defendants breached the contract by not constructing the shell and framework in accordance with plans forming part of the contract. In particular, the plaintiffs alleged that the contract provided for a ceiling height of 2700 mm, and that the apartment was not built in accordance to this. The plaintiffs also alleged that the defendants made representations to the effect that the ceiling would be this height, and thus engaged in misleading conduct.

The trial judge held that the contract did contain a term to the effect alleged, and that it was breached in that the ceiling height was on average 48 mm less than the required height of 2700 mm.

The plaintiffs sought damages reflecting the cost to rectify this defect, which they quantified in the amount of $331,188. The trial judge rejected the claim for damages assessed in this way for three reasons. First, the plaintiffs had elected not to seek rectification damages. Secondly, the ceiling as constructed was substantially in accordance with the contract. Thirdly, it would be unreasonable to carry out the rectification work contemplated. The trial judge instead awarded the plaintiffs damages to reflect the loss of amenity suffered by them on account of the departure from the contractual specification as to the ceiling height, which he assessed in the amount of $30,000.

As to the case alleging misleading conduct by the defendants in relation to the ceiling height, the trial judge held that the plaintiffs had not proven that the defendants made any representation as to ceiling height relied upon by the plaintiffs. Accordingly, that aspect of the claim failed.

In addition to the claim in relation to the ceiling height, the trial judge awarded the plaintiffs contractual damages reflecting the cost to rectify two other breaches of contract (in relation to the door frames and window seals), less an amount referable to the cost of some variations. The trial judge awarded a sum to reflect the refund of a fire inspection fee paid by the plaintiffs, and also awarded the plaintiffs sums reflecting interest on (or damages for the loss of use of) the payments of $500,000 and $480,000 made by the plaintiffs to the defendants in respect of the apartment, on the basis the plaintiffs made those payments prematurely.

The total sum awarded by way of damages to the plaintiffs was $81,046.68.

On appeal, the plaintiffs challenge the trial judge's refusal to award contractual damages assessed by reference to the costs of rectifying the ceiling height, and the trial judge's failure to find misleading conduct in respect of the ceiling height.

In their cross appeal, the defendants challenge the trial judge's awards of damages of $30,000 on account of the plaintiffs' loss of amenity, contending that only nominal damages should have been awarded; of $30,676.85 and $5,535.39 for loss of use of the sums of $500,000 and $480,000 paid by the plaintiffs upon the basis that neither payment was made prematurely, and contending additionally in respect of the $480,000 payment that it was in fact made late such that there should have been a set off in the defendants' favour on account of interest payable to them of $33,486.90; and of $19,942.45 on account of the defective doorframes.

The defendants also rely upon a notice of contention in which they contend that the misleading conduct claim ought to have been rejected on the alternative or additional basis that the evidence did not establish a basis for recovering the loss claimed.

Held per Doyle J (with Kourakis CJ (in part) and Hinton J agreeing):

1. The plaintiffs were not precluded by the common law doctrine of election from seeking rectification damages (at [190]).

2. The plaintiffs' claim for rectification damages was governed by the general rule in Bellgrove v Eldridge (at [268]).

3. The rectification costs claimed by the plaintiffs were unreasonableness and thus fell within the qualification to the general rule in Bellgrove v Eldridge, disentitling the plaintiffs from recovering contractual damages on this basis (at [75], [289], [453]).

4. No error has been established in the trial judge's award of $30,000 for damages by way of loss of amenity (at [94], [299]).

5. The defendants represented that the ceiling height would be 2700mm (at [318]).

6. This representation was not misleading in that the defendants had a reasonable basis for making this representation (at [345]).

7. The plaintiffs have not established that the loss claimed was caused by the misleading conduct complained of (at [366], [380]) (contra per Kourakis CJ at [77]-[84]).

8. The plaintiffs' claim of misleading conduct has not been made out.

9. The plaintiffs did not pay the amounts of $500,000 and $480,000 prematurely so as to entitle them to an award of interest or damages for loss of use of those monies (at [410]).

10. The defendants are entitled to an award of interest for the late payment of the second instalment of the contract price (at [412]).

11. The plaintiffs are entitled to awards of damages for the door frames, window seals and fire inspection fee, less an amount referable to variations (at [390], [416]).

12. The plaintiffs' appeal is dismissed.

13. The defendants' cross-appeal is allowed in part.

Fair Trading Act 1987 (SA) s 45, s 56, s 84, referred to.
Bellgrove v Eldridge (1954) 90 CLR 613, applied.
Brewarrina Shire Council v Beckhaus Civil Pty Ltd [2006] NSWCA 361; *Burke v Lunn* [1976] VR 268; *Copping v ANZ McCaughan Ltd* (1997) 67 SASR 525; *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10; *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28; *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184; *Henville v Walker* (2001) 206 CLR 459; *Jacobs & Youngs v Kent* (1921) 129 NE 889; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413; *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344; *Scott Carver Pty Ltd v SAS Trustee Corporation* [2005] NSWCA 462; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158; *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253; *Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61; *Willshee v Westcourt Ltd* [2009] WASCA 87, discussed.
Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3) (2006) 67 NSWLR 341; *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470; *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 ; *Sargent v ASL Developments Ltd* (1974) 131 CLR 634; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; *Director of War Service Homes v Harris* [1968] Qd R 275; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; *Farley v Skinner* [2002] 2 AC 732; *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217; *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1; *Henville v Walker* (2001) 206 CLR 459; *House v The King* (1936) 55 CLR 499; *HTW Valuers (Central Qld)*

Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109; *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; *Pan Pharmaceuticals Ltd v Australian Naturalcare Products Pty Ltd* (2008) 165 FCR 230; *Radford v De Froberville* [1977] 1 WLR 1262; *Robinson v Harman* (1848) 1 Ex 850; *Roger & Keene v Clarendon Homes NSW Pty Ltd* [2010] NSWCTTT 267; *Rosenberg v Percival* (2001) 205 CLR 434; *Sargent v ASL Developments Ltd* (1974) 131 CLR 634; *Unique Building Pty Ltd v Brown* [2010] SASC 106; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; *Warren v Coombes* (1979) 142 CLR 531, considered.

STONE v CHAPPEL
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Full Court: Kourakis CJ, Doyle and Hinton JJ

1 **KOURAKIS CJ:** I gratefully adopt the recitation of the relevant facts in the judgment of Doyle J.

2 The primary measure of damages in the case of defective building work was stated by Dixon CJ, Webb and Taylor JJ in *Bellgrove v Eldridge*[1] (*'Bellgrove'*) to be 'the amount required to rectify the defects complained of and so give to [the plaintiff] the equivalent of a building on [the plaintiff's] land which is substantially in accordance with the contract'. The Court rejected diminution in building value as the generally applicable measure. The holding in *Bellgrove* maintains the distinction between the assessment of damages in contract and in tort in defective building work cases.

3 The Court held that the building owner is entitled to the 'reasonable costs' of the rectification work 'necessary to produce conformity' with the contract. The rule was qualified in that rectification must be a 'reasonable course to adopt':[2]

> The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt. No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks. In such circumstances the work of demolition and re-erection would be quite unreasonable or it would, to use a term current in the United States, constitute 'economic waste'. (See *Restatement of the Law of Contracts*, (1932) par. 346). We prefer, however, to think that the building owner's right to undertake remedial works at the expense of a builder is not subject to any limit other than is to be found in the expressions *Restatement of the Law of Contracts* (1932) par. 346). We prefer, however, to think that the building owner's right to undertake remedial works at the expense of a builder is not subject to any limit other than is to be found in the expressions 'necessary' and 'reasonable', for the expression 'economic waste' appears to us to go too far and would deny to a building owner the right to demolish a structure which, though satisfactory as a structure of a particular type, is quite different in character from that called for by the contract. Many examples may, of course, be given of remedial work, which though necessary to produce conformity would not constitute a reasonable method of dealing with the situation and in such cases the true measure of the building owner's loss will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials.

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1 (1954) 90 CLR 613 at 617.
2 (1954) 90 CLR 613 at 618-619.

> As to what remedial work is both 'necessary' and 'reasonable' in any particular case is a question of fact. But the question whether demolition and re-erection is a reasonable method of remedying defects does not arise when defective foundations seriously threaten the stability of a house and when the threat can be removed only by such a course. …

4 I make the following observations about those passages.

5 First, the statement of the rule in *Bellgrove* was given in the case of a building intended for personal occupation. The Court expressly distinguished cases of marketable commodities for which diminution in value was the appropriate measure.[3]

6 Secondly, the rejection of the concept of economic waste as a determinative criterion necessarily implies that rectification damages may be awarded even if rectification would require the total or partial demolition of a functional building.

7 Thirdly, the passage does not identify when a structure, albeit satisfactory for some purposes, is 'different in character' to the building contracted for. Nonetheless, the new bricks example suggests that only relatively minor differences would displace the general rule of awarding rectification costs.

8 Finally, it may be doubted that the example given of the contractual stipulation for second hand bricks is a true example of a breach of a contract at all. It may be that the stipulation or term, properly construed, is simply that the walls be made of bricks which need not be new bricks of first quality. Other cases in which rectification damages have not been allowed might also be seen as cases in which there was, on a proper construction of the term, no breach. For example, in the American case of *Jacobs & Youngs v Kent*,[4] a builder, through oversight, used pipes of a brand other than the stipulated brand, but which were in all other respects identical. Cardozo J rejected the claim for the cost of replacing the pipes, reasoning:[5]

> In the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing. … It is true that in most cases the cost of replacement is the measure (*Spence v. Ham, supra*). The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value.

9 On one view the contractual specification of the pipe brand in that contract was no more than a shorthand reference to the structural specifications of the pipes. The point I make is not so much to deny the premise of breach on which those cases proceed but to emphasise how minor a breach must be to preclude an award of rectification damage.

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3 (1954) 90 CLR 613 at 617.
4 (1921) 230 NY 239; (1921) 129 NE 889.
5 (1921) 230 NY 239 at 244.

10 I agree for the reasons given by Doyle J, that *Bellgrove* does not hold that it is a precondition to rectification damages that there be no substantial performance. Substantial performance is related to the concept of a building of 'different character'. Ultimately the degree of performance is a relevant, but not determinative, consideration in deciding whether or not to depart from the primary measure of damages.

11 The rule that rectification costs will generally be awarded (the primary rule) reflects the importance attached by the common law to contract as an instrument of economic exchange. The premise of the law of contract is that everyone is free to contract as they see fit in their self-interest. The law of contract authorises, subject to limited exceptions, the parties to voluntarily bind themselves to a special charter of rights and obligations to govern their economic relationship in addition to, or in derogation of, the general law. The common law of contract is a manifestation of the community consensus in free market economies that freedom of contract benefits the particular parties to the contract and the public by advancing economic growth generally. The measure of damages which places the injured party back in the same position, as if the consideration for which he or she had stipulated was performed, is necessary to fulfil the underlying objective of the law of contract. The position of the common law is succinctly expressed in the Latin expression *pacta sunt severanada*: contracts are to be kept.[6]

12 That legal policy context serves to emphasise the exceptional course of departing from the primary rule. Awarding less than that which is necessary to secure the benefits of the contract to the injured party subverts the very concept of a contract by which parties determine and change their legal rights and obligations as between themselves. The premise of freedom of contract implies that the party who fails to deliver on his or her contractual promise benefited over and above the terms of the bargain. If the injured party is awarded something less than what is necessary to provide, in money terms, the stipulated benefit, the wrongdoer may be handed a windfall profit. In *Scott Carver Pty Ltd v SAS Trustee Corporation*,[7] Ipp J said:[8]

> [120] In my view (and with respect to those who have expressed contrary views), the details of any contract that the proprietor might make for the sale of the building defectively constructed is collateral to the issue of the proprietor's loss, or, as it used to be described, *res inter alios acta*.
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> [121] Were this not to be the rule, the builder in breach of contract would obtain a windfall, depending on coincidence (the proprietor's whim in selling), that would not be deserved.

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6 *Radford v De Froberville* [1977] 1 WLR 1262 at 1270 (Oliver J).
7 [2005] NSWCA 462.
8 [2005] NSWCA 462 at [120]-[121].

13 True it is that the cost of rectification after the event may be much more than the cost of providing the stipulated benefit at the time, but if wrongdoers were to think that, for that very reason, they will escape the full cost of providing the stipulated benefit, the efficacy of contractual instruments would be undermined. That deleterious effect extends beyond the consequences to the innocent party to the particular contract in question. In many circumstances a wrongdoer will have won the contract at the expense of another supplier in the market place who may well have stipulated a higher price precisely because he or she wished to ensure delivery of the contractual promise in full. Of course I am speaking generally and I do not suggest that in this case the respondents never intended to fulfil their contractual obligations.

14 I acknowledge that in this case there is a countervailing legal policy consideration. A rigid adherence to rectification damages will tend to increase the transaction costs in building cases because when contracting builders may make provision for the risk of relatively higher awards of damages.

15 The general observations I have made cannot be statements of a legal rule. They can only inform the application of the rule stated in *Bellgrove* and in particular the qualification to that rule. The 'reasonable course' qualification is necessarily open textured but it is important to observe that in Australia that qualification operates as an exception to the ordinary rule that rectification damages are awarded. In England the reasonableness criterion governs a threshold choice, in every case, as to the measure of damages which will be applied.

16 The decision in *Ruxley Electronics & Construction Ltd v Forsyth*[9] ('*Ruxley*') illustrates the significance of that distinction. The plaintiff in *Ruxley*, Mr Forsyth, contracted with the defendant *Ruxley Electronics & Construction Ltd* to build a pool at a maximum depth of six feet six inches. After completion of the pool, Mr Forsyth asked for the increase in the maximum depth to seven feet six inches, explaining that he was 'a big man and would feel safer when diving and more comfortable with the greater depth of water'.

17 When the pool was finished it was only six foot nine inches deep. The trial Judge found that as a matter of fact the pool was safe for Mr Forsyth to dive into and refused rectification costs, awarding instead the sum of £2,500 as general damages. The term as to depth was agreed after the price for the pool had been fixed and without any variation to that price. Even though of no obvious legal significance, it is difficult not to think that that fact may have influenced the selection of general, instead of rectification, damages in that case. For the purposes of the award of general damages, the Judge accepted that Mr Forsyth did not feel safe and accordingly found that there was a lack of amenity brought about by the lesser depth of water. The Judge found that there was no difference in value of the pool or the home. The cost of rectification was between £5,000

9 (1996) 1 AC 344.

and £10,000. The cost of removal of the pool and further excavation was £21,560. The Judge held that the cost of removal could only be justified if Mr Forsyth intended to carry out that work, and if such a course of action was a reasonable one. The Judge was not satisfied that Mr Forsyth intended to build a new pool. The Judge also found that the cost to do so was wholly disproportionate to the disadvantage of having a pool slightly shallower and, therefore, not a reasonable course to adopt.

18 Mr Forsyth appealed on the grounds that a substantial sum should have been awarded by way of special damages for the rectification work in rebuilding the pool and that the general damages of £2,500 were inadequate. In the Court of Appeal, Staughton LJ held that it was not a precondition to an award of rectification damages that a plaintiff have an intention to carry out the rectification work. Relying on the judgment of Oliver J in *Radford v De Froberville*,[10] Staughton LJ held that the importance of keeping a contract was the primary determinant of reasonableness. Staughton LJ observed that unless rectification costs were ordered 'a builder of swimming pools need never perform his contract' because he can always argue that 'five feet in depth is enough for diving even if the purchaser has stipulated for six, seven or eight feet and pay no damages'.[11] Staughton LJ confined the element of reasonableness to the requirement to mitigate loss in the sense that it is unreasonable of a plaintiff to claim an expensive form of rectification if there is a cheaper alternative which would equally make good the breach. Staughton LJ rightly observed that it is not part of the concept of mitigation of loss to select a measure by which to assess damages which favours the defendant. Staughton LJ held that if there were no alternative course a plaintiff is entitled to the cost of repair or reinstatement even if that is very expensive. Accordingly, Staughton LJ held that an award of rectification costs was appropriate.

19 Mann LJ also held that an award of rectification costs was appropriate. Mann LJ relied on the ordinary rule governing damages for breach of contract that the award must, so far as money can do, place the plaintiff in the same situation as if the contract had been performed. Mann LJ continued:[12]

> This very general principle is shadowed by another, which is that the damages should reflect a reasonable culmination of the relationship which has occurred between the parties. Thus damages will not reflect an unreasonable failure to mitigate loss. However here we are not concerned with any failure to mitigate but rather with disappointment at the unfulfilled bargain.

20 Mann LJ also relied on the statement of Oliver J in *Radford v De Froberville* but went on to observe:

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[10] (1977) 1 WLR 1262.
[11] *Ruxley Electronics & Construction Ltd v Forsyth* [1994] 1 WLR 650 at 659 (Staughton LJ).
[12] *Ruxley Electronics & Construction Ltd v Forsyth* [1994] 1 WLR 650 at 660 (Mann LJ).

> There can be instances where the cost of rectifying a failed project is not reasonable, as, for example where no personal preference is served or where there is no preference and the value of the estate is undiminished.

21 Dillon LJ dissented, holding that reasonableness operated as a limit on damages even before the issue of migration arose, and affected the selection of the appropriate measure of damages.

22 On appeal to the House of Lords, Ruxley contended that reinstatement costs were only recoverable if there was an intention to reinstate and the cost was reasonable. Ruxley argued that if the plaintiff had no intention to rectify the works then it could not be said that the plaintiff had lost the cost of reinstatement. The unstated premise in that submission is that there is only a loss when a contractual benefit is not delivered if the innocent party intends to bear the cost of acquiring the same or similar contractual benefit from another. The premise is a false one. The loss when a contract is breached is the loss of the stipulated contractual benefit which may be called the performance interest. That contractual benefit has been lost as soon as the defaulting party fails to deliver it and irrespective of what the innocent party intends to do with his or her award.

23 Counsel for Forsyth contended that reasonableness did not control the measure of damages but was relevant only to mitigation of loss. In an all or nothing submission, Forsyth's counsel contended that general damages in the sense of disappointment and loss of amenity could not be awarded.[13] Forsyth's counsel contended that in building cases the builder contracts to produce a particular structure but accepted that contracts with a purely commercial purpose cannot be treated in the same way as contracts with a non-commercial objective. Counsel contended that the diminution in value method was inappropriate where the plaintiff, for sentimental, idiosyncratic or irrational reasons, wishes to have work done on his property which has no effect on the value.

24 The House of Lords unanimously allowed Ruxley's appeal. Lord Bridge rejected Forsyth's contention that the only two possible awards of damages were diminution in value or rectification costs. Lord Bridge held that an award based on rectification costs, when there was no diminution in value and no intention to rectify, would 'fly in the face of common sense'.

25 On the other hand Lord Mustill recognised that if the builder were to escape liability at all, because there had not been a diminution in value and because the product generally seemed as good as that which had been promised, then the builders promise became largely illusory and the bargain would be 'unbalanced'.

26 Lord Mustill held that there was a middle ground between awarding no damages in a case in which there is no diminution of value and exorbitant rectification costs. Lord Mustill held that the law recognises that on occasions 'the value of the promise to the promisee exceeds the financial enhancement of

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[13] Counsel relied on *Addis v Gramophone Company Limited* (1909) AC 488.

his position which full performance will secure'. He referred to that difference as the 'consumer surplus'.[14] On that approach a failure to deliver 'lurid bathroom tiles' might still sound in damages even if it might be said that in purely economic terms the builder had done the plaintiff a favour by not installing them. It was not made clear how the consumer surplus was to be valued for the purpose of damages particularly in a case like the example of the lurid tiles in which minds might differ on the evaluation of the loss of amenity.

27 Lord Jauncey of Tullichettle accepted that it was a precondition for the award of rectification costs that the plaintiff intended to carry out the rectification. His Lordship also relied heavily on the fact that the pool was functional to conclude:[15]

> Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate. A failure to achieve the precise contractual objective does not necessarily result in the loss which is occasioned by a total failure.

28 I first observe about that passage that it holds that the proper measure of damage is to be selected on the facts of each particular case. Secondly, it is implicit in that passage that something more than a failure to meet the 'precise contractual objective' will generally be required for a rectification award to be made. Thirdly, a rectification award is implicitly limited to those cases in which there has been 'a total failure'.

29 Lord Lloyd of Berwick proceeded on the basis that in building cases loss is almost always measured by the lesser of either the difference in value of the work done or the cost of reinstatement. His Lordship rejected the cost of reinstatement as the appropriate measure of damages when the expenditure would 'be out of all proportion to the benefit to be obtained' holding that the difference in value would be appropriate even if it would result in a nominal award. His Lordship accepted that personal preferences were relevant when selecting an appropriate measure of damages but denied that residential dwellings were a separate category with special rules. He held that the eccentric landowner was entitled to his whim only if the cost of reinstatement is not unreasonable. Lord Lloyd of Berwick accepted that intention was relevant to reasonableness but held that it was not determinative.

30 Lord Lloyd of Berwick described the decision of the High Court in *Bellgrove* as one which emphasized the central importance of reasonableness in

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[14] Consumer surplus was defined by Harris Ogus and Phillips in *Contract Remedies and the Consumer Surplus* (1979) 95 LQR 581 at 582 as the excess utility of subjective value obtained from a 'good' over and above the utility associated with the market price.

[15] *Ruxley Electronics & Construction Ltd v Forsyth* (1996) 1 AC 344 at 357 (Lord Jauncey of Tullichettle).

selecting the appropriate measure of damages. The contrary is true. *Bellgrove* emphasized, instead, that the ordinary measure of damages was rectification subject to limited exceptions. Lord Lloyd of Berwick not only accepted that damages for loss of amenity may be preferable to an award of rectification damages but went further and suggested that damages for contractual disappointment might also be awarded. I return to that question below when dealing with the appellant's ground that the general damages awarded by the Judge were manifestly inadequate.

31 In *De Cesare v Deluxe Motors Pty Ltd* ('*De Cesare*'),[16] the issue before the Full Court of this Court was whether the developers of residential units were entitled to recover the costs of significant rectification work when they had already sold the units. Doyle CJ held that the primary measure of damages, the cost of rectification, was not displaced merely because the plaintiff did not intend to expend the money to carry out the rectification. Doyle CJ observed that a building owner may have sound economic reasons to sell his or her newly constructed building quickly and without first effecting repairs or recovering damages for rectification. I respectfully adopt those remarks. A building owner is entitled to the full measure of his or her contractual bargain without having to forego the right to deal with the product of that contract in a way which optimises his or her financial position. Doyle CJ placed some importance on the circumstance that, on the evidence adduced in *De Cesare*, it was reasonable to assume that the price obtained was less than it might otherwise have been even though no finding was made quantifying any diminution in value.

32 In the course of his reasons, Doyle CJ adverted to the qualifications on the general rule in cases in which there has been 'substantial performance' and those cases in which the non-performance has had no effect upon the 'value or utility' of the contractual work. The criterion of substantial performance comes as we have seen from *Ruxley* but is also similar to the 'different character' criterion referred to in *Bellgrove*. Nonetheless the application of criteria like those, as determinative, is problematic because they are of uncertain content and result in an opaque, largely unexplained judgment. It is more useful to treat the degree of departure from the contractual stipulation as a relevant factor which, in combination with others, may give good reason to depart from the primary rule, an approach to which I will shortly return.

33 In *Brewarrina Shire Council v Beckhaus Civil Pty Ltd*,[17] the New South Wales Court of Appeal was concerned with the proper measure of damages for the defective construction of levee banks intended to protect the town of Brewarrina from flooding of the Barwon River. The Court upheld an award of damages representing the cost of rectifying the wet side of the levees so as to conform with the contract but denied the additional cost of rectifying the dry side of the levees. Tobias JA (with whom Giles and McColl JJA agreed) allowed the

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[16] (1996) 67 SASR 28.
[17] [2006] NSWCA 361.

cost of rectifying the wet side because the rectification work on the wet side of the levees resulted in levees with the equivalent security and capacity to repel floodwater as levees constructed in conformity with the contract and because the cost of that rectification was not out of proportion to the achievement of the objective of flood mitigation. The decision in that case, and the underlying approach to the reasonable course qualification, is mired by the complexity of the expert evidence on the effects of different methods of rectification. Nonetheless, it should be accepted that disproportionate expenditure on rectification work of little utility is a very relevant consideration.

34 *Westpoint Management Ltd v Chocolate Factory Apartments Ltd*[18] was another case of defective building work in home units which had been on sold by the plaintiff to unitholders who were not asking for the rectification work to be carried out. There was no evidence of diminution in the sale price and, obviously enough, no intention to carry out the rectification work. The New South Wales Court of Appeal accepted that neither the sale of the property nor the absence of an intention by the plaintiff to carry out the rectification work was determinative. However, the Court held that those factors remained relevant considerations in determining whether rectification was a reasonable course in order to achieve the contractual objective. In particular, Giles JA (with whom McColl and Campbell JJA agreed) explained that the reasons for carrying or not carrying out the rectification work will reveal more about the reasonableness of the decision than the decision itself. I respectfully agree. Some reasons, or the lack of any reason, for not carrying out rectification work will show that the undelivered, or poorly delivered, contractual benefit is of no, or little, value. If the reason is that the building has been on-sold then much will depend on whether the building owner has acted reasonably to mitigate his or her loss or to maximise the economic benefit of his or her contract. Giles JA continued:[19]

> [61] So if supervening events mean that the rectification work cannot be carried out, it can hardly be found that the rectification work is reasonable in order to achieve the contractual objective: achievement of the contractual objective is no longer relevant. …

35 I question why the contractual objective should lose its relevance in *all* cases in which a supervening event makes rectification practically impossible. The contractual objective crystallises at the time of the making of the contract and is ascertained from the terms and, commonly understood, context of the contract. The reasonableness of rectification must be measured against that objective as at the time of delivery. The relevant question is whether, given the breach by the wrongdoer, there is reason to depart from rectification damages as the appropriate remedy as between the parties to the contract, having regard to its terms and objectively ascertainable context.

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[18] [2007] NSWCA 253.
[19] [2007] NSWCA 253 at [61].

36 Giles JA accepted that the ordinary measure of damages for breach of contract in building cases is rectification damages, and that an intention not to rectify is not determinative, but nonetheless observed:[20]

> [54] On the other hand, adherence to the compensatory nature of damages suggests that, if the plaintiff will not put itself in the position it would have been in had the contract been performed, the plaintiff should not be given the means of doing so.

This passage is a variation on the submission put by Ruxley's counsel to the House of Lords and referred to in [22] above. It is not clear to me why rectification damages are not compensatory unless they are actually spent on rectification. Rectification damages may properly be regarded as compensatory even if a plaintiff decides not to expend them to achieve contractual compliance because they are a proper measure of the difference between the benefit for which the plaintiff stipulated, and paid the price, and the lesser product delivered by the defendant wrongdoer. Doyle CJ made the same point in *De Cesare* when he observed:[21]

> What is awarded is the cost of bringing the building works into a state of compliance with the contract, not an amount which the plaintiff has in fact expended to do so or proves will be spent.

37 In *UI International Pty Ltd v Interworks Architects Pty Ltd*,[22] the Queensland Court of Appeal considered the appropriate measure of damages for defective design and construction of buildings which had been sold. The plaintiff's claim for the cost of demolishing and reconstructing the defective buildings was struck out because it neither pleaded that the defects had affected its return, nor that the buyers required or consented to any rectification work. The plaintiff's appeal against the strike out was dismissed by the Queensland Court of Appeal.

38 Williams JA held that if rectification was no longer possible, in fact, then rectification was not a reasonable course for the purposes of the award of damages. In reaching that conclusion, Williams JA relied on a statement in the reasons in *Bellgrove*, made when discussing the example of a building painted in the wrong colour, that the building owner 'is entitled to the reasonable cost of rectifying the departure or defect so far as that is possible'.[23] Williams JA reasoned that if rectification was not possible it was not a reasonable course to adopt. With respect, that reasoning reflects a misunderstanding of the passage. The rule stated in *Bellgrove* is that the plaintiff is entitled to the reasonable costs of rectifying the works to comply as nearly as possible with the contractual stipulation. To put it another way the award will cover the costs of bringing the works as close as possible to full compliance. It follows that it would generally

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[20] [2007] NSWCA 253 at [54].
[21] (1996) 67 SASR 28 at 32.
[22] [2008] 2 Qd R 158.
[23] *Bellgrove v Eldridge* (1954) 90 CLR 613 at 617-8.

not be good enough to effect some, but not all, of the possible measures which would ensure compliance. So much is clear in *Bellgrove* from both the immediately following endorsement of the statement of the rule in *Hudson on Building Contracts* that it is the cost of making the building conform to the contract which can be recovered as well as from other references in that judgement to awarding such rectification costs as will achieve substantial compliance with the contract. The statement on which Williams JA relied was not intended to limit the payment of rectification costs to achieve that result to those cases in which it remains, at the time of judgment, within the power of the building owner, as a practical matter, to carry out the rectification work.

39 Keane JA (with whom Holmes JA agreed) distinguished *Bellgrove* and personal occupation cases from cases in which the product of the building contract is intended to be placed on the real estate market. They may be described as building commodity cases and as such fall within analogous class to the exception recognised in *Bellgrove*.[24] Keane JA held that in building commodity cases an award of the diminution in value of the building caused by the defect fully vindicates the plaintiff and is the *prima facie* measure of damage.

40 At [93], Keane JA referred to the following passage in the judgment of Gibbs J in *Director of War Service Homes v Harris*:[25]

> … **If the owner subsequently sold the building, or gave it away, to a third person, that would not affect his accrued right against the builder to damages according to the same measure.** The fact that the building had been sold might be one of the circumstances that would have to be considered in relation to the question whether it would be reasonable to effect the remedial work, but assuming that it would be reasonable to do the work the owner would still be entitled to recover as damages the cost of remedying the defects or deviations from the contract (assuming of course that the contract price had been paid). **In assessing those damages it would not be relevant whether the owner was under a legal liability to remedy the defects, or whether he had made a profit or a loss on the sale of the building, for the builder has no concern with the details of any contract that the owner might make with a third party.**
>
> (Emphasis of Keane JA)

At [103], Keane JA cited Gibbs J further:[26]

> There is a principle that in actions for non-delivery or breach of warranty under a contract for the sale of goods 'the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods' (*Rodocanachi v Milburn* (1886) 18 QBD 67 at 77; *Williams Brothers v Ed T Agius Ltd* [1914] AC 510; *Slater v Hoyle* [1920] 2 KB 11) and this principle (which has been applied to a contract for the sale of a lease, plant, buildings and stock, treated as realty– *Brading v F McNeill & Company Limited* [1946] 1 Ch 145) should in my view be similarly applied to the case of a building contract. **The owner of a defective building**

[24] [2008] 2 Qd R 158, 196 at [106] (Keane JA).
[25] [1968] Qd R 275 at 278.
[26] [1968] Qd R 275 at 278-9.

> **may decide to remedy the defects before he sells it so that he may obtain the highest possible price on the sale; he may sell subject to a condition that he will remedy the defects; or he may resolve to put the building in order after it has been sold because he feels morally, although he is not legally, bound to do so. These matters are nothing to do with the builder, whose liability to pay damages has already accrued.**
>
> (Emphasis of Keane JA)

41 In relation to the first passage cited above, Keane JA noted that Gibbs J did not rule out as irrelevant an incapacity to effect repairs.[27] The passage from *Director of War Services Homes v Harris*[28] does not expressly do so however Gibbs J must have contemplated that, generally, rectification would not be possible after a sale of the building. More importantly, Keane JA distinguished between the contractual expectation in personal occupation building contracts and building commodity cases. It is not obvious to me why the intended use of a building should change the rule in *Bellgrove* that the ordinary measure of damages in building contract cases is rectification damages. True it is that in the case of speculative building developments in which it is intended to sell the completed building on the open market, profit on resale is the predominant interest. For that reason there is a close analogy with industrially produced commodities. However, buildings, and houses in particular, are not as standardised in function, appearance and market price as industrial products. Moreover, the intended use may not be known to both parties at the time of contract and may change over time.

42 Keane JA distinguished the decision in *De Cesare* because in that case it was reasonable to assume that the price obtained by the building owner on resale was less than it otherwise would have been. It can be accepted that Doyle CJ relied on the real likelihood of diminution as a reason for not departing from the primary rule of damages. However, that circumstance was not determinative in the reasoning of Doyle CJ and not mentioned by Nyland J (with whom Bollen J agreed) for reaching the same conclusion.

43 It is not clear to my why a possible, but not proved, diminution in value is any more reason to order rectification costs than cases in which it is proved conclusively that there was a quantified diminution on the one hand, or that there was no diminution at all on the other.

44 The distinction drawn by Keane JA raises the question whether a building owner should be limited to damages based on proving a shortfall between the price received and the hypothetical price which might have been achieved if the building placed on the market complied with the contractual stipulations which were intended to maximise the profit. Keane JA concluded:[29]

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[27] [2008] 2 Qd R 158, 192 at [94] (Keane JA).
[28] [1968] Qd R 275 at 278.
[29] [2008] 2 Qd R 158, 196 at [106].

> [106] Where, by reason of the ownership of a property by a third party, the repairs **cannot** be carried out by the claimant, the claimant cannot claim the cost of repairs. In such a case, it is not a matter of the claimant being entitled to do what he or she pleases with his or her property or the damages due to him or her; rather, it is simply that the damage to the claimant's interest in the performance of his or her contract with the builder cannot reasonably be measured by the cost of repair which cannot occur.

45 The correctness of that passage in its application to what I have called building commodity cases does not arise on this appeal. I observe only that different views might be taken as to whether it is reasonable for damages to be assessed, as against the builder, on the basis of rectification costs irrespective of whether they are able to show a diminution in value based on a hypothetical sale. The building owner's assessment of the character and nature of the building which would maximise his or her profit may not be shared by the experts who give evidence of value but the building owner may still have been proved right, if he or she had had an opportunity to put the building, constructed in accordance with the contract, on the market. It is the conduct of the builder which has denied the building owner the proof of the soundness of his or her economic judgment and the reaping of the consequential profits. The premise underlying freedom of contract, and the ancillary common law rule that damages reflect the cost of attaining the undelivered benefit, is that the parties best know which terms will most benefit them.

46 Be that as it may, I would not apply the rule stated by Keane JA to personal occupation cases, at least as an absolute rule, because I do not accept that in a personal occupation case the sale of a defective building, in which the occupier could no longer bear to reside, precludes rectification damages if the contractual non-compliance does not cause any loss of value.

47 The primacy of the general rule as to rectification costs was affirmed by the High Court in *Tabcorp Holding Ltd v Bowen Investments Pty Ltd ('Tabcorp')*.[30] In that case, the landlord of a commercial building recovered the cost of reinstating the foyer of that building after the tenant had significantly altered it without consent. The Judge's award in favour of the plaintiff of $34,820 reflecting the diminution in value of the building by the tenants fitout of the foyer was set aside by the Full Federal Court. An award of $1.38 million was substituted comprising $580,000 for the cost of restoring the foyer and $800,000 for rent lost during the restoration.

48 The High Court upheld the decision of the Full Federal Court. The Court held that 'the test of unreasonableness is only to be satisfied by fairly exceptional circumstances' and that 'the diminution in value measure of damages will only

[30] (2009) 236 CLR 272.

apply where the innocent party is 'merely using a technical breach to secure an uncovenanted profit'.[31]

49 The terms 'technical breach' and 'uncovenanted profit' are of uncertain meaning. Presumably technical breach means more than a de-minimis variation but beyond that it remains a matter of judgment. As to the latter term, building contracts rarely apportion the contract price between elements of the build, save for some prime cost items. Nonetheless, it is clear that the High Court in *Tabcorp* affirmed the primary measure of damages established in *Bellgrove* and took a narrow approach to the circumstances which warranted a departure from it.

50 The Court in *Tabcorp* doubted the correctness of the decision in *Ruxley* observing that on one view the decision was inconsistent with the principle in *Bellgrove v Eldridge* and *Radford v De Froberville*.[32] Interestingly, counsel for Ruxley had contended that in a landlord and tenant case the measure of damages for breach of covenant to repair is the damage to the landlord's reversion, a submission directly controverted by the decision in *Tabcorp*.[33]

51 In *Willshee v Westcourt Ltd*,[34] the Full Court of the Western Australian Supreme Court awarded the plaintiff the cost of rectifying his home by removing and replacing inferior limestone used in its construction. The contract had stipulated for 'high quality' limestone cladding but the builder had supplied inferior or second quality limestone cladding. The damages awarded by the Judge allowed only for the cleaning and sealing of the second grade limestone. The Judge concluded that the cost of $257,977.91 to replace the limestone was disproportionate to the value of the house at $1.7 million. Martin CJ observed that the plaintiff, Mr Willshee, had 'entered into a contract which he considered served his interests' and that he was entitled to the performance of that contract in 'quite irrespective of the views which other people might form in relation to the advancement of those interests, such as views relating to the aesthetic appearance of the house'.[35]

Analysis

52 Imposing limits on awards for breaches of building contracts by reference to 'contractual objective' 'substantial performance' or 'different character' is problematic. What is in issue is not the right to terminate the contract, but whether there is reason to depart from the ordinary measure of damages.

53 The contractual objective of the parties is to be determined by reference to the terms they agree. The motive of a purchaser of a building may be to profit by

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[31] *Tabcorp Holding Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 288 at [17].
[32] *Tabcorp Holdings v Bowen Investments* 236 CLR 272, 289 at [18].
[33] The position in England has been affected by statutory intervention.
[34] [2009] WASCA 87.
[35] [2009] WASCA 87 at [68] (Martin CJ).

resale. However, the purchaser effects that objective by stipulating specifications and agreeing a price which the purchaser estimates will maximise that profit. The contract therefore remains one for the supply of a particular building and not for an approximation of that building. That is especially so in home building contracts. If rectification costs are not awarded there is, in effect, if not in form, a rewriting of the contract. The building for which the building owner stipulated is replaced with a different building but with a correlative reduction in the purchase price through the mechanism of an award of quasi-tortious damages for diminution in value or loss of amenity.

54 The *Bellgrove* qualification that rectification must be a 'reasonable course' to adopt is calculated to control the level of damages and to address those cases in which the *prima facie* rule produces a result which is manifestly unjust. It is not limited to the question of mitigation in the sense of awarding damages for that method of rectification which best mitigates the loss. It is a qualification which allows the selection, in special circumstances, of an alternative measure of damages. The qualification reflects two methods often employed by the common law. First, in recognition that a sound general rule may nonetheless still work an injustice in a particular case, it qualifies the general rule with a proviso. Secondly, it translates what is, at base, a determination of legal policy into a quasi-factual question by engaging the reasonableness standard. The reasonableness of rectification is not determined by an entirely factual enquiry. The test of reasonableness is only quasi-factual and imports a normative standard. For that reason, the practical capacity to rectify is not determinative. Contracting parties are entitled to protect their self-interest, and in some circumstances are bound to mitigate their loss. For that reason, they may sell or otherwise dispose of, or change, the subject matter of the contract, without relieving the wrongdoer of the consequences of his or her breach of contract. Nor are the circumstances that there are physical or legal impediments to rectification, or that rectification may create risks to the person or property of others, determinative.

55 Rectification damages are awarded for a breach of a building contract unless there is good reason to adopt another measure because the award of rectification damages would be manifestly disproportionate to the attaining of the contractual benefit. That rule entrenches rectification costs as the primary measure of damages and emphasises the exceptional nature of any lesser award. In determining whether good reason exists, the authorities suggest that the following are relevant considerations:

(1) the degree of departure from the contractual stipulation;

(2) the adverse effect of the departure on the functional utility, amenity and aesthetic appearance of the building;

(3) the reasons, objectively ascertained and commonly known, for which the innocent party made the stipulation which was breached;

(4) the practical feasibility of rectifying the work, including the effects on third parties of attempting to do so;

(5) whether or not the innocent party intends to carry out the rectification work;

(6) the absolute cost of the rectification work and the disproportion between that cost and

- the value of the building and contract price;
- the diminution in commercial value of the building;
- the effect of the departure on the functional utility, amenity and aesthetic appearance of the building;

(7) the nature of the wrongdoer's fault for the defect; and

(8) the public interest in reducing economic waste.

56 The following observations should be made by way of exegesis of those considerations.

57 The degree of departure from the contractual stipulation encompasses the ideas of de-minimus or technical breach and substantial performance but, instead of attempting to fix a qualitative descriptor of the breach which will be determinative, the degree of departure is treated it as one of a number of considerations. There is considerable overlap between the first and second considerations but I wish to emphasise that non-performance of any contractual stipulation and the degree of departure from it is in itself an important consideration whether or not it is shown to effect functional utility or aesthetic appearance. The decision of one party to a contract to stipulate for a particular design feature is presumed to have a purpose and to arise from that party's assessment of what is necessary to provide the functional utility and aesthetic appearance he or she desires for personal or commercial reasons.

58 The third consideration draws attention to the reasons for the making of the breached stipulation and may also disclose how important satisfaction of that stipulation was to the innocent party and therefore the degree of disappointment with the result.

59 The practical feasibility of rectifying the work deals with the factual aspects of the rule and encompasses questions like whether the building has been sold, and the risks and inconvenience to others in attempting rectification work.

60 Whether or not the innocent party intends to carry out the rectification work is both an indication of the subjective importance of the stipulation and affects

the question whether or not the award of damages is reasonable as between the parties.

61 The sixth consideration, disproportion, is at the core of the evaluative judgment which must be made.

62 The seventh consideration, the nature of the wrongdoers fault for the defect, is important because, as between the parties, an award of burdensome rectification costs on a builder may be justified by his or her knowledge, negligence or recklessness with respect to that defect.

63 The final consideration was rejected as a determinative factor in *Bellgrove* because, as such, it would deny the primacy of the contractual agreement. However the concept of reasonableness inevitably incorporates a consideration of the public interest in avoiding economic waste. Collaterally it also imports a consideration of the public interest in minimising transactional costs in the building industry which may be increased if insurance is taken against damages based on rectification costs.

64 In this case, the degree of departure from the contractual stipulation is not merely technical. Even though in absolute terms the difference in ceiling height is a matter of millimetres, that is to be measured against not just the total ceiling height but also against the 300 mm above the standard height for which the Stones contracted. Moreover, it appears to me of little significance that the Stones did not appreciate that the ceilings were lower than the contractual specification until they had installed the joinery. It is natural that the difference became obvious by reference to the space between the height of the joinery and the ceiling. It is convenient to record here that for the reasons given by Doyle J the Stones did not elect to forego rectification damages by moving into their apartment.

65 The visual perspective was, as the Stones testified, a large part of the enjoyment of a higher ceiling. The evidence establishes that higher than standard ceilings were important to the Stones. They are not alone in that preference. The degree of departure from the stipulated term and the objectively ascertainable reasons for the stipulation, which must have been known to the defendants, weighs in favour of making an award in accordance with the ordinary measure so that the plaintiffs' bargain is fully enforced.

66 The nature of the defendants' fault also tells in favour of a strict enforcement of the contract by awarding the full measure of rectification damages. The Stones had negotiated for higher than standard ceilings for some time before the formal contract was signed on 22 December 2009. The defendants accordingly arranged for the building of a unit which would accommodate their request. Nonetheless, at some point in 2009 the design of the roof was changed which resulted in the fixing of a steel RB 5 beam which compromised the capacity to provide a ceiling at the requested height. The

building supervisors were aware of that problem. They told Mr Chappel that the beam would have to be modified. The Judge accepted the evidence of Mr Chappel that he was not told that the depth of the RB5 beam precluded a ceiling height of 2700mm.

67 For the reasons given by Doyle J, I accept that Mr Chappel had a reasonable basis on which to make a representation as to ceiling height for the purposes of liability on the statutory misrepresentation action. The reasonable basis was that he had entrusted the building of the apartment to an independent builder who had not informed him that the architectural specifications could not be met. For the purposes of making the representation Mr Chappel was entitled to act on the assumption that the builder would meet its contractual obligation.

68 However, that finding is not dispositional of the question of responsibility for rectification. When Mr Chappel executed the contract with the Stones and undertook to provide an apartment with a ceiling height of 2700mm, he knew that the change in design of the roof meant that the beam was 'too deep' and would need to be modified. Nonetheless, Mr Chappel took no additional precautions to ensure that the building work was carried out in a way which ensured that he would discharge his contractual obligation. Mr Chappel's knowledge must also be imputed to Mr Smallacombe because they were partners. The defendants' reliance on the disproportionate cost of rectification is undermined by their failure to take steps reasonably open to them at the time to avoid the risk of incurring substantial rectification costs.

69 Be that as it may, against those considerations there is undoubtedly a great disproportion between the cost of the rectification work and the contract price for the unit and its value. The full 2700mm ceiling height was important to the Stones but the ceiling height is still substantially higher than a standard ceiling. It is not without significance that Mr Stone's evidence that he would rectify was not unequivocal and was premised on receiving an award of damages on that basis:

> Q. Suppose the court agreed with you and suppose the court, for argument's sake, made an award of damages in your favour, do you have any intention to carry out rectification work to the ceiling.
>
> A. Very probably.
>
> Q. Would you do that even if the costs were in excess of a quarter of a million dollars.
>
> A. The quarter of a million dollars being paid by whom?
>
> Q. Suppose you were given an award of damages of an amount to cover the cost of rectification and suppose the costs of the rectification were over $250,000, would you actually carry out the rectification work.
>
> A. Very, very probably.

Later, he was asked:

> Q. Supposing the court found in your favour on certain issues and it is said that it wasn't reasonable to do the rectification work to the ceiling, what would be your position as to whether or not you would still want to remain in the apartment.
>
> A. I know my wife is disappointed. I don't know. I really, really don't know, your Honour.

70 Mrs Stone said that she would be prepared to move out of the apartment for six months if that was necessary and intended to have the apartment rectified even if the cost exceeded a quarter of a million dollars. She said:

> A. Well, this is not my fault. I haven't caused it, I haven't caused any of the problems, and I don't see why I should suffer or we should suffer.
>
> …
>
> A. I do want it done. Surely the operators understood that I wanted, or we wanted, 2700. They signed for it. Mr Smallacombe promised it.

71 I doubt that anyone in the Stone's position would expend their own money to rectify the ceiling height no matter how great the financial resources at their disposal. That consideration is entitled to some, albeit limited, weight.

72 If the relevant considerations rested there, I would have been inclined to hold the defendants to their contract and award rectification costs. However, an award of rectification costs in this case must be premised on the performance of building work which, if carried out, would create significant risks of damage to the property of other persons and is likely to result in substantial collateral litigation involving the defendants and other occupants of the building. In fact, despite the earnest evidence of the Stones that they intended to carry out the rectification work, the chances of them doing so are not strong. Indeed the rectification work is unlikely to be carried out because of its complexity and the risk of damage to the property of others. An attempt to undertake the work will also almost certainly provoke litigation which is likely to delay it, if not obstruct it altogether.

73 I acknowledge, of course, that an award of rectification costs may be made without any intention or possibility of the work being carried out. Indeed there could be little objection if an award of rectification costs allowed the Stones to recoup their lost expenditure and, if they so chose, to purchase accommodation which better suited them than the apartment which does not comply with the contract they made.

74 However, it appears particularly artificial, and unjust, to award damages on the basis of such a fraught undertaking. The public interest against economic waste and against the promotion of unconstructive litigation is relatively strong in this case. The matter might also be tested by considering a hypothetical claim

by the Stones for the legal costs of litigation with their neighbours over the works, and for damages to indemnify them for liability for nuisance and property damage had they undertaken the rectification before bringing this action. Those heads of loss would almost certainly be regarded as remote and unreasonably incurred.

75 For those reasons, I would find that rectification is not a reasonable course and that there is good reason to depart from the ordinary rule in this case.

Misrepresentation

76 I agree with Doyle J that the Stones' claim of misrepresentation must fail because there was a reasonable basis for the defendants' contractual promise.

77 However, if there were an actionable misrepresentation then I would have held that it was causative of loss. This is a no-contract case for the simple reason that, but for the misrepresentation, the Stones would not have purchased the unit.

78 I agree with Doyle J that for the purposes of determining the question of reliance on the misrepresentation made by the defendants it is necessary to ask whether the Stones would still have contracted for the purchase of the apartment if the defendants had disclosed that they did not have a reasonable basis for making the contractual representation that the ceiling height would be 2700 mm. On the posing of that hypothetical question, I have no doubt that the Stones would not have entered into the contract. The hypothetical question, posed in order to test and determine the issue of reliance, ends with that answer. I acknowledge that if the hypothetical discussion had, in fact, taken place, it would not have ended there and other steps and actions may have been taken. There may have been a request by the Stones that enquiries be made to ascertain whether there was a reasonable basis. If the defendants had returned and reported that they were satisfied with the enquiries and reported that they had a reasonable basis for making the contractual representation, then the Stones may well have contracted to purchase the property. If the defendants had returned and reported that their enquiries had revealed that the ceiling was just under 2700 mm, the Stones may or may not have contracted for the purchase of the apartment, with, or without, some adjustment of the purchase price.

79 However, that is all irrelevant. The hypothetical posed for the purpose of testing reliance cannot be extended to a position where the misrepresentation is corrected, or shown not to be a misrepresentation. Nor can it be extended to take into account how the Stones may have responded to an adjustment in contract price. Extensions of the hypothetical question in that way deny the very premise of the enquiry that a misrepresentation has been made. If there were no reasonable basis for for the representation, the defendants cannot escape liability on the basis that if they had disclosed that it had no reasonable basis, they might have been asked to make enquiries which revealed a reasonable basis for the

misrepresentation, or that they may have disclosed the true position and still won the contract.

80 I acknowledge that after their purchase the Stones' overcapitalised on the fit-out of the apartment. That however is a foreseeable and natural consequence of their purchase of the apartment. Most new dwellings are over-capitalised, at least in the short term, in order to meet the occupants' personal preferences. Had the Stone's not purchased the apartment they would have retained the purchase price, and the cost of the over-capitalisation, in hand, to spend on an apartment which had not been misrepresented to them.

81 In *Kenny & Good Pty Ltd v MGICA (1992) Ltd*,[36] damages were awarded on the basis of the total loss suffered by a financier of a property development who relied on a negligent property valuation even though part of that loss was attributable to a fall in the property market.

82 In *Henville v Walker* ('*Henville*'),[37] the High Court considered the proper measure of damages in a claim based on s 52 of the *Trade Practices Act 1974* (Cth) in which a developer relied on the misrepresentations of a real estate agent as to the sale price he might obtain upon developing and selling units. McHugh, Gummow and Hayne JJ held that the proper measure of damages was the total loss made by the developer even though a portion of it was due to his miscalculation of the costs of the development.[38] There is no analogy between the example given by Hayne J in *Henville* of wasted construction costs and this case because *Henville* concerned a property developed for resale and not the expenditure and fit out of a home which the purchaser believed complied with the contract. For the same reason, the Stones' overcapitalisation is not unforeseen or unreasonable conduct which operates as a supervening cause of the kind postulated.[39]

83 The plaintiff in *Copping v ANZ McCaughan Ltd*[40] was found not to have suffered loss because the evidence showed that he would have entered into another foreign currency loan of the same kind with another bank even if the defendant had not made the alleged misrepresentation. In short the misrepresentation did not prejudice the plaintiff. No such finding could be made in this case.

84 Had the defendant misrepresented the ceiling height, the Stones would have been entitled to be placed back in the financial position they enjoyed before the misrepresentation induced them to enter into a contract they would not otherwise have made. Their loss would have been the change in their financial position

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36 (1999) 199 CLR 413.
37 (2001) 206 CLR 459.
38 (2001) 206 CLR 459, 507 at [145]-[146] (McHugh J); 510 at [166] (Hayne J).
39 *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [28] (Gleeson CJ); [58]-[62] (Gaudron, Gummow and Hayne JJ); [69], [89] (McHugh J).
40 (1997) 67 SASR 525.

occasioned by the purchase of an apartment that they would not have purchased otherwise. It is not to the point that the difference between what they have spent on the apartment and its value was not caused by the representation. Their loss would have been the commitment of their liquid financial resources to residential premises in which they did not want to reside.

General Damages

85 In Australia an award of general damages may be made to compensate for a defendant's breach of promise to prevent vexation or annoyance, or to provide enjoyment or pleasure. General damages for breach of a building contract may include awards for physical inconvenience and consequential anxiety and distress.[41] Such awards need not be restrained or modest. However, a distinction is maintained between mere disappointment at the loss of the contractual benefit and physical inconvenience.[42]

86 In *D Galambos & Son Pty Ltd v McIntyre*,[43] damages for loss amenity were awarded in a case in which the garaging and other areas below the main house had been considerably reduced in height by reason of a failure to observe the strict height requirements for habitable areas which were laid down in the plans and specifications. That failure, however, was not capable of reasonable rectification nor did it affect the value of the house. Woodward J accepted that an award could be made for 'amenity value', which was something more than 'mere annoyance' and resulted in 'substantial inconvenience and discomfort'.[44] He made an award of $500 in a case in which the contract price for the building work was $16,300 and in which an award of 15 per cent of the contract price had already been made to compensate for other defects which had diminished the value of the home.

87 In *Burke v Lunn*,[45] on an application not to accept, and enter judgment for, awards made by referee, Menhennitt J accepted that damages could be awarded for physical inconvenience and discomfort of a substantial nature. The dispute in that case related to a sunroom added to a private home in Malvern. The contract price was for $3,500. Alterations and renovations were also made to the house and the claim for those was $14,543.30. An award of $200 for inconvenience associated with carrying out rectification work which was first imposed by a referee was allowed by the Judge.

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41 *Boncristiano v Lohmann* [1998] 4 VR 82 at 94-95.

42 *Parker v Cunningham* (1879) 5 VLR(L) 202; *Athens-MacDonald Travel Services Pty Ltd v Kazis* (1970) SASR 264; *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10; *Brickhill v Cooke* [1984] 3 NSWLR 396; *Burke v Lunn* [1976] VR 268.

43 (1974) 5 ACTR 10.

44 (1974) 5 ACTR 10 at 14, citing *Bailey v Bullock* [1950] 2 All ER 1167.

45 [1976] VR 268.

88 In *Ruxley* Lord Lloyd of Berwick suggested that damages for breach of contract in a building case may extend beyond an award for loss of amenity and include an award for disappointed expectation:[46]

> What is then to be the position where, in the case of a new house, the building does not conform in some minor respect to the contract, as, for example, where there is a difference in level between two rooms, necessitating a step. Suppose there is no measureable difference in value of the complete house, and the cost of reinstatement would be prohibitive. Is there any reason why the Court should not award by way of damages for breach of contract some modest sum, not based on difference in value, but solely to compensate the buyer for his disappointed expectation? Is the law of damages so inflexible, as I asked earlier, that it cannot find some middle ground in such a case? I do not give a final answer to that question in the present case. But it may be that it would have afforded an alternative ground for justifying the Judge's award of damages.

89 An award for disappointed expectation could narrow the large differential between an award of rectification costs and general damages for loss of amenity, and satisfy subjective views of the justice of the case. However the splitting of the difference between the two would be a largely arbitrary, and therefore, uncertain exercise. Be that as it may it is not open to this Court to depart from the limited basis from which damages for loss of amenity or enjoyment are awarded in Australia.

90 The ceiling height was a matter of special concern to the Stones. They emphasised its importance to them in many meetings with the builder and architect. When asked about the height of the ceiling and in particular the distance between the top of the cupboard which was installed in the ceiling, Mr Stone replied, 'it looks mean and it's wrong'.

91 Mrs Stone testified as follows about the effect of the ceiling on her:

> Q. It might be put against you that the average person wouldn't be able to notice a change in the ceiling height. What's your response.
>
> A. I don't care what the average person thinks; it's my home, I'm living there with my husband.
>
> Q. Are there aspects of the ceiling which bother you.
>
> A. Yes. It feels like it's coming down on me. I don't like it at all. I'm very unhappy with it (INDICATES).
>
> Q. Does the ceiling height impact in any way on the topic of the artwork in the house.
>
> A. Of course, yes.
>
> Q. Can you explain to his Honour where in the house and why.
>
> A. There are several positions in the house, your Honour. There is - when you came, I don't know if you noticed - a very large painting in our entrance, it's called The

[46] (1996) 1 AC 344 at 376.

> Juggler, there is another large painting over our cupboard in the lounge room, there is another large painting in the lounge room and there's a not-so-large painting in our bedroom, but the three I first mentioned do not have the desired space around them. Aesthetically they look wrong and that does bother me. We've had those paintings many years and we knew we were going to hang them there and we expected to see them looking correct, and they are not.

92 The Judge gave the following reasons for his quantification of the award of general damages for loss of amenity:[47]

> [168] Given the conclusion that this is one of the fairly exceptional cases that falls within the qualification to the rule in *Bellgrove,* I turn to the basis for assessing damages for breach of contract. In my view, the appropriate basis for the primary award is damages for disappointment and loss of amenity in accordance with the approach in *Ruxley Electronics and Construction Ltd v Forsyth*. I accept that in terms of amenity and aesthetic satisfaction the plaintiffs have lost something. The basis for an award to compensate for such an intangible loss is necessarily problematic and, to a degree, subjective. In *Ruxley* the court awarded £2,500 in 1993. In *Farley v Skinner* an award of damages of £10,000 was made in 1999 for discomfort and loss of amenity in a somewhat different case. In *Farley* a surveyor was sued for negligent advice in advising a prospective purchaser of a property that it was unlikely the property would suffer greatly from aircraft noise. This proved not to be the case.
>
> [169] Doing the best I can, allowing for changes in the value of money and exchange rates, and endeavouring to fairly compensate the plaintiffs for their loss, I would award them $30,000 for disappointment and loss of amenity.
>
> (citations omitted)

93 I observe that the Judge appears to have taken into account mere disappointment at the loss of the contractual benefit in quantifying the award at $30,000. To that extent, his Honour may have erred in the appellants' favour. For that reason, and because of the obvious difficulties in relying on awards made in a foreign jurisdiction, there is reason to think that his Honour has taken into account irrelevant considerations in quantifying his award.

94 The proper approach in a case like this is to commence with an evaluation of the loss of amenity in the sense of the loss of enjoyment of and diminished aesthetic appearance of the apartment. The translation of that loss into a monetary figure is incapable of precision or even substantial explanation. Measurement of the extent of the loss of amenity against the price paid for the apartment provides some guidance. The Stones paid for a luxury apartment, the premium elements of which included its location, views, architectural design, floor space and ceiling height. All but the ceiling height have been delivered. The ceiling height remains high but does still affect the aesthetic perspectives in that relationship between the apartment's shell and the joinery and artwork. It can also be accepted that the lower ceiling height detracts from the enjoyment of the other premium elements for which the purchase price was paid. Nonetheless

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[47] [2016] SASC 32 at [168]-[169].

I am unable to justify an award above that made by the Judge. For that reason, and without deciding whether the Judge's reasons disclose an error of law adverse to the Stones, I would dismiss the appeal against the award.

Remaining Issues

95 For the reasons given by Doyle J, I agree that the Stones are entitled to the sum of $19,942.45 for the defective door frames. I also agree that the obligation to pay the instalment of $509,000 arose on the handover of the apartment in a condition which allowed the fitout to proceed. I agree that handover occurred on 29 September 2010. I also agree that by the acceptance of the apartment for the purposes of fitting it out, the Stones elected not to enforce any right to withhold payments under the contract.

Conclusion

96 I would join in the orders proposed by Doyle J.

DOYLE J:

Overview

97 The appellants (the plaintiffs, Mr and Mrs Stone) are a retired couple who contracted with the respondents (the defendants, Mr Chappel and Mr Smallacombe) to construct the shell and framework of an apartment in a retirement village in Leabrook.

98 The defendants built and operated the retirement village. They did so as partners or joint venturers, on behalf of their respective family trusts. Mr Smallacombe's role was the marketing and sale of the apartments and villas. Mr Chappel's role was the supervision of the construction of the apartment buildings and villas.

99 The parties entered into a Residents Agreement on or about 22 December 2009 (the contract) by which the plaintiffs acquired a licence to occupy apartment 107, which was on the north-western corner of the top floor of building 4 in the retirement village.

100 At the time of entry into the contract, building 4 was under construction. Under the terms of the contract the defendants were to construct only the shell and framework of the apartment. The plaintiffs were to fit-out the apartment at their own cost. The plaintiffs used the project architects for the retirement village, Pruszinski Architects, to undertake the fit-out work. The plaintiffs ultimately paid the sum of $1,853,254 for their apartment.

101 The defendants constructed the shell and framework of the apartment. The plaintiffs alleged that the defendants breached the contract by not constructing the shell and framework in accordance with plans forming part of the contract. Of particular significance was the plaintiffs' allegation that the contract provided for a ceiling height of 2700 mm. The plaintiffs also contended that the defendants made representations to the effect that the ceiling would be this height, and thereby engaged in misleading conduct under s 56 of the *Fair Trading Act 1987* (SA).

102 The trial judge held that the contract did contain a term to this effect, and that it was breached in that the ceiling height was on average 48 mm less than the required height of 2700 mm.

103 The plaintiffs sought damages reflecting the cost to rectify or cure this defect, which they quantified in the amount of $331,188. The trial judge rejected the claim for damages assessed in this way for three reasons. First, the plaintiffs had elected not to seek rectification damages. Secondly, the ceiling as constructed was substantially in accordance with the contract. Thirdly, it would be unreasonable to carry out the rectification work contemplated.

104 The trial judge instead awarded the plaintiffs damages to reflect the loss of amenity suffered by them on account of the departure from the contractual

specification as to the ceiling height, which he assessed in the amount of $30,000.

105 As to the case alleging misleading conduct by the defendants in relation to the ceiling height, the trial judge held that the plaintiffs had not proven that the defendants made any representation as to ceiling height relied upon by the plaintiffs. Accordingly, that aspect of the claim failed.

106 In addition to the claim in relation to the ceiling height, the trial judge awarded the plaintiffs contractual damages reflecting the cost to rectify two other breaches of contract (in relation to the door frames and window seals), less an amount attributed to the cost of some variations. The trial judge awarded a sum to reflect the refund of a fire inspection fee paid by the plaintiffs. His Honour also awarded the plaintiffs sums reflecting interest on (or damages for the loss of use of) the payments of $500,000 and $480,000 made by the plaintiffs to the defendants in respect of the apartment, on the basis the plaintiffs made those payments prematurely, or before they were contractually obliged to do so.

107 The total sum awarded by way of damages to the plaintiffs was $81,046.68, comprised as follows:

• Loss of amenity	$30,000.00
• Cost of rectifying door frames	$19,942.45
• Cost of window seals	$445.50
• Fire inspection fee	$539.00
• Interest on the premature payment of $500,000	$30,676.85
• Interest on the premature payment of $480,000	$5,535.39
• Subtotal	$87,139.19
• Less cost of variations	($6,092.51)
Total	$81,046.68[48]

108 In this appeal, the plaintiffs challenge:

1. The trial judge's refusal to award them contractual damages assessed by reference to the costs of rectifying the ceiling height; and

2. the trial judge's failure to find misleading conduct in respect of the ceiling height.

[48] Judgement was entered for an amount slightly greater than this, namely $81,046.98.

109 In their cross appeal, the defendants challenge the trial judge's awards of damages:

1. of $30,000 on account of the plaintiffs' loss of amenity, contending that only nominal damages should have been awarded;

2. of $30,676.85 and $5,535.39 for loss of use of the sums of $500,000 and $480,000 paid by the plaintiffs upon the basis that neither payment was made prematurely, and contending additionally in respect of the $480,000 payment that it was in fact made late such that there should have been a set off in the defendants' favour on account of interest payable to them of $33,486.90; and

3. of $19,942.45 on account of the defective door frames.

110 The defendants also rely upon a notice of contention in which they contend that the misleading conduct claim ought to have been rejected on the alternative or additional basis that the evidence did not establish a basis for recovering the loss claimed.

Background

111 In summarising the factual background to the matters in issue I have, except where indicated, confined myself to facts found by the trial judge or which I otherwise understand to be uncontroversial. Indeed, I have drawn heavily from the section of the trial judge's reasons setting out his findings of fact.

112 In 2006, Mr and Mrs Stone were living in a house in Austral Terrace, Malvern. The house had won an award for design. Next door they had constructed a similar house. It too had won an award for design. The plaintiffs were understandably proud of these houses.

113 Both Mr and Mrs Stone had a keen interest in building and interior design. The trial judge found Mr Stone to be a person of fastidious and exacting standards, who expected those he dealt with to meet those standards. He found that while Mrs Stone shared her husband's interest in design, she generally left negotiations over the apartment the subject of these proceedings to Mr Stone.

114 In around 2006, Mr Stone suffered a serious illness. He became anxious about his future and the situation in which Mrs Stone would be left in the event of his death. He decided they would look to acquire accommodation in a retirement village suitable to their needs and tastes. It was Mr Stone's desire that this be achieved quickly so that he could have the comfort of knowing that if the worst were to occur, Mrs Stone would not be left in a position of having to move and sell their home without him.

115 By 2006, the defendants had acquired the old Coopers Brewery site at Leabrook and had successfully undertaken the development on that site of the On

Statenborough Retirement Village. This was a substantial development involving the construction of a number of multi-storey apartment buildings and individual villas in a leafy garden setting. The apartments were marketed as luxury retirement accommodation. The development was undertaken in stages. The defendants would erect one building and use the proceeds from the sale of the apartments to finance the construction of the next building.

116 Mr Stone was aware of the retirement village development. He and Mr Smallacombe knew each other. In 2000 and 2001, the plaintiffs had retained Mr Smallacombe to act as their agent in selling the adjoining property in Malvern off the plan. Mr Stone contacted Mr Smallacombe to discuss acquiring an apartment in the retirement village in August 2006. He visited the retirement village and met Mr Smallacombe. The plaintiffs inspected an existing apartment.

The plaintiffs' option over an apartment in the north-eastern corner

117 The plaintiffs were interested in acquiring an apartment larger than the standard design, and with superior fittings and finishes to those in the existing apartments. At this time the defendants were planning to construct building 4 in the retirement village. The plaintiffs wished to acquire the right to occupy a large apartment in the north-western corner of the top floor of building 4. Someone else had taken an option over this apartment. Mr Smallacombe explained to Mr Stone that that location was unavailable. Mr Stone attempted to persuade Mr Smallacombe to cancel the option. Mr Smallacombe would not do so. The plaintiffs then negotiated to acquire the right to occupy a large apartment in the north-eastern corner of the top floor of building 4.

118 The defendants used the services of Pruszinski Architects as the project architects for the retirement village. Mr Stone and Mr Smallacombe discussed the plaintiffs using their architect, Mr Bastiras, for the apartment design but Mr Stone decided to retain the services of Pruszinksi Architects. Mr Pruszinski chose one of the architects employed in his firm, Mr Girolamo, to undertake the design work on the fit-out of the plaintiffs' apartment. Mr Pruszinski had previously assigned another member of the firm, Mr Jarrett, to undertake the design work on building 4.

119 On 29 September 2006, at the plaintiffs' invitation, Mr Smallacombe attended their house to introduce the plaintiffs to Mr Girolamo. On 30 September 2006, Mrs Stone executed an option over the apartment in the north-eastern corner. She paid an option fee of $1,000 on 3 October 2006.

120 In October and November 2006, there were further discussions between Mr Stone and Mr Smallacombe. The plaintiffs wanted to fit out the shell of a large apartment to be constructed by the defendants. Mr Smallacombe, after discussing this with Mr Chappel, indicated to the plaintiffs that this was possible.

121 In late November 2006, Mrs Stone exercised her option in respect of the north-eastern corner apartment. After some contractual negotiations during 2007, the parties executed a Residents Agreement on or about 31 August 2007. The contract included special conditions drafted by the plaintiffs' solicitor. On 23 October 2007, the plaintiffs paid a deposit of $20,000. Mr Girolamo undertook some design work in relation to the apartment in close consultation with Mr Stone.

The plaintiffs secure apartment 107 in the north-western corner

122 In May 2008, the defendants advised the plaintiffs that an apartment in the north-western corner of the top floor of building 4 had become available. The plaintiffs accepted the defendants' offer of the north-western apartment and instructed Mr Girolamo to prepare an amended floor plan for what became apartment 107. Mr Girolamo prepared a series of drawings, including one showing differing ceiling heights in the apartment, being heights between 2400 mm and 2700 mm.

Communications between Mr Stone and Mr Girolamo as to ceiling height

123 In November 2008, Mr Stone met Mr Girolamo and advised him that the plaintiffs wanted a uniform ceiling height of 2700 mm in their apartment. By January 2009, construction work on building 4 was underway. Mr Girolamo wrote to the plaintiffs confirming that the windows on the northern façade of their apartment would be 2700 mm high. On 26 February 2009, Mr Girolamo met with Mr Stone and confirmed that there would be "no lowered ceilings" in their apartment. Subsequently Mr Girolamo produced further design drawings. They were submitted to Mr Stone for his approval. Amongst the drawings he prepared was drawing 06375-06-26 (drawing 06-26) dated 30 October 2009. It included a ceiling plan for apartment 107 showing a uniform ceiling height of 2700 mm.

Execution of contract in relation to apartment 107

124 On 4 November 2009, the plaintiffs' solicitor wrote to Mr Smallacombe with a new draft of the proposed special conditions for apartment 107, based on the special conditions previously agreed. The letter proposed a base price for the right to occupy apartment 107 of $1,458,120.

125 The letter further proposed a payment schedule of $500,000 to be paid on the handover of the completed shell, $480,000 to be paid within 60 days thereafter and the balance to be paid within 14 days of the adjustment provided for in the special conditions, namely a reduction in the base price by a sum representing the cost of the finishes and appliances not provided by the defendants but which were included in the base price.

126 The plaintiffs' solicitor asked the defendants to prepare a new Residents Agreement. By 22 December 2009, the parties had executed the contract.

The fit-out and handover of apartment 107

127 In February 2010, the defendants granted the plaintiffs access to the building site to enable the plaintiffs' fit out works to commence. Mr Stone became dissatisfied with particular aspects of the building works undertaken by the defendants. He raised his complaints with Mr Girolamo and Mr Bowie (the building supervisor).

128 On 26 August 2010, the defendants' manager, Mr Paul Stanton, wrote to the plaintiffs advising that building 4 was near completion. He referred to the payment schedule in the contract mentioned earlier. He wrote that he would advise in due course the balance to be paid for the completed fit-out once the appropriate adjustments had been made. In the meantime he sought payment in accordance with the agreed schedule.

129 On 3 September 2010, Mr Pruszinksi sent an email to Mr Stanton confirming that the shell of the plaintiffs' apartment was complete. On 27 September 2010, Mr Girolamo sent an email to Mr Stanton referring to an inspection he and Mr Stone had conducted of the plaintiffs' apartment on 24 September 2010, and advising that the shell of the apartment had reached practical completion, although there were outstanding defects in the shell that needed to be addressed.

130 On 29 September 2010, the plaintiffs paid the defendants the first instalment of $500,000 under cover of a letter stating that the payment was made on a without prejudice basis as the shell was not yet complete. Thereafter Mr Stone continued to complain about various defects.

131 On 29 December 2010, the defendants wrote to the plaintiffs requesting payment of the second instalment of $480,000. On 24 January 2011, the plaintiffs wrote to Mr Stanton in response to the request for payment. They said that the apartment was not complete as it was not free of defects. They sought confirmation of when they could expect handover of a completed shell to occur.

132 On 11 March 2011, Mr Stone prepared a list of outstanding defects and proposals for rectification work to be undertaken by the defendants. He gave it to the defendants. It included a complaint that the ceiling height was not 2700 mm in accordance with the plans. It asserted that the ceiling was 40 mm under specification, resulting in a permanent loss of amenity. It did not propose any rectification work in relation to this complaint.

133 The discrepancy in relation to the height of the ceiling in apartment 107 had come to the attention of the plaintiffs some time in early 2011, after the joinery was installed and the plaintiffs noticed that something was wrong in relation to the space between the top of the cupboards and the ceiling.

134 On 15 March 2011, there was a meeting between the defendants and the plaintiffs to address the plaintiffs' complaints. It quickly became acrimonious.

The defendants agreed to address some of the plaintiffs' complaints. There was no agreement to undertake any rectification work in relation to the ceiling height. In examination-in-chief Mr Stone said he raised the defect in the ceiling height but "it was let go through to the keeper". However, in cross-examination Mr Stone gave evidence that Mr Chappel said "we're not doing anything" in relation to the ceiling height. The trial judge did not accept that evidence. He said it was not consistent with the evidence that Mr Stone gave in chief, and Mr Chappel had no recollection of saying such a thing. The trial judge found that Mr Stone did not ask that anything be done in this regard.

135 On 5 April 2011, Mr Stone wrote to Mr Stanton threatening to refer the dispute in relation to defects for dispute resolution under the contract.

136 On 18 April 2011, the project architects certified that the works in relation to building 4 had reached completion. Mr Stanton wrote to the plaintiffs asking them to finalise the transaction in accordance with the contract.

137 In May 2011, the defendants withdrew the plaintiffs' access to the building site because of their failure to make the payments due under the payment schedule in the contract. On 11 July 2011, the defendants, by their solicitors, issued to the plaintiffs a notice to remedy breach due to their failure to pay the sum of $480,000. By letter dated 15 July 2011 from their solicitors, the defendants responded to the plaintiffs' 11 March 2011 list of defects, indicating in respect of the complaint about the ceiling height that they did not propose to take any action.

138 On 26 July 2011, the plaintiffs, by separate bank cheques, paid the sums of $480,000 and $457,120 to the defendants under protest. A few weeks later the defendants permitted the plaintiffs access to the building to complete the fit-out of apartment 107, and on 1 October 2011 the plaintiffs took up residence in apartment 107.

139 On 16 November 2011, the plaintiffs issued the defendants a notice to make good in relation to particular defects they alleged existed. The notice did not refer to the reduced ceiling height.

The contract

140 As mentioned, the contract is entitled Residents Agreement and was executed on or about 22 December 2009.

141 Pursuant to the contract, the defendants, as Operator, granted the plaintiffs, as Resident, a licence to occupy apartment 107 and use the common areas. The plaintiffs had a right to quiet enjoyment of the apartment, subject to a right of the defendants to enter at any time in the case of emergency or upon reasonable notice to inspect or carry out repairs and maintenance.

142 The contract included within its annexures plans of the apartment and a plan of the property showing the location of the building in which the apartment was located (namely building 4).

143 The contract provided that the Resident's right of occupancy will terminate on the earliest of the death of the Resident or the survivor, the Resident giving the Operator 14 days' notice in writing that they wish to terminate, or the Operator terminating the Resident's right of occupation in any of the circumstances entitling it to terminate pursuant to the *Retirement Villages Act 1987* (SA). In consideration for the right to occupy apartment 107, the Resident agreed to pay the Operator an amount by way of interest free loan. In the case of the plaintiffs, that loan was $1,458,120 payable by instalments on the periodic basis mentioned earlier in these reasons.

144 An important aspect of the contract was the obligation to repay the loan. The obligation to repay the loan was subject to specified adjustments set out in the contract. The obligation on the Operator to repay the loan varied depending on whether upon termination the Operator elected to relicense the apartment or not. In the usual course, it would be expected that the apartment would be relicensed. If the apartment were relicensed, the Operator was to repay the loan within 12 calendar months of the apartment being vacated or 10 business days after receipt of the next loan, whichever was the earliest. If the Operator elected not to relicense the apartment, it was to repay the loan within 60 business days of notice to the Resident of that decision. The contract then provided for offsets and adjustments to the amount of the loan to be repaid. The offsets included a deferred management fee as well as repayment deductions.

145 In addition to the repayment of the loan, the contract prescribed a mechanism for assessing the value of the apartment at the time of termination and making payments between the parties based on any movement in the value of the apartment over the period of the occupancy. The mechanism involved what is described as a value adjustment supplement or deduction. A value adjustment supplement was to be paid to the Resident or a value adjustment deduction deducted from monies otherwise payable to the Resident. The supplement or deduction was calculated in accordance with a formula prescribed in the contract. The formula provided that if the value of the apartment increased over the term of the occupancy, the Operator would pay the Resident a supplement on a sliding scale depending upon the period of occupancy. Conversely, if the value of the apartment decreased over the term of the occupancy, a deduction was to be made by the Operator in accordance with a similar sliding scale.

146 The contract provided for certain covenants granted by the Resident, including an agreement by the Resident not to make any alterations to the apartment without the prior written consent of the Operator. That covenant was reinforced by a provision that the Resident not damage any structure nor make any alteration or addition to any apartment without written approval of the

Operator. The contract also provided that the Resident was not to use any part of the property in a manner that may unreasonably interfere with the use and enjoyment of any other Resident.

147 Importantly, the contract included the special conditions found in annexure 1 to schedule 9, which were drafted by solicitors for the plaintiffs. Those special conditions applied to the construction of the plaintiffs' apartment. They were in the following terms:

> The Operator and the Resident agree that the following shall apply in respect to the construction of the Apartment:
>
> 1. That the Resident has agreed to purchase a specifically designed Apartment and finish it to a higher standard than that offered by the Operator and in finalising the Apartment the Resident will use the services of the project architect Pruszinski Architects.
>
> 2. To achieve the intention in paragraph 1 the Operator shall be responsible to construct the shell and framework of the Apartment generally in accordance with the plans as attached ("the plans"). The parties agree that without limiting the generality of the preceding paragraph the Operator shall be responsible to provide an unpainted finished shell which shall include all walls and door frames in position, finished slab floors, electrical and gas plumbing penetrations all as detailed in the plans, all specified air conditioning plant and ductwork, ceiling and wall insulation, hot and cold water penetrations and all outside aluminium windows and sliding doors ("the Works").
>
> 3. The parties acknowledge that it is the intention of the parties that the Resident will fit out the Apartment at their costs and propose to use fixtures, finishes and appliances not normally provided by the Owner. The Resident agrees to use Pruszinski Architects to design and oversee the fit out to be carried out by the Resident.
>
> 4. The Resident will be directly responsible for all of the Architect's costs in respect to the design and supervision of the fit out by the Resident.
>
> 5. The Operator shall execute or cause to be executed all the works.
>
> (a) in accordance with the plans; and
>
> (b) in a proper and workmanlike manner and to Australian Best Practice Standards; and
>
> (c) under the control and supervision of a licensed builder.
>
> 6. The Operator shall allow the Resident and/or their authorised agents in the presence of the Architect or Project Manager access to the Apartment as and when reasonably required by the Resident during the course of construction of the Works to view the progress of construction.
>
> 7. (a) The parties further acknowledge that the price quoted by the Operator for the Apartment (being the Loan under this Residents Agreement) to be completely finished to the Operator's normal specifications and using its

normal selections is $1,458,120.00 ("the base price"). The parties further agree that on the basis that the Resident will be completing the fit out of the Apartment at their costs, and that the price to be paid by the Resident shall be the base price less the costs of the finishes, and appliances that are not provided by the Operator but which have been included in the base price including but not limited to the costs of carpets, tiling, cupboard painting, light fittings and air conditioning vents.

(b) The parties shall endeavour to agree the amount of the relevant costs that are to be deducted from the base price and to assist in this process the Operator shall provide the Resident with a detailed Schedule setting out what costs the Operator considers should be deducted from the base price.

(c) If there is a dispute as to what the costs are to reduce the base price, the costs shall be determined by a quantity surveyor approved by Pruszinski Architects and such Quantity Surveyor shall be deemed to be an expert.

(d) Part 4 of the Summary Information is amended to reflect this paragraph the intention being that the Loan amount shall be the base price less the deductions referred to in paragraph 5 plus the costs incurred by the Resident in completing the upgraded fit out and as certified by Pruszinski Architects.

Breach of contractual term as to ceiling height

148 The trial judge held it was a term of the contract that the ceiling height in the apartment would be 2700 mm, and that the defendants breached this term. While these matters are not in issue on the appeal, it is convenient to summarise the trial judge's reasoning by way of background to the matters that are in dispute.

149 The body of the Residents Agreement made no reference to the ceiling or its height. As the trial judge observed, the crucial provisions were clauses 2 and 5 of the special conditions.

150 Clause 2 made the defendants responsible "to construct the shell and framework of the Apartment generally in accordance with the plans as attached ("the plans")." The clause went on to describe "the Works" to be carried out in general terms. The trial judge held that it was implicit in this clause that the ceilings and walls formed part of the works the defendants were to construct.

151 Clause 5 provided that the defendants "shall execute or cause to be executed all the works (a) in accordance with the plans; and (b) in a proper and workmanlike manner to Australian Best Practice Standards …"

152 The trial judge explained that no plans were attached to the contract. As mentioned, there were three plans or drawings included in, or embodied within, the contract document. However, these were not plans "attached" to the contract, and were in any event not plans which made any reference to the height of the ceiling.

153 The trial judge reasoned that, through the terms of clauses 2 and 5 of the special conditions, the parties evinced an intention that the works that were to be carried out by the defendants be carried out in accordance with detailed plans. As there were in fact no plans "attached" to the contract, the parties must have intended that the apartment be constructed in accordance with the specifications in the plans drawn in relation to its construction; that is, all plans that were issued "for construction"[49] of the shell of apartment 107.

154 The trial judge said that it was unnecessary to identify all of the plans. It was sufficient that he was satisfied that the reference to "the plans as attached" was intended by the parties to include the ceiling plan in drawing 06-26. That was one of the plans issued "for construction" prior to the execution of the contract, and specified a ceiling height of 2700 mm above floor level.

155 The trial judge then turned to the provision in clause 2 of the special conditions that construction was to occur "generally" in accordance with the plans. His Honour held that this expression (when read in the context of clause 5 of the special conditions, and the surrounding circumstances) qualified only the obligation on the defendants to construct the shell and framework in accordance with the specifications in the plans to the extent that they were not required to perform all of the construction work specified in those plans. Some of the work was to be undertaken by the plaintiffs (through their architect assisting them with the fit-out). The trial judge rejected the defendants' contention to the effect that the reference to "generally" meant that it was not necessary to comply strictly with the plans, such that the defendants' contractual obligation as to the ceiling was satisfied if it was constructed generally in compliance with, or in the vicinity of, the stipulation of 2700 mm.

156 The trial judge held that to the extent the defendants were obliged by the contract to perform construction work, they were required to do so in accordance with the specifications in the plans, and to perform that work in a proper and workmanlike manner and in accordance with accepted Australian construction standards. While clause 5 referred to "Australian Best Practice Standards", there was no evidence to suggest that any such standards existed. The trial judge held that the parties intended by these words that the works would be undertaken in accordance with accepted Australian construction standards.

157 The trial judge held that the construction of the ceiling in a proper and workmanlike manner permitted some departure from the specified height in the plans in accordance with accepted Australian construction standards. He held that those standards recognised that there was some tolerance in meeting specifications in undertaking building work. The evidence was that accepted Australian construction standards recognised that specifications could not always be met precisely. The extent of the permitted tolerance varied from jurisdiction

[49] The evidence was to the effect that it was industry practice to build to the "for construction" versions of the plans, these having been prepared by the architects and approved by the defendants.

to jurisdiction and was not always precise. There was no specific established industry standard tolerance for ceiling heights.

158 The trial judge was satisfied on the evidence that accepted Australian construction standards permitted a departure of up to plus or minus 20 mm in a construction of a ceiling to a specification of 2700 mm in height. The trial judge made this finding based on the evidence of the engineering experts, Mr Hayden and Mr Whelan. While accepting evidence to the effect that it was possible to construct a ceiling closer than 20 mm to specification, the trial judge did not consider that the requirement in a contract that the shell be constructed to Australian best practice standards imposed an obligation to build to some stricter tolerance.

159 Turning to the issue of breach of the contractual term as to ceiling height, the trial judge reasoned that in determining the ceiling height the relevant reference point was the distance from the top of the concrete floor slab to the underside of the plasterboard ceiling. His Honour rejected contentions that the height was to be measured by reference to any point higher than the underside of the ceiling, or from the top of the floor coverings. As to the former, this overlooked that the critical matter was the internal space of the apartment. The latter overlooked that the builder constructing the shell could not be expected to know the depth of the floor coverings.

160 The trial judge noted the parties' agreement that the height of the ceiling in the plaintiffs' apartment was in the range of 32 to 57 mm below the specified height of 2700 mm, as measured from the top of the concrete slab to the underside of the plasterboard ceiling. The average height was 48 mm below the specified height. At no point did the ceiling reach the specified height.

161 The trial judge found that the height of the ceiling was thus outside the acceptable tolerance under Australian construction standards. Those standards, given the tolerance of 20 mm, in effect required that the ceiling be constructed to a height within a range of 2680 to 2720 mm. The trial judge held that this did not occur, and it followed that the ceiling was not constructed to the specifications in the plans. Accordingly the trial judge found that the defendants, in constructing the ceiling to a height of an average 48 mm less than the specified height, breached the contract.

Damages for breach of the contractual term as to ceiling height

162 The plaintiffs sought an award of damages for breach of the contractual term as to ceiling height, assessed by reference to the cost of the rectification work required to raise the ceiling height in their apartment to 2700 mm.

The evidence

163 The trial judge made a number of observations and findings relevant to this aspect of the claim.

164 First, the trial judge summarised the evidence from the engineers called by the plaintiffs and defendants, Mr Hayden and Mr Whelan respectively, as to the nature and feasibility of rectification work required to raise the ceiling to a height of 2700 mm above the floor level.

165 The trial judge noted that the two experts agreed that there were at least two obstacles to raising the ceiling in the plaintiffs' apartment to the specified height. First, even after it was cut back, the steel beam RB5 was still too deep to permit the ceiling to be reconstructed to a height of 2700 mm. Secondly, the steel beam SB7 was deeper than RB5 and, accordingly, it also prevented the ceiling being raised to the specified height.[50]

166 Both Mr Hayden and Mr Whelan agreed that it was possible for RB5 and SB7 to be cut and suitably reinforced so as to ensure the roof had the necessary stability and strength to create sufficient space to allow the ceiling to be raised to a height of 2700 mm. Of course, this could only occur after the existing ceiling had been removed. The modification to RB5 required cutting the beam and the installation of inverted T-sections which would provide the requisite stiffness for the beam. The T-sections would be stitch welded to the cut beam. A supporting column would also have to be inserted into the party wall between the plaintiffs' apartment and the adjoining apartment

167 Mr Whelan had some doubts about the practicability of undertaking the work on the beams. He was sceptical whether a tradesperson could obtain sufficient access and workspace to undertake effectively the modification work on the beams because the underside of the beams would limit the height at which the tradesperson could undertake the work. However, he ultimately said that it was possible for the work to be undertaken.

168 Mr Whelan and Mr Hayden disagreed as to whether the fire risk that the work would create could be managed effectively. Mr Hayden thought it could be done with the use of fire blankets. Mr Whelan doubted that the risk could be managed effectively. He considered there was a real risk of sparks flying into the ceiling. He thought overcoming the risk would be extremely difficult.

169 There was also some difference in emphasis between Mr Hayden and Mr Whelan in relation to the amount of noise and dust that would be generated by the works required to rectify the ceiling height and the potential for disruption to other residents from this work.

170 Both agreed that the full extent of the works required could not be known until the ceiling was demolished.

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[50] The alterations to the original design to include the use of steel beams RB5 and SB7 are explained later in these reasons.

171 Secondly, as to the likely cost of the rectification works, the trial judge noted the evidence of Mr Deans, a quantity surveyor, that if the rectification works were now undertaken to raise the ceiling to the height of 2700 mm above the floor level, it would cost $331,188. This estimate was based on Mr Hayden's opinion of the required works.

172 Thirdly, the trial judge noted the valuation evidence called from the parties' respective valuers, Mr Fudali and Mr Carter. Mr Fudali, the plaintiffs' valuer, valued the plaintiffs' apartment at $1,500,000 as at 11 December 2009, at $1,575,000 as at 1 October 2011 and at $1,650,000 as at 11 March 2015. He agreed under cross-examination that the base price of $1,458,120 represented fair market value in 2009. Mr Carter concluded that a 40 mm differential in the ceiling height of the plaintiffs' apartment would have no conscious effect on a potential consumer's outlook, and that the consumer's value judgment on the space or area of the apartment would therefore not be affected. It would not impact their purchasing decision and hence the value of the apartment. He explained that by reason of the consistent ceiling height throughout the apartment, and the large size and bright light of the apartment, there was no sense of a low ceiling, and a person's attention would not be directed to the ceiling height. The design of the apartment was such that a person's view was taken northwards out to the balcony such that a discrepancy in ceiling height was unnoticeable.

173 Fourthly, the trial judge accepted the plaintiffs' evidence that they wish to undertake the rectification of the ceiling height. His Honour accepted that if the Court were to make orders requiring the rectification work to be undertaken the plaintiffs would do so.

Trial judge's rejection of the claim for rectification damages

174 The trial judge rejected the claim for rectification damages on three alternative bases.

175 The first basis was a finding that the conduct of the plaintiffs in occupying the apartment on 1 October 2011 constituted an election by them that was inconsistent with any continued claim that the defendants were obliged to complete the works by raising the ceiling height in their apartment. His Honour held that this precluded the plaintiffs from claiming damages on the basis of rectification. There was an inconsistency in conduct by them in preventing the defendants from rectifying the ceiling height and claiming damages on the basis of the costs of that rectification work.

176 The second and third bases both related to the principle or rule in *Bellgrove v Eldridge*,[51] as confirmed by the High Court in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*.[52] The trial judge described these cases as authority for two

[51] *Bellgrove v Eldridge* (1954) 90 CLR 613.
[52] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272.

propositions. First, that the measure of damages recoverable by a building owner for a breach of a building contract is the cost of making the work substantially conform to the contract, together with consequential loss. Secondly, that this principle is subject to the qualification that the works undertaken to produce conformity must be necessary and in the circumstances reasonable.

177 The second basis for rejecting the claim for rectification damages was the trial judge's holding that the plaintiffs' case did not fall within the rule in *Bellgrove*. The trial judge reasoned that despite the ceiling height involving a breach of contract, it was still "substantially in accordance with the contract."

178 The third basis was that even if the rule in *Bellgrove* did apply, this was one of the "fairly exceptional cases" that falls within the qualification to the rule in *Bellgrove*. The trial judge held that it would be unreasonable to undertake the work necessary to raise the ceiling to the specified height of 2700 mm. The trial judge gave five reasons for so holding, which I consider later in these reasons.

179 On appeal, the plaintiffs challenged all three of the bases given for rejecting their claim for damages assessed by reference to rectification costs.

Election not to seek rectification damages

180 The common law doctrine of election operates in circumstances where a person has alternative but inconsistent rights available to them. If that person, knowing of the facts giving rise to those rights, engages in conduct that evinces an unequivocal election to pursue one of those competing rights, then the other right is no longer available. The enjoyment of one right results in the extinction of the other inconsistent right.[53]

181 The doctrine of election may operate, for example, where there has been a breach of contract giving the innocent party a right to terminate the contract. The innocent party need not accept the repudiatory breach and terminate the contract. He or she may choose to treat the contract as remaining on foot, and insist upon further performance. However, the exercise of rights available only if the contract remains on foot, despite knowledge of a breach entitling one party to bring the contract to an end, will constitute an election to maintain the contract on foot.[54]

182 In the present case, the trial judge acknowledged that the plaintiffs did not ever expressly give up their claim that the defendants had not constructed the ceiling to the specified height, that the defendants had therefore not completed the ceiling in accordance with the contract, and that the defendants remained obliged to do so. The trial judge nevertheless held that the plaintiffs' conduct in

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[53] *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [58]; *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 641, 646, 655-656.
[54] *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [58].

taking possession of the apartment, completing the fit-out and commencing residential occupation on 1 October 2011 constituted an election by them.

183 His Honour said that the nature of the election of was two-fold. First, they elected not to rescind the contract. Secondly, they elected to abandon any right to claim specific performance of the contract by way of requiring the defendants to rectify the defect by raising the height of the ceiling to meet the specifications in the plans. His Honour reasoned that there was an inconsistency between taking up residential occupation of the apartment and insisting that the defendants raise the height of the ceiling. His Honour added:

> I form this view notwithstanding the plaintiffs' insistence that the court should award damages based on the costs of rectification of the ceiling height and order the defendants to permit the plaintiffs to undertake such work. Once the plaintiffs had commenced occupation of the premises, the defendants had no practical means of rectifying the ceiling height had they been so inclined (which they were not). Nonetheless, the commencement of occupation of the apartment by the plaintiffs prevented the defendants from completing the works in accordance with the contract.

184 I agree that by taking possession, completing the fit-out and commencing residential occupation, the plaintiffs elected to treat the contract as remaining on foot, and thereby lost any right they might have had to rescind or terminate the contract on account of the deficiency in the ceiling height. There is a clear inconsistency between rights premised upon the contract subsisting and treating the contract as having been rescinded or terminated.

185 However, I do not agree that by taking possession, completing the fit-out and commencing residential occupation, the plaintiffs acted in a manner necessarily inconsistent with any rights they had to specific performance or rectification damages (this being the monetary equivalent of specific performance). While the plaintiffs' conduct assumed the continued subsistence of the contract, so too does the pursuit of the remedies of specific performance or rectification damages.

186 To the extent that there is any inconsistency between the plaintiffs' claim and their conduct it arose from their conduct representing a practical impediment to any contemporaneous rectification work by the defendants. But in circumstances where, as the trial judge accepted, the defendants had made it plain that they did not intend to undertake any rectification of the ceiling height,[55] I do not consider there was any relevant inconsistency in the plaintiffs' conduct.[56]

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[55] For example, through the appendix to a letter from the defendants' solicitors dated 15 July 2011, in response to the plaintiffs' 11 March 2011 list of defects. That list had included the ceiling height discrepancy, and the defendants' response was that "[t]he Operator does not propose to take any action in relation to this issue."

[56] There is some analogy with *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184 at [124]; cf *Roger & Keene v Clarendon Homes NSW Pty Ltd* [2010] NSWCTTT 267, where a similar issue in relation to ceiling height arose during the course of the building work, but the owner expressly authorised the builder to continue the work and complete the building with the lower ceiling,

187 It is also significant in this case that the remedy sought by the plaintiffs is not specific performance of the contract. While the plaintiffs seek damages predicated upon the rectification work being carried out, or at least assessed by reference to the cost of that work, it is not a necessary part of that remedy that the defendants be ordered to carry out that work, or even that they permit the plaintiffs to have that work carried out. The likelihood or otherwise of the work in fact being carried out may be a relevant consideration in determining whether it is appropriate to make an award of rectification damages.[57] But that is a separate matter, and does not give rise to any relevant inconsistency for the purposes of the operation of the doctrine of election.

188 Further, and in any event, the quantification of the amount claimed by way of rectification damages sought by the plaintiffs is based upon the work being carried out after completion of the fit-out, and hence not at the time, or in the circumstances, that existed prior to the plaintiffs' conduct in taking possession and undertaking the fit-out. The judge accepted the evidence of the engineers to the effect that rectification of the ceiling height remained possible. This is a further reason why there is no inconsistency between the plaintiff's conduct and the relief sought in these proceedings. The very significant cost that would now be required to carry out the rectification work may again be relevant to whether it is appropriate to make an award of damages. But there has been no election by the plaintiffs to pursue rights inconsistent with a right to the relief now sought.

189 While the trial judge used the expressions "abandonment" and "approbate and reprobate" in his reasons, I do not understand his Honour to have invoked any doctrine separate from the doctrine of common law election in holding that the plaintiffs were precluded from seeking rectification damages. The parties have not suggested otherwise. In any event, the conduct of the plaintiffs in not actively pursuing their claim that the defendants carry out the rectification work for a period of some months in 2011 falls short of what would have been necessary to warrant a conclusion that the plaintiffs either abandoned their right to seek rectification damages, or approbated and reprobated in respect of the same. At no point did the plaintiffs ever give any indication that they were not intending to pursue whatever contractual entitlement to damages that they might have based upon the deficiency in the ceiling height.

190 For these reasons, the trial judge erred in holding that the plaintiffs were precluded by the common law doctrine of election from seeking rectification damages.

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albeit with a reservation of rights by the owner. In that case it was accepted that the owner thereby elected not to seek rectification of the ceiling or damages assessed by reference to the cost of that work. The owner was confined to the diminution in value measure of damages.

[57] See discussion later in these reasons.

The plaintiffs' claim for rectification damages

The general rule in Bellgrove v Eldridge

191 The "ruling principle" in assessing damages for breach of contract is, as stated by Parke B in *Robinson v Harman*,[58] that the plaintiff is entitled to recover the amount necessary to place him or her in the same position as if the contract had been performed.

192 In some cases the focus will be on placing the plaintiff in the same financial position he or she would have been in had the contract been performed. Thus, in the case of the supply of defective goods, the *prima facie* measure of damages is the difference in value between the goods contracted for and the goods supplied (the diminution in value measure of damages). This measure of damages seeks to reflect the financial consequences of a notional transaction whereby the buyer sells the defective goods on the market and purchases the goods contracted for. It thus assumes the contract is for the sale of a marketable commodity.

193 In other cases, where the contract does not involve the sale of a marketable commodity, and hence where it is not possible to sell the defective item and purchase an item conforming with the contract, a different measure of damages may be appropriate.

194 In the case of defective building work, the *prima facie* measure of damages is the cost of rectifying the work so that it conforms with the contract (the rectification measure of damages). This is sometimes referred to as the general rule in *Bellgrove v Eldridge*.[59]

195 In *Bellgrove v Eldridge,*[60] the defendant built a house which, in breach of contract, contained defective concrete and mortar that rendered the foundations unstable. In rejecting the defendant's contention that the plaintiff should be confined to the diminution in value measure of damages, Dixon CJ, Webb and Taylor JJ explained:[61]

> In the present case, the respondent was entitled to have a building erected *upon her land* in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her. This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract.

196 Their Honours gave an illustration of this general rule:[62]

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[58] *Robinson v Harman* (1848) 1 Ex 850 at [855]; 154 ER 363 at 365.
[59] *Bellgrove v Eldridge* (1954) 90 CLR 613.
[60] *Bellgrove v Eldridge* (1954) 90 CLR 613.
[61] *Bellgrove v Eldridge* (1954) 90 CLR 613 at 617.
[62] *Bellgrove v Eldridge* (1954) 90 CLR 613 at 617.

> Departures from the plans and specifications forming part of a contract for the erection of a building may result in the completion of a building which, whilst differing in some particulars from that contracted for, is no less valuable. For instance, particular rooms in such a building may be finished in one colour instead of quite a different colour as specified. Is the owner in these circumstance without a remedy? In our opinion he is not; he is entitled to the reasonable cost of rectifying the departure or defect so far as that is possible.

197 There is a qualification to the general rule in *Bellgrove v Eldgridge*, or the general rule that the plaintiff in a defective building case is entitled to the rectification measure of damages. The qualification is that the rectification work must be "necessary to produce conformity" with the contract, and must be a "reasonable course to adopt."[63]

198 The example that their Honours gave of rectification work that would be unreasonable was as follows:[64]

> No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks.

199 In *Bellgrove v Eldridge* the Court accepted that demolition and rebuilding of the house was necessary and reasonable to provide a building in conformity with the contract. It was thus appropriate that the plaintiff recover damages reflecting the cost of this rectification work.

200 The general availability of rectification damages reflects the importance that the law of contract attaches to the plaintiff's performance interest.[65] That is, it reflects the plaintiff's interest in securing performance of the contract, even if that reflects some subjective aesthetic or eccentric benefit bargained for by the plaintiff rather than some objective financial benefit. It permits the recovery of damages assessed by reference to the performance the plaintiff bargained for, rather than confining the plaintiff to compensation for the loss of the objective financial or economic benefits of performance.

201 As Oliver J explained in *Radford v De Froberville*[66]

> Now, it may be, viewed objectively, it is not to the plaintiff's financial advantage to be supplied with the article or service which he has stipulated. It may be that another person might say that what the plaintiff has stipulated for will not serve his commercial interests so well as some other scheme or course of action. And that may be quite right. But that, surely, must be for the plaintiff to judge. Pacta sunt servanda. If he contracts for the supply of that which he thinks serves his interests – be they commercial, aesthetic or merely eccentric – then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being

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63 *Bellgrove v Eldridge* (1954) 90 CLR 613 at 618.
64 *Bellgrove v Eldridge* (1954) 90 CLR 613 at 618.
65 Sometimes also referred to as the plaintiff's expectation interest.
66 *Radford v De Froberville* [1977] 1 WLR 1262 at 1270.

> provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.

202 The qualification to the general rule must thus be understood as a limitation upon the law of contract's preparedness to give effect to the plaintiff's interest in the performance of the contract. The rationale for, and content of, this limitation is a matter to which I shall return later in these reasons.

Defective building work cases after Bellgrove v Eldridge

203 There are a number of building cases involving illustrations of the general rule and its qualification that were decided between the High Court's decision in *Bellgrove v Eldridge* and its most recent consideration of these matters in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd.*[67] I propose to address only those that featured in the parties' submissions in this case.

204 In *Ruxley Electronics & Construction Ltd v Forsyth*[68] the House of Lords rejected a claim for £21,560 in damages to rectify a swimming pool that was nine inches less in depth than the contract specified. In rejecting the claim for rectification damages, and confining the plaintiff to damages reflecting the diminution in value occasioned by the breach, their Lordships held that the expenditure necessary to rectify the defect was not reasonable.

205 Lord Jauncey identified the following findings of fact made by the trial judge as relevant:[69]

> (1) the pool as constructed was perfectly safe to dive into; (2) there was no evidence that the shortfall in depth had decreased the value of the pool; (3) the only practicable method of achieving a pool of the required depth would be to demolish the existing pool and reconstruct a new one at a cost of £21,560; (4) he was not satisfied that the respondent intended to build a new pool at such a cost; (5) in addition such cost would be wholly disproportionate to the disadvantage of having a pool of a depth of only 6 feet[70] as opposed to 7 feet 6 inches and it would therefore be unreasonable to carry out the works; and (6) that the respondent was entitled to damages for loss of amenity in the sum of £2,500.

206 In explaining the role of unreasonableness in the context of the qualification to a plaintiff's general right to rectification damages, Lord Jauncey said that it formed part of the inquiry into whether the plaintiff had suffered loss. His Lordship said:[71]

> Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of

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67 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272.
68 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344.
69 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 354-355.
70 The pool was 6 feet 9 inches deep at its deepest point, although only 6 feet at the point where people would most likely dive.
71 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 357 (omitting citations).

an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate. A failure to achieve the precise contractual objective does not necessarily result in the loss which is occasioned by a total failure. This was recognised by the High Court of Australia in the above cited passage in *Bellgrove v Eldridge*, where it was stated that the cost of reinstatement work subject to the qualification of reasonableness was the extent of the loss, thereby treating reasonableness as a factor to be considered in determining what was that loss rather than, as the respondents argued, merely a factor in determining which of two alternative remedies were appropriate for a loss once established. Further support for this view is to be found in the following passage in the judgment of Sir Robert Megarry V.-C. in *Tito v Waddell (No. 2)* [1977] Ch. 106, 332:

> "Per contra, if the plaintiff has suffered little or no monetary loss in the reduction of value of his land, and he has no intention of applying any damages towards carrying out the work contract for, or its equivalent, I cannot see why he should recover the cost of doing work which will never be done. It would be a mere pretence to say that this cost was a loss and so should be recoverable as damages."

207 His Lordship emphasised that what constitutes loss is a matter of fact and degree. His Lordship explained:[72]

> Where the contract breaker has entirely failed to achieve the contractual objective it may not be difficult to conclude that the loss is the necessary cost of achieving that objective. Thus if a building is constructed so defectively that it is of no use for its designed purpose the owner may have little difficulty in establishing that his loss is the necessary cost of reconstructing. Furthermore in taking reasonableness into account in determining the extent of loss it is reasonableness in relation to the particular contract and not at large. Accordingly if I contracted for the erection of a folly in my garden which shortly thereafter suffered a total collapse it would be irrelevant to the determination of my loss to argue that the erection of such a folly which contributed nothing to the value of my house was a crazy thing to do.

208 His Lordship contrasted the situation where the contractual objective has been achieved to a substantial extent. In that case, as his Lordship explained, the plaintiff had acquired a perfectly serviceable swimming pool, albeit one lacking the specified depth. The plaintiff's loss was thus not the lack of a useable pool with the consequent need to construct a new one.[73] His Honour added:[74]

> Indeed were he to receive the cost of building a new one and retain the existing one he would have recovered not compensation for loss but a very substantial gratuitous benefit, something which damages are not intended to provide.

209 Lord Jauncey added that whether or not the plaintiff intended to carry out the reinstatement work would not ordinarily be a matter of concern for the court. Irreparable damage to an article as a result of a breach of contract would ordinarily entitle the owner to recover its value regardless of whether the plaintiff intended to replace it or to spend the money on something else. However, a

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[72] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 358.
[73] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 358.
[74] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 358.

plaintiff's intention to rectify, or lack thereof, might be relevant to the issue of reasonableness, and hence to the extent of the loss that has been sustained.[75] In other words, the absence of an intention to rectify might support a conclusion that it would be unreasonable to do so, or that the plaintiff has not lost anything except the difference in value, if any.[76]

210 Lord Jauncey concluded that while the plaintiff's personal preference was relevant, it cannot be determinative. As it would be unreasonable to incur the cost of demolishing the existing pool and building a new and deeper one, it cannot be said that the plaintiff's loss extended to the cost of reinstatement.[77]

211 Lord Mustill reasoned similarly. While acknowledging the importance to be attached to the plaintiff's contractual choice as to the performance required, his Lordship confirmed that the "reasonableness" limit upon this importance meant that rectification costs would not be recoverable where, as here, they were "wholly disproportionate to the non-monetary loss" suffered by the plaintiff.[78]

212 Lord Lloyd also invoked the "reasonableness" limitation upon a plaintiff's ability to recover the monetary equivalent of specific performance. His Lordship reasoned that a plaintiff would be confined to the diminution in value measure of damages where the rectification cost would be "out of all proportion to the benefit to be obtained".[79]

213 Lords Keith and Bridge agreed with the reasons of Lords Jauncey, Mustill and Lloyd.

214 It is noteworthy that when invoking the notion of proportionality in determining the limits of the availability of rectification damages, Lord Lloyd relied upon the reasoning of Cardozo J in *Jacobs & Youngs v Kent*.[80] In that case the builder, through oversight, used a make of pipes that differed from the contractually specified make, but which was in all other respects identical. In rejecting the customer's claim for the significant cost of replacing the pipes, Cardozo J reasoned:[81]

> In the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing. … It is true that in most cases the cost of replacement is the measure. … The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value.

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75 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 359.
76 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 373.
77 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 359.
78 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 360-361.
79 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 367.
80 *Jacobs & Youngs v Kent* (1921) 129 NE 889.
81 *Jacobs & Youngs v Kent* (1921) 129 NE 889 at 891.

215 In *De Cesare v Deluxe Motors Pty Ltd*[82] the Full Court of this Court was concerned with a claim in relation to a joint venture agreement to build a development of residential units. The building company was placed into liquidation before the units were completed. The entitlement of the plaintiff subcontractor to claim under a worker's lien turned on the proper measure of damages recoverable by the joint venturers. In particular, an issue arose whether the joint venturers were entitled to recover the costs of the significant rectification work required to complete the units, despite them having sold the units before that work was carried out.

216 Doyle CJ addressed the general rule in *Bellgrove v Eldridge*, describing it as being subject to a "controlling factor of unreasonableness."[83] His Honour emphasised that in determining whether rectification costs were recoverable, the focus was the cost of bringing about compliance with the contract, not the amount that the plaintiff proves he or she will, or intends to, spend.[84] As his Honour explained:[85]

> In principle, the owner who chooses to make do with defective contractual performance is entitled still to an appropriate award of damages because that is the measure of what the plaintiff has lost. There are plenty of cases which illustrate that point, and citation of authority is not necessary.

217 Turning to the impact of the sale of the units upon the joint venturers' entitlement to recover damages, his Honour noted the primary judge's finding that, in the circumstances of this case, the sale without the rectification work having been carried out did not provide any basis for contending that the work would have been unreasonable and hence not the measure of the joint venturers' loss. His Honour explained:[86]

> It is common knowledge that sometimes it will suit an owner to sell a defective building as it is, leaving the new owner to complete or repair the work in accordance with the new owner's wishes. In the present case, for what it is worth, there was evidence to suggest that there were financial reasons why the building owner might have found it desirable to effect a quick sale. It is also necessary to repeat that in the present case there is no reason to think that the defective completion of the work had no effect upon the value of the building or upon the utility of the works. The evidence and the magistrate's findings, to the contrary, suggest that the defective works would have had a depreciating effect upon the value of the building and that a purchaser of the building would have found it necessary to carry out certain remedial work at least.

218 Doyle CJ concluded:[87]

> In my opinion the cost of remedying the defective contractual performance remains the primary measure of damages, subject to the test of reasonableness and a careful

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[82] *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28.
[83] *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28 at 31.
[84] *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28 at 31-32.
[85] *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28 at 32.
[86] *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28 at 32.
[87] *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28 at 35-36.

> consideration of what was contracted for and what has been lost. I make these qualifications because the case law makes it quite clear that a plaintiff may recover damages for the completion of a pointless but decorative and desired structure. I make the further point, as is made by their Lordships in *Ruxley Electronics* & *Construction Ltd* v *Forsyth,* that it may be necessary to distinguish between cases in which there has been substantial performance and cases in which there has not.
>
> In my opinion, in the present case, having regard to the findings of the magistrate, it was reasonable for the building owner to carry out the remedial work. Prima facie the building owner was entitled to damages measured according to that cost. There is no doubt at all, in my opinion, that that would be the measure of the damages if the property had not been sold, and that that would have been the measure without inquiry as to the owner's intention to carry out the work.
>
> The performance of that work, and a claim for the cost of doing it, does not cease to be reasonable because the building has been sold. The fact that the building owner in the present case no longer intends to carry out the work throws no light on the reasonableness of doing so. The reasonableness of doing so is to be judged, in a case like this, objectively and does not depend in any way upon an inquiry as to the likelihood of the work in fact being done.
>
> It follows that in my opinion the cost of carrying out the remedial works remains the appropriate measure of damages, and upon the magistrate's findings that led to the conclusion that no moneys were owing to the builder and accordingly there was no fund to which the lien could attach. As a matter of caution, I emphasise once again that in this case, on the evidence and on the findings, it is appropriate to proceed upon the assumption that the defective contractual performance did have some depreciatory effect upon the value of the land and upon the utility of the building. This is not one of those cases like *Ruxley Electronics* & *Construction Ltd v Forsyth* in which one can say that the defective performance had no practical significance, and that one is concerned only with a desire by the building owner to be compensated for non-performance which has had no effect upon the value or utility of the contract works. In the present case the position is the reverse.

219 Nyland J (with whom Bollen J agreed) reached the same conclusion, namely that the appropriate measure of the joint venturers' entitlement to damages was the cost of the rectification works, with the result that they owed no monies to the builder and there was no fund to which the plaintiff's lien could attach.[88]

220 In *Brewarrina Shire Council v Beckhaus Civil Pty Ltd*[89] the plaintiff sought damages from the defendants on account of their defective construction of levee banks intended to protect the town of Brewarrina from inundation by floodwaters from the Barwon River. The New South Wales Court of Appeal upheld an award of damages representing the cost of rectifying the wet side of the levees so as to conform with the contract. However, the Court also upheld the trial judge's application of the qualification to the rule in *Bellgrove v Eldridge* to deny

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[88] *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28 at 42.
[89] *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2006] NSWCA 361.

recovery of the additional cost of rectifying the dry side of the levees. Tobias JA (with whom Giles and McColl JJA agreed) explained:[90]

> … whether the rectification work is a reasonable course to adopt is dependent upon a finding of fact that the proposed work was reasonable in order to achieve the contractual objective. The rectification work would be unreasonable if it was out of all proportion to the achievement of that objective or to the benefit to be obtained therefrom.

221 Tobias JA explained that rectification of the wet side of the levees would result in levees with the equivalent security and capacity to repel floodwater of levees constructed in conformity with the specifications in the contract. This being the contractual objective, it was unreasonable to rectify the dry side of the levees.[91]

222 In *Westpoint Management Ltd v Chocolate Factory Apartments Ltd*[92] the original building owner plaintiff complaining of defects in the building work had sold all the units in the building to unit holders who were not asking that rectification work be carried out. There was no evidence that there had been any diminution in the sale price of the units and no evidence that the purchaser of any unit was seeking to have the alleged defects remedied or was consenting to the obvious inconvenience of having such work done. The original building owner did not propose to carry out the rectification work. The evidence was that it would return the recovered cost of reinstatement to its shareholders.

223 Referring *inter alia* to the decision of this Court in *De Cesare v Deluxe Motors Pty Ltd,* the New South Wales Court of Appeal (Giles JA, McColl and Campbell JJA) acknowledged that neither the sale of the property, nor the absence of an intention by the plaintiff to carry out the rectification work, of themselves displaced the general entitlement to damages in the rectification measure. However, those considerations were potentially relevant in determining whether the rectification works in question were reasonable in order to achieve the contractual objective.

224 As Giles JA (with whom McColl and Campbell JJA agreed) explained:[93]

> But the plaintiff's intention to carry out the rectification work, it seems to me, is not of significance in itself. The plaintiff may intend to carry out rectification work which is not necessary and reasonable, or may intend not to carry out rectification work which is necessary and reasonable. The significance will lie in why the plaintiff intends or does not intend to carry out the rectification work, for the light it sheds on whether the rectification is necessary and reasonable. Putting the same point not in terms of intention, but of whether or not the plaintiff will carry out the rectification work, whether the plaintiff will do so has significance for the same reason, and not through the bald question of whether or not the plaintiff will carry out the rectification work. That question is immaterial, see *Bellgrove v Eldridge*.

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90 *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2006] NSWCA 361 at [89].
91 *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2006] NSWCA 361 at [96]-[97].
92 *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253.
93 *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253 at [60]-[61].

> So if supervening events mean that the rectification work can not be carried out, it can hardly be found that the rectification work is reasonable in order to achieve the contractual objective: achievement of the contractual objective is no longer relevant. If sale of the property to a contented purchaser means that the plaintiff did not think and the purchaser does not think the rectification work needs to be carried out, it may well be found to be unreasonable to carry out, the rectification work. An intention not to carry out the rectification work will not of itself make carrying out the work unreasonable, but it may be evidentiary of unreasonableness; if the reason for the intention is that the property is perfectly functional and aesthetically pleasing despite the non-complying work, for example, it may well be found that rectification is out of all proportion to achievement of the contractual objective or to the benefit to be thereby obtained.

225 In *UI International Pty Ltd v Interworks Architects Pty Ltd*[94] the plaintiff developer sought damages from the defendants in respect of their defective design and construction of certain buildings. Despite having subdivided and sold most of the lots in the development, the plaintiff sought damages reflecting the cost of demolishing and reconstructing the defective buildings. The plaintiff's claim was struck out on the basis that rectification damages were not available in circumstances where the defects had not affected the plaintiff's return from the contractually intended commercial realisation of the development, and rectification could not be carried out because the buyers neither required nor consented to it.

226 The Queensland Court of Appeal (Williams, Keane and Holmes JJA) unanimously dismissed the appeal. Williams JA emphasised the impossibility of carrying out the rectification works. He said:[95]

> There is nothing, in my view, in the decision in *Bellgrove* which supports the proposition that, if the building owner cannot for some reason demolish and re-build, nevertheless the cost of demolishing and re-building is the measure of damages for the breach of contract by the builder. Surely if for some reason demolition and re-building cannot be carried out there is a basis for saying that in the circumstances that is not a "reasonable course to adopt". But even if one rejected that approach one is still faced with the qualification that demolition and re-building must be "possible".

227 His Honour also said:[96]

> Where there has been a supervening event which makes reinstatement impossible then the measure of the building owner's loss is the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials – again to use language taken from *Bellgrove*.

228 Keane JA (with whom Holmes JA agreed) noted that by reason of the sale of most of the lots, the plaintiff was not able unilaterally to carry out the rectification work on the buildings in the development, any decision in that

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[94] *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158.
[95] *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158 at [10].
[96] *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158 at [41].

regard being a matter for persons who are not parties to the plaintiff's action.[97] His Honour held:[98]

> Where, by reason of the ownership of a property by a third party, the repairs cannot be carried out by the claimant, the claimant cannot claim the cost of repairs. In such a case, it is not a matter of the claimant being entitled to do what he or she pleases with his or her property or the damages due to him or her; rather, it is simply that the damage to the claimant's interest in the performance of his or her contract with the builder cannot reasonably be measured by the cost of repair which cannot occur.

229 However, it appears to have been significant to his Honour's conclusion that the sale in this case reflected the plaintiff's contractual expectation. In other words, the contractual objective was a commercial or financial one, with the building being in effect a marketable commodity. His Honour contrasted that case with the situation in *Director of War Service Homes v Harris*[99] where the intervening sale did not reflect the parties' contractual intention. His Honour explained:[100]

> It is to be noted that, in the last sentence in this passage, Gibbs J. does not include as "irrelevant" the fact that the owner has sold the building for full value and cannot effect repairs to it. *Director of War Service Homes v. Harris* was a case where the builder's obligation was to build a structure on the owner's land in accordance with a contractually agreed standard. The fact that the property as developed was subsequently sold by its owner to third parties had nothing to do with the contractual expectations generated by the arrangements between the owner and the builder. That was nonetheless the case even if, as may well have been the case, it was always the owner's private intention so to dispose of the houses. The private intentions of one party must not be confused with the contractual intentions of the parties enshrined in the contract. The point is that there was nothing in that case to suggest that the owner's private intention became a term of the bargain reflecting the owner's expectation interest protected by the contract. In such a case, the sale of the homes was truly "accidental", so far as the contract between the owner and builder was concerned, even though the owner may have intended to on-sell the homes to veterans of war service. In the present case, however, the contractual expectation which the plaintiff claims to vindicate is expressly defined by the statement of claim as an expectation of a marketable commodity. The measure of what is required to vindicate that commercial expectation can readily proceed by a consideration of whether and the extent to which, in the events which have happened, the market has devalued the marketable commodity by reason of the defendants' breaches of contract. The plaintiff's claim for demolition and reconstruction costs cannot be supported as "*prima facie*, the only measure" of the plaintiff's loss.

The High Court decision in Tabcorp Holdings

230 In *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*[101] the High Court considered the general rule in *Bellgrove v Eldridge*. However, it did so in the context of a claim by a plaintiff landlord for breach of an express negative

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97 *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158 at [46].
98 *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158 at [106].
99 *Director of War Service Homes v Harris* [1968] Qd R 275.
100 *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158 at [94].
101 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272.

covenant by the defendant tenant, rather than a claim for defective building work. The plaintiff had granted the defendant a lease of certain office premises. The lease contained a covenant by the defendant not to make or permit to be made any substantial alteration or addition of the demised premises without the written approval of the plaintiff. The defendant commenced and undertook significant alterations to the foyer of the premises without obtaining the plaintiff's consent. The plaintiff sued the defendant.

231 At first instance, the plaintiff was awarded $34,820 in damages, most of which was an assessment of the difference between the value of the premises at the end of the term with the old foyer and the value with the new foyer constructed by the defendant. On appeal to the Full Court of the Federal Court the amount of damages was increased to $1.38 million, representing $580,000 as the cost of restoring the foyer to its original condition and $800,000 for rent lost during the restoration period.

232 In a joint judgment, the High Court dismissed the appeal. The Court commenced its reasoning by reaffirming the "ruling principle" in *Robinson v Harman,* and its application to cases involving defective building work through the general rule in *Bellgrove v Eldridge.* Their Honours held that the same approach was applicable in the case of the negative covenant relied upon by the plaintiff. The plaintiff was contractually entitled to the preservation of the premises without alterations not consented to; its measure of damages was the loss sustained by the failure of the tenant to perform that obligation; and that loss was the cost of restoring the premises to the condition in which they would have been had the obligation not been breached.

233 The defendant had emphasised the trial judge's findings that the plaintiff had erected and leased the building for commercial purposes; that the landlord had never suggested it valued the foyer for its aesthetic qualities as distinct from its "pulling power" as a "leasing tool"; and that the new foyer was no less effective as a leasing tool than the old foyer. However, the Court held that the answer to submissions based on these considerations lay in the passage from the reasons of Oliver J in *Radford v De Froberville*[102] set out earlier in these reasons; that is, it lay in a recognition that the focus must be on the benefit contracted for by the plaintiff, and not some objective assessment of the financial advantage to the plaintiff.[103]

234 The Court next referred to the qualification to the general rule in *Bellgrove v Eldridge,* and the illustration of that qualification given by the Court in that case (the use of new bricks, rather than the contractually specified second-hand bricks, in building a cement rendered wall). Their Honours said:[104]

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[102] *Radford v De Froberville* [1977] 1 WLR 1262 at 1270.
[103] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [16].
[104] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [17].

> That tends to indicate that the test of "unreasonableness" is only to be satisfied by fairly exceptional circumstances. The example given by the Court aligns closely with what Oliver J said in *Radford v De Froberville,* that is, that the diminution in value measure of damages will only apply where the innocent party is "merely using a technical breach to secure an uncovenanted profit".

235 After noting that the unreasonableness qualification was not invoked in *Bellgrove v Eldridge,* the Court held that nothing in the reasoning in that case suggested that when applied to the circumstances under consideration, the course which the plaintiff proposed was unnecessary or unreasonable.[105]

236 The Court then considered the decision of the House of Lords in *Ruxley Electronics & Construction Ltd v Forsyth*.[106] The Court observed that the result at which their Lordships arrived in that case was "on one view inconsistent" with the principles in *Bellgrove v Eldridge* and *Radford v De Froberville*, but said that "for present purposes it is sufficient to say that the facts of *Ruxley Electronics & Construction Ltd v Forsyth*, which their Lordships evidently saw as quite exceptional, are plainly distinguishable from those of the present appeal."[107]

237 The Court concluded that an award of rectification damages was necessary and reasonable in order that the plaintiff secure the benefit of the covenant it contracted for, and dismissed the appeal from the award of damages assessed on that basis.[108]

Defective building work cases after Tabcorp Holdings

238 In *Willshee v Westcourt Ltd*[109] the plaintiff (Mr Willshee) claimed that the defendant (Westcourt) breached a term of a contract for the construction of a house by using inferior or second quality limestone in the external cladding of the house.

239 The trial judge upheld the plaintiff's claim, but awarded damages which reflected only the cost of cleaning and sealing the limestone and some associated repainting. The plaintiff appealed the trial judge's rejection of his claim for damages reflecting the cost of replacing the inferior limestone, which the trial judge had found would be $257,977.91. The trial judge had rejected the proposition that it was reasonable to spend this sum in rectifying defects in a house worth $1.7 million. Invoking the qualification to the rule in *Bellgrove v Eldridge,* the trial judge had held that it would be unreasonable to demolish the entire external cladding of the plaintiff's house, including a substantial number of satisfactory blocks, when the structural integrity of the house was not in doubt and when the plaintiff's complaint was based only on the aesthetic quality of the limestone, about which the contract was silent. The trial judge concluded that the

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[105] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [17].
[106] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344.
[107] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [18].
[108] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [20]-[21].
[109] *Willshee v Westcourt Ltd* [2009] WASCA 87.

claim was analogous to that of the unsuccessful plaintiff in *Ruxley Electronics & Constructions Ltd v Forsyth*.

240 In allowing the appeal, Martin CJ (with whom Buss JA and Newnes AJA agreed) noted that the decision of the High Court in *Tabcorp Holdings* had been handed down since the trial judge's decision. His Honour described the High Court's decision as reaffirming the approach to common law damages in *Robinson v Harman,* as reflected in the present context in the rule in *Bellgrove v Eldridge*. His Honour held that the trial judge's reasoning to the effect that the plaintiff was impermissibly seeking damages based upon some subjective aesthetic standard not reflected in the contract was contrary to the High Court's decision. Martin CJ explained:[110]

> The decision in *Tabcorp* establishes that this process of reasoning is erroneous. Although in the present case there was no express term of the contract relating to the aesthetic standard to be achieved by the limestone cladding, there was a term of the contract which required the limestone cladding to be of high quality. It was breach of that term which resulted in accelerated deterioration of the limestone surfaces which Mr Willshee did not regard as aesthetically pleasing. As the High Court points out in *Tabcorp*, the question of whether or not Mr Willshee's views in this respect are idiosyncratic, or would be shared by others, is not to the point. Mr Willshee entered into a contract which he considered served his interests, and he is entitled to the performance of that contract quite irrespective of the views which other people might form in relation to the advancement of those interests, such as views relating to the aesthetic appearance of the house.

241 Turning to the "unreasonableness" qualification to the general rule in *Bellgrove v Eldridge,* Martin CJ referred to the observations of the High Court in *Tabcorp Holdings* to the effect that it only applied in the fairly exceptional circumstances where the innocent party was merely using a technical breach to secure an uncovenanted profit (quoting from *Radford v De Froberville*[111]).[112] Martin CJ rejected the contention that the qualification applied:[113]

> Applying that test to the circumstances of the present case, it could not be said that Westcourt's breach of contract was, in any sense 'technical'. It was a serious and significant breach, which had a significant impact upon the rate at which the external cladding of the house weathered and deteriorated, and which has had a significant impact upon the appearance of the house.
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> Nor could it be reasonably concluded that Mr Willshee is pursuing his claim in order to secure a profit to which he has no entitlement under the building contract. Mr Willshee gave evidence in the strongest terms of his displeasure upon discovering that a significant part of the limestone used for the external cladding of his house was of inferior quality. That evidence was entirely plausible and reasonable, and was not rejected by the trial judge. Westcourt submits that the evidence does not sustain the conclusion that Mr Willshee will in fact use the damages awarded to undertake the relevant remedial work ...

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[110] *Willshee v Westcourt Ltd* [2009] WASCA 87 at [68] (omitting citations).
[111] *Radford v De Froberville* [1977] 1 WLR 1262 at 1270.
[112] *Willshee v Westcourt Ltd* [2009] WASCA 87 at [69].
[113] *Willshee v Westcourt Ltd* [2009] WASCA 87 at [70]-[71].

> However, there are passages in the evidence of Mr Willshee … which suggest that it is his intention to undertake the reconstruction work in the event that damages are awarded.

242 Martin CJ noted the suggestion in *Bellgrove v Eldridge* that a plaintiff's intention as to whether or not the work would be undertaken was "quite immaterial", but acknowledged that under the more recent formulation in *Tabcorp Holdings* it may have some relevance to the qualification to the general rule. However, the defendant in that case had not established an evidential basis for invoking the qualification on the basis of a lack of intention to carry out the rectification work.[114]

243 Martin CJ distinguished the case from *Ruxley Electronics & Construction Ltd v Forsyth*:[115]

> With respect to the trial judge, that is a very different situation to the present case. In the present case there was a contractual obligation to supply limestone of high quality for use as the external cladding of the house. The external cladding of a house is quite obviously a matter of great significance and importance to its owner. Notwithstanding that contractual obligation, Westcourt installed a significant quantity of limestone which was of inferior quality, with the result that it deteriorated rapidly, necessitating significant remedial work. Even though the deterioration did not adversely affect the structural soundness of the building, it was nevertheless material to the calibre and quality of the building supplied, when compared to the calibre and quality of the building for which Mr Willshee contracted.

244 Having concluded that the plaintiff was not relying upon a technical breach to obtain an award of damages that would result in a profit outside the terms of the contract, Martin CJ allowed the appeal, and awarded the plaintiff the sum of $295,216.91 (being the $257,977.91 cost of the rectification works, with some additional associated costs), plus $5,000 on account of the distress and inconvenience associated with the breach of the building contract.[116]

245 In *Unique Building Pty Ltd v Brown*[117] the plaintiffs contracted the defendant to build four townhouses. The trial judge found various defects in the defendant's building work, including that the floor slab was not square with the boundaries of the property (which resulted in a laundry that was reduced in size and unable to accommodate the planned shower), that the western edge of the slab encroached upon the neighbouring property (with the result that the side door of one of the townhouses was unusable), and that the slab height was greater than specified (with the result that there would be a steep slope upon entry to the garage with some cars unable to enter the garage, and that there would be a significant step up to one of the side doors).

246 On appeal, the Full Court of this Court applied the general rule in *Bellgrove v Eldridge*, holding that the nature and significance of these defects, and the

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[114] *Willshee v Westcourt Ltd* [2009] WASCA 87 at [71]-[72].
[115] *Willshee v Westcourt Ltd* [2009] WASCA 87 at [75].
[116] *Willshee v Westcourt Ltd* [2009] WASCA 87 at [76]-[80].
[117] *Unique Building Pty Ltd v Brown* [2010] SASC 106.

inadequacy of the alternative minor rectification work proposed by the defendant, meant that it was not unreasonable that the plaintiff obtain an award of damages to reflect the cost of demolishing and rebuilding so as to bring the building work into conformity with the contract.

247 In *Wheeler v Ecroplot Pty Ltd*[118] the plaintiff homeowner sued the defendant building company for rectification costs required to underpin defective footings constructed by the defendant. In upholding the plaintiff's entitlement to rectification damages, Macfarlan JA (with whom McColl and Basten JJA agreed) applied the general rule in *Bellgrove v Eldridge*. While accepting that rectification work that was "out of all proportion to the benefit to be obtained" remained an example of the "unreasonableness" qualification to the general rule,[119] that consideration did not arise on the facts of that case.

248 Finally, in *Cordon Investments Pty Ltd v Lesdor Properties*[120] the New South Wales Court of Appeal dismissed an appeal from a judgment declining to award the plaintiff rectification damages in respect of defective building work undertaken by the defendant. Relying upon *Westpoint Management Ltd v Chocolate Factory Apartments Ltd*,[121] Bathurst CJ (with whom Macfarlan and Meagher JJA agreed) reasoned that because the plaintiff had transferred ownership of the property, with the result that rectification work would never be carried out, there was no loss.[122]

The current state of the law in relation to rectification damages

249 While itself concerned with breach of a negative covenant, the decision of the High Court in *Tabcorp Holdings* confirmed the continued operation of the general rule in *Bellgrove v Eldridge* in cases involving defective building work. It also confirmed the qualification to that general rule.

250 In so doing, the Court emphasised the primacy to be afforded to the plaintiff's performance interest in assessing damages for breach of contract. While identifying that this will result in the "unreasonableness" test underpinning the qualification to the general rule being satisfied in only "fairly exceptional" cases, the Court's reasons provide little guidance in relation to the application of the qualification.

251 The Court mentioned the use of new rather than second-hand bricks in a cement rendered wall (a scenario mentioned in *Bellgrove v Eldridge*) as an example that aligned closely to cases involving a technical breach to secure an uncovenanted profit. However, I do not understand the Court's reasoning as suggesting that unreasonableness will be confined to the notion of using a

[118] *Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61.
[119] *Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61 at [81].
[120] *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184.
[121] *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253.
[122] *Cordon Investments Pty Ltd v Lesdor Properties Ltd* [2012] NSWCA 184 at [230].

"technical breach to secure an uncovenanted profit". While that language or characterisation of a plaintiff's claim may be appropriate in cases where the Court is not satisfied that the plaintiff intends to carry out the rectification work, the preclusion of rectification damages is not confined to such cases. There will be cases in which the rectification work is unreasonable despite the plaintiff intending to carry it out.

252 In my view, while the "unreasonableness" qualification may well form part of the inquiry into whether the plaintiff has in truth suffered loss (measured by the claimed cost of replacement),[123] it goes further than this. It represents a limit or controlling factor upon the preparedness of the law of contract to protect and give effect to the plaintiff's interest in the performance of the contract. It may be that it is a limit founded merely in pragmatism. To the extent that it is founded upon some competing concern or rationale based upon principle or policy, that principle or policy has not been expressly identified in the Australian case law.

253 The references in the authorities to the irrecoverability of rectification costs that are out of proportion to the benefit to be gained by the plaintiff have led one commentator to suggest that the unreasonableness qualification may be seen as a resolution of the need to balance the primacy to be afforded to the plaintiff's performance interest (as reflected in the maxim *pacta sunt servanda*), against the fairness of the burden to be imposed on the defaulting party.[124] Under this approach it will be relevant to consider the proportionality between the rectification cost sought to be imposed upon the defendant and the benefit to be obtained by the plaintiff through the rectification work. The latter will include consideration of the triviality or otherwise of the defendant's departure from the contractual standard or objective. It has also been suggested that if the unreasonableness restriction is one justified in part by reference to the unfairness of the burden to be imposed upon the defendant, then it may be that this will also permit consideration of the nature or quality of the defendant's breach.[125] If the defendant's breach was intentional, sharp, cynical, profit-driven or opportunistic, then it would be more difficult for the defendant to satisfy a court that the burden sought to be imposed upon it was unreasonable.

254 I consider there to be merit in this approach to the unreasonableness qualification. However, as the law currently stands, there has been no express identification in the Australian case law of any principle or policy underpinning the notion of unreasonableness. Certainly there has been no express adoption of a principle or policy referable to fairness to the defendant. The matter has been largely left as a question of fact and degree to be determined by reference to the circumstances of the individual case.

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[123] This being the essential rationale articulated by Lord Jauncey in *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 357.

[124] Loke FH, 'Cost of cure or difference in market value? Toward a sound choice in the basis for quantifying expectation damages' (1996) 10 JCL 189 at 198.

[125] Loke FH, 'Cost of cure or difference in market value? Toward a sound choice in the basis for quantifying expectation damages' (1996) 10 JCL 189 at 198-199.

255 In determining what is reasonable, the issue is one to be determined objectively, there being no suggestion that the plaintiff should be the arbiter of his or her reasonableness. However, the determination must take place in the context of the relevant contract, and hence by reference to the plaintiff's needs and desires reflected in the bargain he or she struck.

256 Consistent with this general approach, my survey of the authorities has identified several matters that will be relevant in determining the reasonableness of the rectification costs claimed.

257 The first is a proper identification of the plaintiff's performance interest; that is, the benefit bargained for. Often this will involve going behind the express contractual standard or specification relied upon in order to determine whether the benefit sought to be achieved by the standard or specification was merely functional or economic in nature, or a matter of aesthetic choice or amenity on the part of the plaintiff. If the true contractual objective was purely functional or economic, than a departure from the contractual standard that does not compromise the functionality or value of the building work may not reasonably require an award of rectification damages to adequately protect the plaintiff's performance interest.

258 By way of illustration, the achievement of the (functional or economic) contractual objective, despite a departure from the contractual standard, in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (in relation to the dry levee banks), *Jacob & Youngs v Kent* (in relation to the pipes) and *UI International Pty Ltd v Interworks Architects Pty Ltd* (in relation to the buildings sold as marketable commodities) largely explains the results in those cases. It also explains the example of the use of new bricks rather than second-hand bricks mentioned in *Bellgrove v Eldridge*. On the other hand, in *Willshee v Westcourt Ltd*, the Court held that the contractual objective sought to be achieved by the specification of high quality limestone was more than a merely functional one.

259 The second matter is a consideration of the extent to which the defendant has, despite departure from the contractual standard, nevertheless achieved the contractual objective, and hence provided the plaintiff with the benefit he or she bargained for. In *Tabcorp Holdings*, the defendant completely ignored the plaintiff's contractual desire to control alterations to its premises. Similarly, in the incorrect paint colour and garden folly examples given in the authorities there was a complete failure to achieve the contractual objective. In *Willshee v Westcourt Ltd* it was relevant that the defendant's use of inferior quality limestone involved a significant and substantial departure from the benefit contracted for by the plaintiff. On the other hand, in *Ruxley Electronics & Construction Ltd v Forsyth,* the House of Lords was influenced by the relatively minor, if not technical, departure from the contractual objective and hence relatively minor benefit to the plaintiff from carrying out the rectification work proposed.

260 The third matter is any lack of proportionality between the proposed work and cost, and the benefit to be achieved by the plaintiff through this work. I do not understand the High Court's reasoning in *Tabcorp Holdings* to exclude consideration of any disproportion between the rectification work proposed and the benefit to be obtained. While it is plain that any consideration of the issue must be undertaken in the context of the contractual bargain struck by the parties, and hence having regard to the plaintiff's interest in having that bargain performed, I consider that disproportion remains a relevant consideration in determining whether it would be unreasonable to undertake the rectification work contemplated.

261 It is true that the High Court in *Tabcorp Holdings* expressed reservation as to the outcome in *Ruxley Electronics & Constructions Ltd v Forsyth*, and did not expressly endorse the relevance of disproportion. However, by the same token, the Court did not expressly cast any doubt upon their Lordships' reliance upon disproportion in determining whether the rectification work would be unreasonable.

262 The issue of disproportion was considered relevant, for example, in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd*[126] and *Westpoint Management Ltd v Chocolate Factory Apartments Ltd.*[127] The continuing relevance of disproportion is supported by the post-*Tabcorp Holdings* decision in *Wheeler v Ecroplot Pty Ltd*.[128]

263 Finally, it will be relevant to consider the plaintiff's intention and ability to carry out the rectification work. For the reasons explained in the authorities that I have summarised (particularly *De Cesare v Deluxe Motors Pty Ltd, Westpoint Management Ltd v Chocolate Factory Apartments Ltd* and *UI International Pty Ltd v Interworks Architects Pty Ltd*) these considerations are not usually decisive or even relevant in their own right. Rectification costs may be reasonable and recoverable even though a plaintiff does not intend to, or is not able to, carry out the rectification work. One cannot say more without knowing the reasons why the plaintiff does not intend to, or is not able to, carry out the contemplated rectification works. Alternatively, rectification costs may be unreasonable and irrecoverable despite the plaintiff intending to, and being able to, carry out the contemplated rectification work. As the authorities make plain, the plaintiff's intention and ability to carry out the works are relevant only insofar as they shed light on the issue of the true nature of the plaintiff's loss, or the reasonableness or otherwise of the contemplated rectification works.

264 The above is not intended by me to preclude the relevance of other factors that may arise in particular cases, including, for example, in this case, any

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[126] *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2006] NSWCA 361 at [89].
[127] *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253 at [61].
[128] *Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61 at [81].

inconvenience to third parties or safety risks associated with the proposed rectification work.

265 As mentioned, I am not aware of any authority that has expressly taken into account the nature and quality of the defendant's breach. However, it may be that in cases where the defendant's breach is intentional, or profit driven, that the Court may be more reluctant to deprive the plaintiff of rectification damages designed to protect his or her performance interest. Indeed, the intentional and flagrant breach by the defendant in *Tabcorp Holdings* may have influenced the Court in that case in its preparedness to award rectification damages.

Application of the general rule in Bellgrove v Eldridge

266 I have already found error in the trial judge's first basis for rejecting the plaintiff's claim for rectification damages, namely the operation of the doctrine of election.

267 The trial judge's second basis for rejecting the plaintiff's claim for rectification damages was that the case did not fall within the general rule in *Bellgrove v Eldridge*. His Honour reasoned that the basis of the rule in *Bellgrove v Eldridge* was that damages were to be assessed by ascertaining the amount required to rectify the defects complained of and so give the equivalent of a building which was "substantially in accordance with the contract". His Honour held that while the departure from the contractually specified ceiling height represented a breach of contract, the ceiling was nevertheless still constructed substantially in accordance with the contract given that the average departure from specification, allowing for the tolerance of 20 mm, was only 28 mm. This discrepancy, as his Honour pointed out, was only marginally more than one per cent of the contractually specified height.

268 I consider that the trial judge erred in imposing a threshold requirement to the application of the general rule in *Bellgrove v Eldridge*. Having concluded that the variation in the ceiling height from the contractual specification constituted a breach of contract, and was not *de minimis,* this was sufficient to trigger the operation of the general rule entitling the plaintiff to damages for the cost of rectification. While the extent of the departure from the contractual specification (including whether it was substantial) is very relevant to the application of the qualification to that general rule, and hence is relevant (in combination with various other considerations) to the ultimate availability of rectification damages under the general rule in *Bellgrove v Eldridge,* it is not a threshold requirement to the application of the general rule.

269 I am not aware of any authority supporting the existence of such a threshold requirement. It would appear that the trial judge's reference to the ceiling being "substantially in accordance with the contract" had its genesis in the concluding words in the passage from the reasons of Dixon CJ, Webb and Taylor JJ in *Bellgrove v Eldridge* extracted earlier in these reasons. In my view these words

were not intended by their Honours to introduce a threshold requirement, or even a disqualifying condition, upon the application of the general rule. Rather, I understand their Honours to be merely making allowance for the possibility that even when rectification damages are to be awarded, they will not always or necessarily be in an amount sufficient to result in perfect or literal compliance with the contract. In some cases the measure will be confined to what is necessary to achieve substantial compliance with the plaintiff's performance interest. However, whether, and if so to what extent, there should be some limitation upon the rectification costs recoverable is a matter that falls to be considered by reference to the qualification to the general rule.

Application of the unreasonableness qualification to the general rule

270 The trial judge's third basis for rejecting the plaintiff's claim for rectification damages was the operation of the qualification to the general rule in *Bellgrove v Eldridge*. His Honour identified five reasons for his conclusion that the qualification applied to prevent recovery in this case.

271 The first was that the rectification work and cost was disproportionate to the benefit to be obtained. In support of this the trial judge described the work as requiring the demolition of the apartment ceiling and the balcony windows, and the cutting of the steel beams in the roof of building 4, together with the insertion of a supporting column in the party wall between the plaintiffs' apartment and the adjoining apartment, before undertaking the reinstatement of the ceiling and windows. His Honour accepted Mr Deans' evidence that the work would cost at least $331,188 to raise the ceiling height by 48 mm.

272 As to the benefit to be obtained by raising the ceiling height, and while not rejecting the plaintiffs' evidence that the discrepancy in height was noticed by them by reference to the lack of space above the cupboards and paintings, his Honour held that (unlike the limestone in *Willshee v Westcourt Ltd*) the discrepancy did not have a significant impact upon the appearance of the apartment's interior. His Honour accepted the opinion of Mr Carter that the design of the apartment was such that when a person is standing inside the apartment, his or her eye is drawn naturally to the external balcony areas. His Honour concluded that most people would not be able to detect the reduction in the height of the ceiling from 2700 mm.

273 The second reason was the interference with the reasonable peace, comfort and amenity of the other apartment owners likely to be associated with the rectification work.

274 The trial judge explained that the apartment was located on the second floor of a building that formed part of a retirement village. There was another apartment on the same floor, and other apartments on the two floors below, each with elderly residents. The proposed rectification work was expected to take between five weeks and two months, but as his Honour noted, building work

frequently takes longer than expected. The work would generate noise and dust; there would be tradespeople coming and going through the building; there would need to be building materials brought into the apartment and substantial waste material removed; a crane and rubbish chute from the plaintiffs' balcony may be required for some of the work. All of this would detract from the peace, comfort and amenity of the residents in the vicinity. The trial judge added that he was satisfied that this could breach the contractual obligations that the defendants owed to their residents, which include a right on the part of the residents to use their apartment without interference by the defendants except, *inter alia*, to carry out repairs and maintenance; and obligations on the part of the defendants not to interfere with the reasonable peace, comfort or privacy of the residents, and to take all reasonable steps to enforce the obligations of other residents not to interfere with the reasonable peace, comfort or privacy of the residents.

275 The third reason was the risk of a fire resulting from the rectification work, which his Honour described as potentially catastrophic to persons and property, and disproportionate to the benefit to be obtained. In so holding, his Honour mentioned the evidence of Mr Hayden (to the effect that the risk was manageable with the use of fire blankets), but preferred the evidence of Mr Whelan (who had a greater familiarity with the relevant building standards, and who was more sceptical, opining that the risk of fire due to combustible materials in the roof could not be eliminated by the use of fire blankets when cutting and welding steel beams).

276 The fourth reason was that the defect in the present case was readily distinguishable from the defects considered in *Unique Building Pty Ltd v Brown* (where the building encroached onto an adjoining property, doors could not be used, a step was at an unsafe height, cars could not use a garage and a shower could not be installed). His Honour acknowledged that the defects in the present case were closer to, but were nevertheless still distinguishable from, the defect in *Willshee v Westcourt Ltd* (inferior limestone that had deteriorated rapidly). Unlike *Willshee v Westcourt Ltd,* his Honour considered that the defect in this case was "technical" rather than substantial, albeit that his Honour accepted that there was some (but not a significant) impact upon the appearance and amenity of the apartment.

277 The fifth reason was that it was undesirable that the Court make orders requiring the work to be undertaken as this would involve orders in the nature of a mandatory injunction necessitating the continued supervision of the work by the Court.

278 The trial judge concluded his reasoning in relation to the issue of the unreasonableness qualification to the general rule in *Bellgrove v Eldridge* by noting that he accepted the evidence of the plaintiffs that they want to undertake the rectification of the ceiling height, and that if the Court made orders requiring that it be undertaken the plaintiff would do so. However, his Honour concluded

that to do so would be unreasonable. It followed that the plaintiffs were not entitled to damages assessed on the basis of the cost of rectification (plus any consequential costs, such as the cost of relocation).

279 I commence my analysis by observing that while the concept of unreasonableness involved an evaluative judgment by the trial judge, the appeal on this issue does not require an application of the principles in *House v The King*.[129] That said, it is necessary that the appellants identify error in the trial judge's determination that the proposed rectification works and cost were unreasonable before this Court can intervene; and in determining whether an error has been made out, it is necessary to give respect and weight to the reasons and conclusion of the trial judge.[130]

280 In considering whether the rectification costs claimed by the plaintiffs are unreasonable, I do not attach any weight to the fifth reason given by the trial judge. If the Court were otherwise of the view that the rectification costs reflected loss suffered by the plaintiffs and were not unreasonable, then damages assessed by reference to those costs would be recoverable. An order requiring that the work be carried out would not, in my view, form a necessary part of the relief sought by the plaintiffs and so I do not think it informs the inquiry as to the reasonableness of the work and costs proposed by the plaintiffs. It may be that, were rectification damages to be awarded, the Court's intervention or assistance may be required in due course to address any issues arising from a potential breach by the defendants of their contractual obligations to the other residents. While the possibility of this might in some general way inform the inquiry as to the unreasonableness of the rectification works and cost, I do not think it adds materially to the matters encompassed within the trial judge's second reason.

281 Turning to that second reason, I agree with the trial judge that the proposed rectification works would detract from the peace, comfort and amenity of other residents and that this was a relevant consideration. While the primary focus of the unreasonableness inquiry is upon the parties to the building contract and the bargain they have struck, I consider it appropriate to attach some weight to the impact upon others. In my view, a reasonable person would attach some weight to the effect upon others of them insisting upon strict performance of their contractual rights. It informs in a general way the reasonableness of the proposed rectification works and cost.

282 I also agree with his Honour that the work may place the defendants in breach of their contractual obligations to other residents. The evidence falls short of establishing that there is a legal barrier to the work being carried out such that it could be said that the work will not or cannot be carried out. The evidence is merely that there is a prospect of the defendants being in breach of their obligations to the other residents. But even if the rectification works might result

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[129] *House v The King* (1936) 55 CLR 499 at 504-505.
[130] *Warren v Coombes* (1979) 142 CLR 531 at 551.

in the defendants being in breach of their obligations to the other residents, this does not mean that the work could not be undertaken. Any such difficulty might be resolved by the defendants through negotiation with, or by the payment of compensation to, the other residents. Viewed in this way, there is a risk of an additional burden being placed upon the defendants by reason of their contractual obligations to other residents. While these considerations are relevant, given the inherent uncertainty as to the nature and extent of this burden, there is a limit to the weight it can be afforded.

283 In my view, the risk of fire that formed the trial judge's third reason was also a relevant matter. No error has been established in his Honour's preference for the evidence of Mr Whelan, and his finding that there was a risk of a potentially catastrophic fire associated with the rectification works. Again, I accept that this is a matter that was appropriately taken into account in determining the reasonableness of the plaintiffs' proposed rectification works.

284 While the above matters are relevant, I consider that the matters collected by the trial judge in his first reason, and summarised by reference to some of the authorities in his fourth reason, are the most weighty matters in the determination of the reasonableness of the rectification works and cost. They mirror the first three matters that I have identified as relevant to the inquiry in the earlier section of my reasons summarising the current state of the law, namely the nature of the relevant contractual objective, the extent of the departure from the achievement of that objective (and hence the extent of the likely benefit to the plaintiffs from rectifying) and the proportionality of the rectification work and cost.

285 As to the nature of the relevant contractual objective, there is clearly a functional and economic aspect to the specification of a ceiling height. For a building to function as, and be saleable as, an apartment, the ceiling must be at least a certain height. However, I accept that in this case there was also an aesthetic or amenity objective associated with the specification. In this way, the ceiling height was not unlike the pool depth in *Ruxley Electronics & Construction Ltd v Forsyth* – it had both functional and amenity objectives underpinning it.

286 As to the extent of the departure from the achievement of the contractual objective, and hence the likely benefit to the plaintiff from rectifying, there is again some analogy with the situation in *Ruxley Electronics & Construction Ltd v Forsyth*. The functional objective was achieved, and the amenity or aesthetic objective was substantially achieved. The finding that the difference between the ceiling height as constructed and as contractually specified would not impact the value of the apartment reinforces this conclusion. The defendants did achieve a uniform and relatively high ceiling. While it fell short of the specified height, as the trial judge held, the difference in height is not one that would have an impact on the amenity (or sense of space) of the apartment so far as most people are concerned. This was so not only by reason of the limited departure from the

specified ceiling height, but also by reason of the design of the apartment being such that a person's eye is drawn naturally to the external balcony. While the trial judge accepted that the difference was noticeable to the plaintiffs, and hence did affect the amenity of the apartment from their perspective, this was not a case where it could be said that there had been a complete or substantial failure to achieve the plaintiffs' contractual objective. To the contrary, there was substantial achievement of that objective. Indeed, in my view, it was even more substantially achieved than the contractual objective in *Ruxley Electronics & Construction Ltd v Forsyth*.

287 In this respect, the trial judge was right to distinguish both *Unique Building Pty Ltd v Brown* and *Willshee v Westcourt Ltd*. In the former there had been a very substantial failure to achieve various functional objectives. In the latter, there had been a substantial failure to meet the relevant contractual objective. The inferior quality limestone did not achieve the aesthetic aspect of this objective, and, it would appear, was also deficient to some extent in function.

288 Finally, there is the issue of proportionality. This involves a comparison between the matters just discussed (that is, the extent of the departure from the contractual objective and hence the likely benefit to the plaintiffs from the rectification work), and the cost or burden associated with carrying out the rectification work. On any view, the likely cost is significant. The evidence is that it would cost at least $331,188, although there would also be additional associated costs such as relocation costs. The plaintiffs contend that when compared with the cost of the apartment to the plaintiffs (approximately $1.8 million) and the return to the defendants from the sale of apartments in the retirement village (approximately $14 million), the amount is not disproportionate. While those comparators are relevant in a general way, the more important comparator in assessing the proportionality of the rectification works is the extent of the benefit to the plaintiffs likely to be achieved through the rectification work. Here, given the very limited extent of the failure to meet the contractual objective, and hence the limited benefit from an aesthetic or amenity point of view, even from the plaintiffs' perspective, it is my view that the rectification works and cost is out of all proportion to the likely benefit. To the extent that the impact upon the other residents and the risk of fire inform the issue of proportionality (rather than being merely independent aspects of the unreasonableness inquiry) they serve only to underscore the disproportion.

289 In my view, based on all of the above, there was no error in the trial judge's conclusion that the rectification work and cost contemplated by the plaintiffs were unreasonable. Further, I do not consider that the finding that the plaintiffs intended to carry out the work prevents or undermines this conclusion. Their intention to carry out the work does support the trial judge's finding that there would be some benefit to the plaintiff from an increase in the ceiling height, and to that extent informs the issue of unreasonableness. However, in the ultimate analysis, the plaintiffs cannot be the arbiters of their own loss. It is for the Court

to determine whether it would be unreasonable for the plaintiffs (having regard to their desire and interest in securing the performance they contracted for) to undertake the rectification works proposed.

290 For these reasons, I reject the challenge to the trial judge's holding that the plaintiffs are not entitled to rectification damages.

Damages for loss of amenity

291 Having upheld the trial judge's rejection of the plaintiffs' claim for damages reflecting the cost of rectification, the plaintiffs would ordinarily be entitled to damages for any diminution in the value of their apartment on account of the deficiency in the ceiling height. However, the evidence does not permit any finding that there was a diminution in the value of the apartment on account of the deficient ceiling height.

292 The trial judge did, however, award damages reflecting the plaintiffs' disappointment and loss of amenity on account of the deficient ceiling height in the amount of $30,000. His Honour explained:

> I accept that in terms of amenity and aesthetic satisfaction the plaintiffs have lost something. The basis for an award to compensate for such an intangible loss is necessarily problematic and, to a degree, subjective. In *Ruxley* the Court awarded £2,500 in 1993. In *Farley v Skinner*[131] an award of damages of £10,000 was made in 1999 for discomfort and loss of amenity in a somewhat different case. In *Farley* a surveyor was sued for negligent advice in advising a prospective purchaser of a property that it was unlikely the property would suffer greatly from aircraft noise. This proved not to be the case.
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> Doing the best I can, allowing for changes in the value of money and exchange rates,[132] and endeavouring to fairly compensate the plaintiffs for their loss, I award them $30,000 for disappointment and loss of amenity.

293 In their cross appeal, the defendants challenge the trial judge's award of $30,000 for the plaintiffs' disappointment and loss of amenity. They do not challenge the conceptual basis for an award of damages for disappointment and loss of amenity. Their challenge is to the availability and quantum of the award on the facts of this case.

294 Given the nature of an award of damages of this nature, the defendants' challenge is governed by the principles of appellate restraint in *House v The King*.[133] This requires that the defendants establish that the trial judge made an error of fact or principle, took into account some irrelevant matter, failed to take into account some relevant matter, or otherwise arrived at a manifestly unreasonable outcome.

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[131] *Farley v Skinner* [2002] 2 AC 732.
[132] £10,000 in 1999 now would be worth £15,900. At an exchange rate of £1 sterling equals AU$2.06 that equates to $32,634.18.
[133] *House v The King* (1936) 55 CLR 499 at 504-505.

295 In support of their appeal on this issue, the defendants rely upon the limited nature and extent of their departure from the contractual specification in relation to ceiling height. They rely in this respect on the trial judge's findings that the deficiency was only 32 to 57 mm, or 12 to 37 mm after allowing for a 20 mm tolerance; that this was "substantially" in accordance with the contractual specification of 2700 mm and involved only a "technical" breach; that there was no significant impact on the interior living space; and that in part by reason of the apartment's design, most people would not notice the deficiency in height. Further, so far as the impact on the plaintiffs is concerned, the defendants rely upon the plaintiffs' failure to notice the discrepancy until some time in early 2011 when the joinery was installed. The defendants also rely upon the fact that the deficiency in ceiling height would not occasion any inconvenience to the plaintiffs, and contend that insofar as it merely annoyed them or was contrary to their taste, these were not matters that sounded in damages. They further contend that the plaintiffs suffered no loss of amenity or aesthetic pleasure.

296 I reject the defendants' contention that the deficiency in ceiling height had no impact on the plaintiffs' amenity or aesthetic pleasure. In my view, this contention is contrary to the evidence and the trial judge's findings. The evidence, accepted by the trial judge, was that the plaintiffs did notice the deficiency in height. On the basis of this evidence, it was open to the trial judge to find as he did that the plaintiffs did lose something in terms of amenity and aesthetic pleasure or satisfaction. The fact that they did not notice the deficiency until after the joinery had been installed, while perhaps indicative of the modest extent of the loss, is not inconsistent with some loss of amenity and aesthetic satisfaction. Indeed, one would not expect to be in a position to assess fully the aesthetic effect of an apartment until the furniture, particularly significant built-in furniture, was in place.

297 As damages for loss of amenity or aesthetic pleasure are only available in circumstances where there has been a breach of a term of the contract intended by the parties to provide a level of amenity or aesthetic pleasure,[134] it is implicit in the trial judge's approach that he viewed the contractual specification as to ceiling height in this way. For the reasons set out in my consideration of the unreasonableness qualification to the general rule in *Bellgrove v Eldridge,* I agree with his Honour.

298 In challenging the quantum of the award, the defendants point to the apparent reservations of the House of Lords in *Ruxley Electronics & Construction Ltd v Forsyth* as to the quantum (£2,500) that had been awarded below but was not under challenge before their Lordships. They also contend

[134] *Farley v Skinner* [2002] 2 AC 732 at 748-749, endorsing the observations of Lords Mustill and Lloyd in *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 at 360-361, 374.

that the significant loss of amenity in *Farley v Skinner*[135] suggests the award in this case is too high.

299 It is trite that in assessing damages of this nature every case turns on its own facts. While the departure from the contractual specification was minor in objective and relative terms, on the findings of the trial judge it nevertheless had an impact on the plaintiffs. It has had an impact on their enjoyment of their place of living, and hence an impact that is likely to be experienced by them daily and on an ongoing basis. In my view, despite the rectification work and cost being out of all proportion to their loss, the plaintiffs did nevertheless suffer a material loss of amenity and aesthetic pleasure. I consider that $30,000 was within the range of awards that would have been appropriate in this case. No error of the type required by *House v The King* has been established in the trial judge's award.

Misleading conduct in relation to ceiling height

300 At trial the plaintiffs contended that the defendants engaged in misleading conduct as to the ceiling height, and that were it not for this conduct, they would not have entered into the contract. They sought damages reflecting the difference between the amount they paid for the apartment ($1,853,254), and the value of the apartment at the date of acquisition ($1,500,000) or at the date of occupation ($1,575,000).

301 The plaintiffs relied upon three types of representation. First, oral representations made by Mr Smallacombe and Mr Girolamo in late 2006 to the effect that the ceiling height would be 2700 mm. Secondly, written representations made through the presentation to them of drawings (and in particular drawing 06-26), which depicted the ceiling at 2700 mm above the floor level in the ceiling plans for the apartment. Thirdly, a representation by silence, relying upon the defendants' failure to inform them of a decision they had made prior to 29 September 2010 to reduce the ceiling by 40 mm.

Trial judge's rejection of the plaintiffs' claim

302 In rejecting the first limb of the plaintiffs' case for misleading conduct, the trial judge was not satisfied that Mr Smallacombe made the representation alleged. This finding was not challenged on appeal.

303 In relation to the alleged representation by Mr Girolamo, the trial judge found that he met with the plaintiffs on 29 November 2006 at their home. They had previously had some discussions about the plaintiffs' wishes and intentions for the fit-out of their apartment. During their meeting on 29 November 2006, ceiling height was a topic of discussion. The plaintiffs (or one of them) pointed out that the ceiling height in their home was 2850 mm and expressed a desire that the ceiling in the proposed apartment be as high as possible. Mr Girolamo

[135] *Farley v Skinner* [2002] 2 AC 732.

explained his understanding of the basic design of the apartments in the proposed building 4. He said that he understood the highest point of the ceiling was 2700 mm, but that the coffers and bulkheads were lower. He may have mentioned his understanding that the coffers and bulkheads were at a height of 2400 mm. One or both of the plaintiffs then expressed a preference for a flat ceiling at a uniform height of 2700 mm.

304 Having made findings in these terms, the trial judge addressed Mr Girolamo's capacity and authority in making the representations he did. His Honour held that in making the statements he did, Mr Girolamo was not acting as an agent for, or with the actual or ostensible authority of, the defendants. While Mr Girolamo's firm, Pruszinski Architects, were the project architects retained by the defendants, the plaintiffs had also engaged that firm to design the fit-out of their apartment. The principal architect working on the construction of building 4 for the defendants was Mr Jarrett. Mr Girolamo, on the other hand, was allocated to the fit-out work for the plaintiffs. His Honour found the Mr Girolamo acted as a conduit for the plaintiffs' instructions to Mr Jarrett and the defendants, it being necessary that there be cooperation between the architect designing the fit-out for the plaintiffs' apartment and the architect undertaking the design work for the building in which that apartment was to be constructed. His Honour held that if Mr Girolamo had authority to act as an agent of anyone, it was the plaintiffs.

305 His Honour acknowledged that Mr Girolamo did engage in some design work for the construction of the shell and framework. For example, he prepared some of the drawings for the plaintiffs' apartment that related to the shell rather than the fit-out. However, as this work was confined to the plaintiffs' apartment, his Honour did not regard it as establishing any agency on behalf of the defendants.

306 The trial judge went on to hold that, in any event, the statement made by Mr Girolamo about ceiling height was merely his understanding of the ceiling height and not a representation as to the height at which the ceiling in the plaintiffs' apartment would be constructed. Further, his Honour held that in stating that the ceiling height in building 4 was 2700 mm at its highest, the representation was one as to the future, and that Mr Girolamo reasonably believed it to be true. The statement by Mr Girolamo had therefore not been proved to be misleading.

307 On appeal there was no challenge to his Honour's reasoning in relation to the Mr Girolamo representation. While some of his Honour's reasoning in relation to the capacity in which Mr Girolamo acted remains relevant on appeal, the first limb of the plaintiffs' case for misleading conduct can otherwise be put to one side.

308 In relation to the second limb of the plaintiff's case for misleading conduct, his Honour accepted that the ceiling plan in drawing 06-26 (dated 30 October

2009) specified a ceiling height of 2700 mm above floor level. However, his Honour was not satisfied that the plaintiffs were presented with this drawing, and that accordingly "there can be no question of them relying on any representation contained in that drawing for the purpose of entering into the contract in December 2009."

309 In so holding, the trial judge noted the evidence of Mr Stone and Mr Girolamo to the effect that Mr Girolamo showed Mr Stone the architectural drawings and plans from time to time. However, his Honour considered that the evidence did not permit a finding that Mr Stone (or Mrs Stone) was shown drawing 06-26. When shown this drawing at trial, Mr Stone's evidence was that "I can only surmise that I was shown those [plans]." In his Honour's view, the evidence of Mr Stone and Mr Girolamo on this issue was too vague, general and imprecise to permit a finding that the plaintiffs were presented with drawing 06-26.

310 The third limb of the plaintiffs' case for misleading conduct focused on the evidence as to the defendants' decision some time in 2009 to vary the plans for the roof framework construction by using timber trusses (with supporting steel beams) in lieu of steel trusses. The plaintiffs' case was that by reason of this variation, and the inadequate attempts by the builders to address the impact of this variation upon the ceiling height, a ceiling height of 2700 mm became unachievable. The plaintiffs allege that the defendants' failure to inform them of this rendered them liable for misleading or deceptive conduct by silence.

311 As this third limb of the plaintiffs' claim was not pressed on appeal it is not necessary to summarise the trial judge's reasons for rejecting it. To the extent that some aspects of his Honour's findings on this issue remain relevant, they are addressed later in these reasons.

Did the defendants make a representation as to ceiling height?

312 On appeal, counsel for the plaintiffs did not challenge the trial judge's rejection of the oral representations by Mr Smallacombe and Mr Girolamo (the first limb of their case), and disavowed reliance upon any representation by silence (the third limb of their case). So far as the second limb was concerned, the plaintiffs' counsel articulated the case as one based upon representations in the plans (including, but not limited to, the ceiling plan in drawing 06-26) to the effect that the ceiling height would be 2700 mm. It was contended that these were continuing representations as to the future. They were misleading because the defendants (in particular Mr Chappel) did not have reasonable grounds for making the representations.

313 So far as the drawings other than drawing 06-26 are concerned, I do not accept that the plaintiffs established any misleading conduct. None of these drawings included ceiling plans. While they included reference to a ceiling height of 2700 mm in various places, it is not self-evident how those references

are to be understood given that various of the drawings also contained references to different heights or elevations, and in many cases are plans for the building more generally rather than just the plaintiffs' apartment. It was not established that the references to 2700 mm on those plans indicated, or were to be understood as indicating, a uniform ceiling height of 2700 mm throughout the plaintiffs' apartment.

314 Given that drawing 06-26 was the only plan containing a ceiling plan for the plaintiffs' apartment, the trial judge was right to focus upon this as the operative plan so far as the plaintiffs' case for misleading conduct in relation to the ceiling height was concerned.

315 During the course of the appeal, the plaintiffs' case in relation to drawing 06-26 evolved, or was refined, to some extent. In part this was a reflection of difficulties arising from the fact that it was Mr Girolamo who was identified as the author of drawing 06-26 (giving rise to a potential problem in establishing that it contained a representation by the defendants in light of his Honour's finding that Mr Girolamo was an agent for the plaintiffs and not the defendants), and from the trial judge's finding to the effect that Mr Stone did not rely on drawing 06-26.

316 While not abandoning the case as initially articulated, the plaintiffs' counsel embraced a more general formulation of his clients' case. The thrust of that formulation was that while it was not possible to identify precisely when and how the relevant communication or communications occurred, it can be inferred that at some point prior to entry into the contract, Mr Girolamo communicated the plaintiffs' November 2008 instruction (that they wanted a uniform ceiling height of 2700 mm in their application) to the defendants, either directly or through one of his colleagues working on the design of building 4 at Pruszinski Architects. It can further be inferred that the defendants (either directly or through one of Mr Girolamo's colleagues at Pruszinski Architects) communicated their approval of this request or instruction to Mr Girolamo. In circumstances where Mr Girolamo informed the plaintiffs in February 2009 that the ceiling would be constructed at this height, and then prepared drawing 06-26 with a ceiling at this height, it can be inferred that such communications must have occurred. It is unrealistic to suggest that Mr Girolamo proceeded in this way without communications along these lines. In this way, while it is difficult to pinpoint the precise communications it can be inferred both that the defendants represented that the ceiling height would be 2700 mm, and that this was communicated and relied upon by the plaintiffs through their agent Mr Girolamo.

317 While I consider there to be merit in a case articulated in these terms, the defendants complained that the plaintiffs ought not be permitted to reformulate their case in this way on appeal. In support of this the defendants pointed out that Mr Girolamo had given evidence and was not asked about any such communications either in his evidence in chief or in cross-examination.

318 In my view, it is not necessary to resolve whether the plaintiffs may now rely upon a case formulated in this way because I consider that the evidence does establish a representation as to ceiling height, and reliance by the plaintiffs, in terms very similar to the second limb of the plaintiffs' case at trial.

319 In my view, the key lies in the recognition of the status of drawing 06-26. While prepared by Mr Girolamo, it was marked as a drawing "issued for construction". The evidence was that such drawings required the approval of the defendants and governed the building work to be undertaken. Further, in the case of drawing 06-26, it became part of the contract, and the source of the contractual specification that the ceiling height would be 2700 mm. Understood in this context, I consider drawing 06-26 does represent, or at least evidence, a representation by the defendants that the ceiling height would be 2700 mm.

320 So far as reliance is concerned, the evidence of both Mr Stone and Mr Girolamo was to the effect that Mr Stone was shown, and noted the key details of, various of the plans. While, as the trial judge observed, Mr Stone could not recall whether he saw drawing 06-26, and could only surmise that he saw it, the evidence of Mr Stone and Mr Girolamo as to the process by which Mr Stone was shown and reviewed various drawings suggests it is likely that Mr Stone did see this plan, given it was a drawing "issued for construction". In any event, once the status of drawing 06-26, and the representation it contained as to ceiling height, is understood, I do not think it is fatal that Mr Stone could not recall viewing that particular drawing. In my view, reliance upon a representation that forms a term of a contract does not always require that the plaintiff read the particular provision of the contract in question. If contractual negotiations have been conducted on the clear basis that the defendant is promising it will perform work to a particular standard or specification, then entry into the contract on that basis may be sufficient reliance.

321 Here there can be no doubt that the plaintiffs were operating under the well-founded belief throughout a significant period of the negotiations leading up to entry into the contract that the defendants were contracting to construct their apartment with a ceiling height of 2700 mm. In my view, it does not matter that it is not possible on the evidence to determine precisely how and when the ceiling height specification was communicated to the plaintiffs. The entry into the contract can be seen as a crystallisation of both the defendants' representation as to the ceiling height in drawing 06-26 and the plaintiffs' reliance upon the same. I do not consider that Mr Stone's inability to recall being shown drawing 06-26 stands in the way of a finding that the plaintiffs relied upon the ceiling height representation in the ceiling plan in that drawing in the circumstances where they clearly (and correctly) understood that the contract specified for a ceiling height of 2700 mm, and the ceiling plan in that drawing was the source of that specification.

322 There is no conceptual difficulty with a contractual warranty or promise operating as a representation or involving misleading conduct.[136] To the contrary, an unconditional promise forming part of the contractual obligations will often involve the making of a representation as to a future matter; here, that the plaintiffs' apartment would be constructed with a ceiling height of 2700 mm.

323 However, assuming the correctness of my conclusion as to the making of, and reliance upon, a representation as to ceiling height, it remained for the plaintiffs to establish that the representation was misleading and that the loss complained of was caused by the misleading conduct. For the reasons that follow, it is my view that the plaintiffs' case foundered at both of these stages.

Was the ceiling height representation misleading?

324 The plaintiffs accept that the defendants' representation as to ceiling height was one as to the future, namely that the plaintiffs' apartment would be constructed with a uniform ceiling height of 2700 mm.

325 Such a representation is taken to be misleading unless the defendants had a reasonable basis for making the representation.[137] That reasonable basis must exist at the time the representation was made. In the case of a continuing representation, the reasonable basis must also continue to exist.

326 In this case, the plaintiffs contend that by reason of the change in design that occurred some time prior to entry into the contact in December 2009, the defendants did not have a reasonable basis as at December 2009 for making a representation that the ceiling height would be 2700mm.

327 It is appropriate to commence by summarising the trial judge's findings in relation to the change in design.

328 The trial judge found that in 2009, the defendants, through Mr Chappel, decided to vary the plans for the roof framework construction by using timber trusses in lieu of steel trusses. The change in construction resulted in the erection of a steel beam RB5. Shop drawings of the varied plans showed a gap of only 2619 mm between the concrete slab of the floor and the underside of RB5.

329 At some point in 2009 the builders realised that as a result of the varied plan, the specification of a ceiling of 2700 mm could not be achieved. Mr Chappel was the principal of the building company retained by the

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[136] *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470 at 505-506; *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217 at 239-241; *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at [13]; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [35]-[36]; *Pan Pharmaceuticals Ltd v Australian Naturalcare Products Pty Ltd* (2008) 165 FCR 230 at [135]-[138].

[137] By reason of s 54(1) of the *Fair Trading Act 1987* (SA). While s 54(2) casts an evidentiary onus upon the defendants, the ultimate onus remains on the plaintiffs: *Pan Pharmaceuticals Ltd v Australian Naturalcare Products Pty Ltd* (2008) 165 FCR 230 at [191]-[192].

defendants to carry out the construction work. Mr Bowie was the building supervisor, and Mr Peake the project manager.

330 After discussion between Mr Bowie and Mr Peake, they decided to cut RB5 to reduce its depth so as to overcome the problem. After undertaking this rectification work, Mr Bowie took a measurement at a point near the apartment entrance. He thought this would leave space for the erection of a ceiling close to 2700 mm above the floor. This was a viewed shared by Mr Peake.

331 Mr Peake's evidence was that he told Mr Chappel there was a problem with the beam as it was too deep, and that he believed he would have told him that the beam was modified but could not recall doing so. Mr Chappel, on the other hand, gave evidence that he was not told of any modification. The trial judge found that Mr Peake did not tell Mr Chappel that the depth of the beam would prevent the ceiling being built to a height of 2700 mm.

332 When dealing with the plaintiffs' case based upon misrepresentation by silence, the trial judge summarised his findings on this issue in following terms:

> This was not a case where the defendants had no intention of complying with the contractual term that specified a ceiling height of 2700 mm. The evidence does not establish that either of the defendants, but in particular Mr Chappel, understood or believed at any time prior to the execution of the contract that the ceiling in the plaintiffs' apartment could not be constructed to the specified height. Accordingly, the premise of the plaintiffs' claim in reliance on a misleading and deceptive conduct by silence fails. It assumes the defendants knew as a matter of fact at a time before the execution of the contract that the apartment could not be constructed with a ceiling at the specified height. The evidence does not establish this to be the case. On the contrary, when the builders became aware that the depth of the steel beam RB5 created a problem in constructing the apartment to the specified ceiling height, they undertook rectification work to address the problem. Mr Bowie and Mr Peake thought they had done so successfully. I accept the evidence of Mr Chappel that at the time it was not brought to his attention that the depth of RB5 presented any obstacle to the construction of the ceiling in the plaintiffs' apartment to a height of 2700 mm.

333 As the trial judge explained, it was the plaintiffs' case that the problem could have been rectified at that time by further reducing the depth of the beam and reinforcing it, at a lesser cost than is now the case. In fact the evidence of Mr Hayden and Mr Whelan was that the work necessary to rectify the ceiling height would also have required the modification of another steel beam, referred to as SB7. The obstacle that this beam presented to achieving a ceiling height of 2700 mm was not recognised by the builders at the time or subsequently. However, the problem with SB7 could have been rectified using a similar technique to the one used for RB5.

334 On appeal, the plaintiffs challenged the reasonableness of the approach of Mr Bowie and Mr Peake to the problem with the steel beam and hence their belief that a ceiling height of 2700 mm would be achieved. They also challenged the reasonableness of any belief on the part of Mr Chappel as to the same and

hence the reasonableness of him representing that the ceiling height would be 2700 mm.

335 As to Mr Bowie and Mr Peake, the plaintiffs' submission was that the problem ought to have been obvious and that a reasonable solution required more than the single measurement carried out by the builders and consequential belief that after the adjustment to RB5 the ceiling in the apartment would be constructed "close" to 2700 mm. There is also a complaint that they overlooked the similar problem that existed in relation to SB7.

336 There are two difficulties with this submission. The first is the difficulty in making a finding that the builders' response to the change in design and its impact on ceiling height was unreasonable in the absence of any expert evidence on the topic. While there is some force in the submission that common sense suggests that the approach taken was not careful or robust enough, I do not consider it appropriate to make such a finding. This is particularly so when the asserted inadequacies in the approach of Mr Peake and Mr Bowie were not put to them in cross-examination, and they were not otherwise challenged as to the reasonableness of their approach.

337 The second and more fundamental difficulty is that I am not satisfied it is appropriate to attribute the conduct of Mr Peake or Mr Bowie to the defendants for this purpose. While the evidence is not entirely clear, I understand the builders to be independent contractors retained by the defendants, albeit with Mr Chappel as the principal of the builder. In my view, in the circumstances of this case, where the issue is whether the defendants had a reasonable basis for making the representation they made, the reasonableness or otherwise of their conduct must be assessed by reference to their own knowledge and conduct, and in particular that of Mr Chappel.

338 That said, when considering Mr Chappel's position, I accept (as the defendants' counsel conceded on appeal) that the defendants are to be attributed with all of Mr Chappel's knowledge, regardless of the capacity in which he acquired it. In other words, the defendants cannot quarantine themselves from any knowledge that Mr Chappel had, even if some or all of that knowledge might have been acquired in his capacity as principal of the builder (rather than in his capacity as one of the operators of the retirement village).

339 Turning to the knowledge and conduct of Mr Chappel, as noted above, the trial judge made findings to the effect that Mr Peake did not inform Mr Chappel, and it was not brought to Mr Chappel's attention, that the depth of RB5 prevented (or presented an obstacle to) the ceiling being built to a height of 2700 mm.

340 The plaintiffs challenge this finding, relying upon the evidence of Mr Chappel to the effect that he was informed that there was a problem with the beam. Mr Chappel's evidence was as follows:

Q Do you recall an occasion in the course of the work pertaining to building four where the subject of a steel beam was drawn to your attention.

A I do.

Q Can you recall who raised that issue with you.

A Stephen Peake.

Q Doing the best you can what did he say to you about that topic.

A We were walking through the building just having a general peruse. He pointed to a steel beam on level four and said that beam is bigger than it should be.

Q What else if anything was said about that.

A Not a great deal. That was – it wasn't a major topic of discussion.

Q Was there any discussion on that occasion with respect to what steps might be taken to address that issue.

A No.

Q At any time prior to the completion of the project were you aware as to what steps were taken to address that issue.

A I don't believe we ever spoke about that beam again.

341 Later in his evidence Mr Chappel returned to this issue, and acknowledged that he was informed by Mr Peake at the first inspection that the beam was lower than 2700 mm.

342 Properly understood, I do not consider that the trial judge found that Mr Chappel was not aware of any issue at all in relation to RB5 and the ceiling height. This would have been inconsistent with Mr Chappel's evidence. Rather, the finding was simply that Mr Chappel was not aware that the problem was one that would prevent the ceiling height being constructed to 2700 mm. In other words, he was alerted to the issue that had arisen in relation to RB5 and the ceiling height, but was not aware that it was an issue that would not or could not be resolved. As Mr Chappel said, "not a great deal" was said about the issue. It may be inferred the issue was treated as one worthy of mention, but not of great moment; an issue that would be worked through and resolved in the ordinary course of events.

343 It is true that Mr Chappel did not give express evidence to the effect that he believed the problem was one that could and would be resolved. However, in my view, that is the tenor of his evidence. Certainly he was not asked, and did not give evidence, that he realised or appreciated that the problem could not be resolved, or had not been resolved.

344 The plaintiffs complain that having been put on notice of the issue, it was unreasonable for Mr Chappel to take no further steps and simply assume the issue would be or had been resolved. I do not accept that submission. It will often be appropriate for a property owner or developer to rely upon the skill and expertise of their builders to address and resolve problems such as the one that arose in relation to RB5, or to alert them if the problem cannot or has not been resolved. Here there is no evidence that Mr Chappel was told that the problem had not or could not be adequately resolved.

345 In the circumstances, I am satisfied that Mr Chappel did have a reasonable basis for representing that the apartment would be constructed with a ceiling height of 2700 mm. That was the effect of the plans, and Mr Chappel was not aware of any problem that would prevent the ceiling being constructed to this height.

346 It follows that the plaintiffs have failed to establish that any representation by the defendants as to ceiling height was misleading at the point of entry into the contract by the plaintiffs.

Was the loss claimed caused "by" the defendants' misleading conduct?

347 Finally in relation to the claim for misleading conduct, and even if the defendants did engage in misleading conduct in relation to the ceiling height, I am not satisfied that they are entitled to recover the loss they seek to recover (i.e. the difference between the amount they paid for the apartment ($1,853,254) and the value of the apartment at the date they acquired it ($1,500,000) or at the date of occupation ($1,575,000).

348 Under s 84(1) of the *Fair Trading Act*, a person who suffers loss or damage "by" conduct of another in contravention of the s 56 proscription against misleading conduct may recover the amount of the loss or damage.

349 When determining a plaintiff's loss in a misleading conduct case, the measure of damages in tort is usually the appropriate guide;[138] that is, the amount necessary to put the plaintiff in the position they would have been in had the contravening conduct not occurred. Or, put another way, the amount necessary to put the plaintiff in the position they would have been in had the defendant told them the true position rather than misled them.

350 However, the issue is not to be approached rigidly. The focus must remain upon the central issue under s 84(1) of the *Fair Trading Act*, which involves

[138] *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281 at 290; *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 6-7, 14.

consideration of whether the plaintiff has established a causal connection between the loss claimed and the misleading conduct.[139]

351 As the High Court explained in *Wardley Australia Ltd v Western Australia,*[140] in respect of the equivalent provision in s 82(1) of the *Trade Practices Act 1974* (Cth):

> The statutory cause of action arises when the plaintiff suffers loss or damage "by" contravening conduct of another person. "By" is a curious word to use. … But the word clearly expresses the notion of causation without defining or elucidating it. In this situation, s 82(1) should be understood as taking up the common law practical or common-sense concept of causation recently discussed by this Court in *March v Stramare (E & MH) Pty Ltd,* except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act. Had Parliament intended to say something else, it would have been natural and easy to have said so.

352 While common law principles will thus inform and guide consideration of whether a sufficient connection has been established between the loss claimed and the misleading conduct, the issue should not be approached through a rigid or mechanical application of those principles.[141]

353 In considering the issues of loss and causation in a misleading conduct case, it is often useful to adopt a two stage process. The first stage involves consideration of the plaintiff's reliance, and in particular whether the error induced by the misleading conduct resulted in particular acts being done or refrained from. It involves consideration of the hypothetical position the plaintiff would have been in "but for" the defendant's misleading conduct; that is, the position they would have been in had they known the true position.[142]

354 The second stage involves consideration of the sufficiency of the link between the loss or damage sought to be recovered, and the plaintiff's reliance upon the defendant's misleading conduct. The misleading conduct does not have to be the sole, or even primary, cause of the action or inaction said to cause the damage, for the requisite connection to exist.[143] However, a mechanical or indiscriminate application of the "but for" test will not always be sufficient. The defendant's conduct may be superseded as a cause of the loss by something that can be described as unreasonable, extraneous or extrinsic. Alternatively,

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[139] *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at [38]; *Henville v Walker* (2001) 206 CLR 459 at [130] per McHugh J (with whom Gummow J agreed); *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [102] per Gummow, Hayne, Heydon and Kiefel JJ.

[140] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525 per Mason CJ, Dawson, Gaudron and McHugh JJ; applied in *Henville v Walker* (2001) 206 CLR 459 at [95]-[96] per McHugh J (with whom Gummow J agreed).

[141] *Henville v Walker* (2001) 206 CLR 459 at [96] per McHugh J (with whom Gummow J agreed).

[142] *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 13 per Mason, Wilson and Dawson JJ; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at [42] per McHugh, Hayne and Callinan JJ; *Henville v Walker* (2001) 206 CLR 459 at [132] and [162].

[143] *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [33] per Gleeson CJ, at [57] per Gaudron, Gummow and Hayne JJ, at [90]-[93] per McHugh J and at [216] per Callinan J; *Henville v Walker* (2001) 206 CLR 459 at [110]-[111] per McHugh J and at [163] per Hayne J.

common-sense and experience may suggest that the defendant's conduct merely set the scene, or provided the opportunity for the loss to be incurred, rather than being a cause of that loss in any meaningful sense.

355 In the present case, the plaintiffs contend that if they had not been misled, and knew the ceiling height would be less than 2700 mm, they would not have entered into the contract. In other words, the plaintiffs contend that this is a "no transaction" case. They contend that they are therefore entitled to recover damages representing their loss on the transaction in which they acquired their apartment, being the difference between the amount they paid for the apartment ($1,853,254) and its value at the date of acquisition ($1,500,000).

356 Two issues arise. The first is whether the factual premise underpinning the submission that this is a "no transaction" case has been made out. This issue arises at the first stage of the process as it involves consideration of what the plaintiffs did in reliance upon the misleading conduct. The second is whether, even assuming this was a "no transaction" case, the loss claimed was suffered "by" the misleading conduct complained of. This is a second stage issue involving consideration of the sufficiency of the connection between the loss suffered and the misleading conduct.

Was this a "no transaction" case?

357 As mentioned, in assessing damages for misleading conduct, the usual approach is similar to the approach taken to tortious damages. This involves a focus upon restoring the plaintiff to the position they would have been in had the misleading conduct not occurred. Here that involves consideration of what the plaintiffs would have done had Mr Chappel informed them in late 2009 that he did not have a reasonable basis for representing that the ceiling height of 2700 mm would be achieved. In my view, it is unrealistic to think that this would have resulted in the plaintiffs simply walking away from the transaction at that late stage.

358 The plaintiffs rely upon their oral evidence that if told the specified ceiling height could not be achieved they would have walked away from the transaction.

359 The first observation I make in response to this submission is that the courts are generally cautious about attaching much weight to the self-serving evidence of a plaintiff in relation to a past hypothetical.[144] The potential unreliability of such evidence is notorious in cases involving plaintiffs who have suffered personal injury. The Courts recognise the natural, and often subconscious, tendency of a person who has been through a traumatic experience to give evidence that they would not have exposed themselves to the relevant risk if more information had been known. The present case is different in that the

[144] *Rosenberg v Percival* (2001) 205 CLR 434 at [26] per McHugh J, at [155]-[158] per Kirby J and at [221] per Callinan J; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [146] per Gummow, Hayne, Heydon and Kiefel JJ.

plaintiffs have not endured any physical trauma. However, the plaintiffs would be the first to acknowledge that the dispute that has ensued in relation to the defendants' failure to achieve a ceiling height of 2700 mm has caused them significant upset, stress and inconvenience. In my view, this makes it difficult to attach any significant weight to the plaintiffs' evidence about what they believe they would have done if an issue arose in relation to the ceiling height late in 2009. I note in this context the trial judge's finding that Mr and Mrs Stone's evidence as to their 2006 discussions with Mr Smallacombe was unreliable and reconstructed, observing that Mr and Mrs Stone "have become convinced over time, after they were upset to discover the discrepancy in ceiling height in their apartment, that certain things had been said by Mr Smallacombe that I am unable to find were said." This is an illustration of the risk of unreliability to which I have referred.

360 An additional difficulty with reliance upon the plaintiffs' evidence is that it addressed the wrong hypothetical or counter-factual scenario.[145] The relevant hypothetical involves an assumption that the plaintiffs were told the true position rather than misled. In circumstances where the misleading conduct involved the absence of a reasonable basis for making a statement as to the future, the relevant hypothesis requires consideration of the plaintiffs' likely response if informed of the absence of such a basis. It does not directly require consideration of the more absolute proposition that the statement as to the future would necessarily prove to be false. In other words, the relevant hypothetical in this case was what the plaintiffs would have done if Mr Chappel had told them he did not have a reasonable basis for representing that the specified ceiling height could be reached, as opposed to telling them that it could not or would not be achieved.

361 There was no evidence from the plaintiffs that addressed this more nuanced hypothetical. I accept that if informed that Mr Chappel did not have a reasonable basis for believing that the specified ceiling height would be achieved, the plaintiffs would likely have 'pushed back' on the issue. They would likely have requested that Mr Chappel take steps to clarify the position and to ensure that the specified ceiling height could be achieved. But how events would thereafter have played out is far from clear.

362 The plaintiffs contend that it can be inferred that the defendants would have been intransigent such that even under this more nuanced hypothetical they would ultimately have been confronted with the stark alternatives of proceeding with the lower ceiling or walking away from the contract. I am not satisfied that it is appropriate to draw this inference. As the plaintiffs contended in a different context, and as the trial judge held, if rectification work had been undertaken

[145] As to the need to be precise in relation to the relevant hypothetical, and the danger in inferring too readily that a plaintiff would not have proceeded with the relevant transaction, see *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [143]-[147] per Gummow, Hayne, Heydon and Kiefel JJ; *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3)* (2006) 67 NSWLR 341 at [56]-[63].

back in 2009 it would have involved significantly less expense than will now be necessary. It was not put to Mr Chappel in cross-examination that he would have refused to have the relevant beams cut back (or cut back further, in the case of RB5) if the plaintiffs had pressed him on the issue in late 2009. While Mr Chappel's lack of preparedness to undertake rectification work to address the ceiling height in 2011 is of some significance in drawing an inference as to what he would have done in 2009, events had moved on significantly by 2011. The construction and fit-out had been substantially completed. While it can be inferred that Mr Chappel would have been reluctant to spend significant money on rectifying the ceiling height in late 2009, it may well be that significant pressure from the plaintiffs (including a threat to walk away from the contract), would have been sufficient to persuade him to undertake the relatively modest rectification work that would have been required at the time to achieve the ceiling height specified in the contract. If so, then the plaintiffs would not be entitled to recover damages based upon this being a 'no transaction' case.

363 Further, and in any event, even if they had been met with intransigence from Mr Stone, I am also not satisfied that the plaintiffs would have walked away from the transaction. The plaintiffs had invested significant time and effort in getting to the point they had by 2009. Mr Stone had suffered from serious illness and wished to provide suitably comfortable accommodation for his wife. The plaintiffs were both eager to acquire a large apartment in the retirement village operated by the defendants. Indeed, they had been sufficiently eager to acquire the apartment in their desired north-western corner (which later became apartment 107) that Mr Stone had attempted to persuade Mr Smallacombe to cancel an option granted to another purchaser over that apartment. The plaintiffs saw the acquisition of an apartment in the retirement village as an opportunity to design and fit-out a large residence to their personal and superior level. They had been prepared to sign a contract for an apartment in the less desirable north-eastern corner in August 2007, which was well prior to any plans for ceiling heights in the apartments being in existence.

364 While the ceiling height was an important matter to the plaintiffs, I do not consider that it was of such importance to them in late 2009 that a risk of the ceiling height being about four or five centimetres lower than specified would have led to them walking away from the opportunity to acquire apartment 107.

365 It is of some relevance that when they became aware of the discrepancy in the ceiling height in early 2011, the plaintiffs were prepared nevertheless to move in without insisting upon rectification works at that time. That said, I accept that this last matter is of limited significance given that the plaintiffs had by that point in time already paid their deposit, and the first instalment of $500,000 of the purchase price.

366 In summary, I am not satisfied that the plaintiffs have established the factual premise for their contention that this was a "no transaction" case. For this

reason their claim for loss measured by reference to the difference between their outlay and the value of the apartment has not been made out.

Was there a sufficient causal connection?

367 Even if the plaintiffs had established misleading conduct, and that this was a "no transaction" case, an issue would remain as to the sufficiency of the causal connection between the loss claimed and the misleading conduct complained of.

368 In this case, the evidence and findings were to the effect that the 48 mm discrepancy in height did not result in any diminution in the value of their apartment. It follows that they paid $1,853,254 for an apartment that would have been worth $1,500,000 even if the specified ceiling height had been achieved. It may further be inferred from this that the plaintiffs, by opting for their own superior quality fit-out, have over capitalised their apartment. That was the effect of the evidence of the valuer, Mr Fudali. While there is nothing necessarily irrational about paying above market value for something that meets one's own taste and desire, it is in my view a matter that is relevant to the issue of causation.

369 In my view, approaching the issue in the practical and common-sense manner that the law requires, the loss claimed by the plaintiffs was not caused by the misleading conduct of the defendants. Even assuming for the purposes of this section of my reasons that the plaintiffs relied upon the defendants' misleading conduct in the sense that "but for" the misleading conduct they would not have entered into the contract, that is not necessarily enough. When no portion of the differential between $1,853,254 and $1,500,000 is referrable to the ceiling height discrepancy, it would in my view be artificial, and contrary to common-sense, to regard the defendants' misleading conduct as causative of that loss.

370 In contending for a different conclusion, the plaintiffs rely upon *Henville v Walker*.[146] In that case the defendant made misleading representations which over valued a development the plaintiffs were interested in undertaking. In deciding to invest in the development, the plaintiffs relied upon this misleading conduct as well as their own underestimate of the cost of the development. The plaintiffs claimed the entire loss suffered by undertaking the development of $319,846. The majority of the High Court (McHugh, Gummow and Hayne JJ) held that the plaintiffs were entitled to recover the entire loss on the development. The minority (Gleeson CJ and Gaudron J) would have confined the plaintiffs to recovery of the portion of the loss attributable to the defendants' misleading conduct as opposed to the plaintiffs' own conduct.

371 In separate reasons, both McHugh and Hayne JJ held that in the circumstances of that case, the plaintiffs' conduct in underestimating cost did not

[146] *Henville v Walker* (2001) 206 CLR 459.

prevent a conclusion that the plaintiffs' entire loss was caused by the conduct of the defendants. Put another way, the defendant's misleading conduct remained "a" cause of the entire loss. Gummow J agreed with the reasons of both McHugh and Hayne JJ.

372 However, in my view, the present case is readily distinguishable from the circumstances in *Henville v Walker*. In that case, the misleading representation related to the value of the development property. The misleading conduct therefore not only contributed to and induced the decision to acquire the property, but was also part of the reason or explanation for the loss suffered upon acquisition of that property. The loss claimed was the difference between the amount paid for the property and its value (as developed). Calculation of the value of the property, and hence of the plaintiffs' loss, thus required taking into account not only the costs of the development (which had been underestimated by the plaintiffs) but also the value of the development (which had been overestimated by the defendants). In the present case, the misleading conduct, even if it contributed to and induced the decision to purchase the apartment, it does not provide any part of the reason or explanation for the loss claimed. The misleading conduct did not relate to a matter that affected the value of the apartment, or that otherwise affected the calculation of the loss claimed by the plaintiffs. There is a significant difference in my view between claiming a value-based loss in a case involving a representation as to value (or as to a feature or specification affecting value) and claiming a value-based loss in a case involving a representation in relation to a matter that had no effect upon the value of the property.

373 In the ultimate analysis, the plaintiffs' case (even assuming the "no transaction" premise had been established) rests on what I consider to be a mechanical or indiscriminate application of the "but for" test. The authorities, including *Henville v Walker*, do not support such an approach.

374 Even the majority in *Henville v Walker* left open the possibility of loss suffered in the wake of (or following) an act of reliance not being caused by, or not being entirely caused by, the misleading conducting.[147]

375 As Hayne J explained:[148]

> There may be cases where some of the loss suffered by a person following – and I use the word "following" in a neutral sense – the conduct of another in contravention of the Act may not be loss suffered by that person by the contravening conduct. Had the appellants chosen, for wholly extraneous reasons, to change the design of the units, part way through their construction, in such a way as to waste some costs of construction already incurred, it might be said that the extra costs incurred were not caused by the respondents' contravention.

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[147] *Henville v Walker* (2001) 206 CLR 459 at [138], [147] per McHugh J, at [166] per Hayne J. Gummow J agreed with both McHugh and Hayne JJ.
[148] *Henville v Walker* (2001) 206 CLR 459 at [166].

376 There is some analogy between the present case and the qualification mentioned by Hayne J. Even putting to one side the fact that in this case the misleading conduct did not relate to value, it is significant that the entire loss in this case is the product of the plaintiffs' decision to spend heavily upon, and over capitalise, their apartment. They decided to spend more on their apartment than the market would return were that apartment to be sold. In the face of that decision, I consider it contrary to common-sense to suggest that the difference between the amount they paid and the value of the apartment they acquired was caused by anything other than their conduct.

377 Similarly, in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*,[149] the Court emphasised that a defendant may not be responsible for the entire loss suffered by reason of transaction induced by the defendant's misleading conduct in circumstances where a separately identifiable part of the loss is referable to unreasonable conduct on the part of the plaintiff, or some other independent cause unrelated to the defendant's misleading conduct.[150] That must *a fortiori* be so in a case where the entirety of the loss is referable to some independent cause.

378 Some assistance may be derived from the decision of this Court in *Copping v ANZ McCaughan Ltd*.[151] In that case the plaintiff borrower entered into a loss-making offshore loan arrangement following a misrepresentation by the defendant in relation to the function of a "sinking fund" used to service the loan. The loss suffered by the plaintiff arose from a decline in the value of the Australian dollar, whereas the misrepresentation did not relate to the inherent risk in foreign currency variations. Despite finding that the plaintiff would not have entered into the transaction "but for" the defendant's misrepresentation, a majority of this Court held that there was an insufficient connection between the loss suffered and the misrepresentation complained of to permit recovery.

379 The majority emphasised that a conclusion that "but for" the misleading conduct the plaintiff would not have entered into the relevant (loss-making) transaction was not always sufficient.[152] It was relevant also to consider whether, and the extent to which, the loss claimed flowed from the misrepresentation itself, as opposed to the transaction as a whole.[153] In circumstances where the plaintiff would have borrowed funds subject to the same currency risk in any event, the loss was not one attributable to the misrepresentation, and hence not one recoverable by the plaintiff.[154] Put another way, the misrepresentation did not

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[149] *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109.
[150] *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [27] per Gleeson CJ, at [58], [62] per Gaudron, Gummow and Hayne JJ, and at [69], [88]-[89] per McHugh J.
[151] *Copping v ANZ McCaughan Ltd* (1997) 67 SASR 525.
[152] *Copping v ANZ McCaughan Ltd* (1997) 67 SASR 525 at 538 per Doyle CJ.
[153] *Copping v ANZ McCaughan Ltd* (1997) 67 SASR 525 at 538 per Doyle CJ and at 591 per Lander J.
[154] *Copping v ANZ McCaughan Ltd* (1997) 67 SASR 525 at 539 per Doyle CJ and 591 per Lander J.

induce the plaintiff to take on a currency risk, but rather induced only the particular form of the transaction in which that risk was assumed.[155]

380 To the extent that, in the circumstances of this case, the difference between the amount paid and the value of the apartment acquired is a "loss" at all, it is a loss that the plaintiffs would have incurred even if the ceiling height had been as represented. Indeed, even if they had walked away from the contract to purchase apartment 107, given the plaintiffs' desire to obtain an apartment with a superior fit-out and to their own taste, and their preparedness to pay for it, there is every chance that they would have over capitalised some other apartment. Viewed in this way, the defendants' misleading conduct did not induce the plaintiffs to over capitalise; it merely induced them to over capitalise on this particular apartment. While the plaintiffs would no doubt have preferred to spend heavily upon, and over capitalise, an apartment with the specified ceiling height, and hence contend they have lost the ability to do so, I do not regard this as a sufficient connection between the misleading conduct complained of and the loss suffered to permit a conclusion that it was a loss suffered "by" the defendants' conduct.

Damages for defective door frames

381 The plaintiffs complain that the contract called for door frames that projected 5 mm past the gyprock surface of the adjoining wall, whereas in fact the required setback had not been evenly maintained. The extent of the setback ranged from 0 to 2 mm.

382 The trial judge held that the plaintiffs were entitled to an award of damages in the amount of $19,942.45, being the cost to rectify the door frames. This reflected an expert determination made by Mr Walsh QC. The trial judge explained:

> I note Mr Walsh found that it was possible to undertake the rectification works in relation to the door frames and that in all the circumstances it is reasonable and practicable that the defect be rectified. However, the extent to which such rectification works might disrupt the comfort and convenience of the other residents of the retirement village was not explored in evidence before me. I am unclear whether it was considered by Mr Walsh in reaching his conclusion that the rectification works were reasonable and practicable. Certainly he does not refer to it, except perhaps obliquely when he observed that it is the plaintiffs who would be most inconvenienced by the work. In the circumstances I am prepared to make an award on the basis of those costs but I am not prepared to make any orders requiring the defendants to permit the works to be undertaken.

383 In their cross appeal the defendants challenge this award. They do so on two bases. First, on the basis that the trial judge erred in not taking into account the inability of the plaintiffs to undertake the relevant work under the contract. Secondly, on the basis that, contrary to the trial judge's statement that the issue of disruption of the comfort and convenience was not explored in the evidence,

[155] *Copping v ANZ McCaughan Ltd* (1997) 67 SASR 525 at 538 per Doyle CJ at 540.

there was some evidence as to the onsite measures, and consequential inconvenience, required to undertake rectification of the door frames.

384 In order to understand the defendants' challenge, it is necessary to understand the role of the expert, Mr Walsh. The expert determination deed provided that the findings of Mr Walsh would be "final and binding upon the Parties", and would have the status of agreed facts in the proceedings. In relation to the matters the parties agreed were to be the subject of expert determination, Mr Walsh was asked to make findings as to:

> … the practicality and reasonableness of now undertaking such work and incurring such expenditure (provided however that such findings shall the [sic] not preclude the Defendants from pressing before Stanley J their further argument ("the No Right to Remedy Argument") to the effect that by virtue of the terms of the Residents Agreement, the Plaintiffs have no legal right to undertake any structural work either within or external to the shell of their Apartment, and that by reason thereof, it is inappropriate to assess loss or damage for such acts or omissions by reference to the estimated cost of repairs (being repairs which on the Defendants' case, will never in fact be undertaken, and would otherwise comprise an unfair windfall of monies to the Plaintiffs).

385 Ordinarily the plaintiffs would be entitled to rectification damages for the defective door frames under the rule in *Bellgrove v Eldridge,* subject only to the qualification to that rule, namely that the contemplated rectification works are unreasonable.

386 Here, by conferring upon Mr Walsh the power to determine the "practicality and reasonableness" of the contemplated rectification work it appears that the parties intended that Mr Walsh determine whether the qualification was applicable, and intended that the trial judge be bound by this determination. In other words, on the face of it, the parties intended that the trial judge be bound by Mr Walsh's determination of the issue of reasonableness and hence the application of the qualification to the rule in *Bellgrove v Eldridge*. While the expert determination deed gives Mr Walsh's findings the status of "agreed facts", the reference to "reasonableness" makes it plain that the issue to be determined was the application of the qualification to the rule in *Bellgrove v Eldridge*.

387 However, the parties also agreed a proviso which reserved to the defendants the ability to rely upon what is described as the "No Right to Remedy Argument". The terms of the proviso are curious, and appear to reflect a lack of understanding of the general rule in *Bellgrove v Eldridge,* and its qualification. As explained earlier in these reasons, the intention of a plaintiff to carry out the rectification work, and their ability (legal or otherwise) to do so, are generally said to be relevant to a plaintiff's entitlement to recover rectification damages only insofar as they cast light upon, or are probative of, the reasonableness or otherwise of the rectification work. The absence of an intention or ability to carry out the works does not operate as an automatic or independent barrier to the recoverability of rectification damages.

388 Against this background, the proviso in the expert determination deed is best understood as having no content, or at least no work to do. Even if the defendants had established that the plaintiffs had no legal ability to carry out the rectification works by reason of the provisions of their contract, this would not be a barrier to the application of the general rule in *Bellgrove v Eldridge,* with the result that Mr Walsh's determination that the qualification does not apply would be determinative of the plaintiffs' entitlement to damages. I do not accept that the expert determination deed should be read as permitting, let alone requiring, the trial judge to consider the issue of reasonableness afresh but taking into account any legal inability of the plaintiffs to carry out the contemplated work. Such an approach would undermine, if not entirely remove, the utility of the expert's determination of the issue of reasonableness.

389 In my view, this conclusion is determinative of the defendants' cross appeal in relation to the door frames. It must fail. Mr Walsh's conclusion that the rectification works were reasonable is determinative of the plaintiffs' entitlement to damages in respect of the door frames.

390 But even if I am wrong about this, and it was open to the trial judge to revisit the issue of reasonableness (having regard to the additional consideration of the plaintiffs' legal ability to carry out the rectification work), I do not consider that any error has been made out. To the extent that there was any potential contractual impediment to the work being carried out, it was one that arose by reason of the defendants' ability to withhold consent to such works. Even if the defendants would be contractually entitled to withhold consent to the works contemplated in relation to the door frames, I do not regard this as probative of the unreasonableness of the contemplated work in the circumstances of this case. Similarly, while there was some general evidence as to the inconvenience that would be occasioned by the work, the inconvenience would be minor in comparison with the inconvenience associated with the ceiling height rectification works. As the work would be internal to the plaintiffs' apartment, the inconvenience would be, as Mr Walsh observed, largely to the plaintiffs themselves. I am not satisfied that the evidence justifies a conclusion that the rectification works contemplated in respect to the door frames, or the estimated cost of $19,942.45, would be unreasonable.

Damages for loss of use of monies paid prematurely

391 The contract provided for periodic payment of the base price. Apart from the payment in advance of a deposit,[156] the contract provided for payment of a sum of $500,000 at "Handover of Completed Shell", payment of a further $480,000 "60 Days after Handover" and payment of the balance (after the contemplated deduction) within 14 days of "Completed Fit out".

[156] A deposit of $21,000 was paid by payments of $1,000 on or about 30 September 2006 and $20,000 on 23 October 2007. The $1,000 was paid as consideration for an option to purchase a licence over a different apartment and subsequently treated as part payment of the deposit.

392 The plaintiffs paid the sum of $500,000 under protest on 29 September 2010. They paid the sums of $480,000 and $457,120 (representing the balance of the base price) under protest on 26 July 2011.

393 The plaintiffs contended at trial that they were entitled to damages by way of interest (or for loss of use of money) on the basis that they were not required to pay anything other than the deposit because the triggering event for the payment of the balance of the purchase price was completion of the shell. The plaintiffs contended that a completed shell meant a shell constructed in conformity with the plans, and that in this case there were material deviations or defects, including the height of the ceiling that had not been rectified.

394 The defendants, on the other hand, contended that construction of the shell and framework was complete within the meaning of the contract by 3 September 2010, when the project architect certified that the shell and framework were complete, or, in the alternative, by 1 October 2011 when the plaintiffs took possession of the apartment and commenced occupation. On the defendants' case, the $480,000 was paid late, entitling them to an award of interest.

395 The trial judge correctly identified that the contractual provisions relating to timing of payment were to be construed in accordance with the principles set out by the High Court in *Electricity Generation Corporation v Woodside Energy Ltd*[157] and *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*.[158] The effect of those authorities is that the meaning of commercial contracts such as the present is to be determined by reference to what a reasonable businessperson would have understood the terms to mean. It requires consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract.

396 Having noted that the expression "Completed Shell" was not defined in the contract, the trial judge concluded that it was to be understood as a reference to "the works" as defined in clause 2 of annexure 1 to schedule 9. That is to say, the "Completed Shell" is the shell and framework of the apartment constructed "in accordance with the plans". The expression was also to be understood by reference to the clause 5 obligation that the works be executed not only in accordance with the plans but also in a proper and workmanlike manner, and in accordance with accepted Australian construction standards.

397 His Honour summarised that there was no obligation to pay the $500,000 until there had been handover of the shell and framework "complete in all respects in accordance with the plans, in a proper and workmanlike manner and in accordance with accepted Australian construction standards." His Honour

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[157] *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35] per French CJ, Hayne, Crennan and Kiefel JJ.
[158] *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46]-[51] per French CJ, Nettle and Gordon JJ.

considered that this construction was consistent with the ordinary meaning or sense of the word "complete".

398 His Honour rejected the defendants' contention that the reference to a completed shell meant practical completion of the works, or when the architects certified that it was complete. His Honour reasoned that while these expressions or concepts were often used in building contracts, the parties here had chosen a different expression, and one that was clear in its meaning.

399 His Honour rejected the suggestion of a lack of commerciality in his construction, noting that the event of completion triggered the obligation to pay two substantial sums of money (albeit the second was not for a further 60 days). The only protection the contract afforded the plaintiffs against the failure on the part of the defendants to fulfil their construction obligations was to withhold payment until the shell and framework were complete. Finally, his Honour noted that even on his construction of the contract, *de minimis* departures from the contractual specifications would not prevent the obligation to pay being triggered.

400 Applying this reasoning, the trial judge held that the plaintiffs were entitled to an award of damages for loss of use of monies or interest on the sums of $500,000 and $480,000 because they were paid prematurely. There had not been handover of the "completed shell" when those payments were made. On the other hand, the trial judge rejected an entitlement to damages in respect of the payment of $457,120 because this was paid voluntarily and not as a result of any demand by the defendants.

401 As to the end point to the entitlement to damages for the premature payments, the trial judge held that the plaintiffs were not entitled to interest after 1 October 2011 when they took possession of the apartment and commenced occupation. His Honour reasoned that by taking possession and commencing occupation the plaintiffs acted inconsistently with any continued claim that the defendants were obliged to complete the works by raising the ceiling, with the result that the obligation to pay $500,000 fell due by this date, and the obligation to pay $480,000 fell due 60 days later.

402 On the sum of $500,000, paid 29 September 2010, his Honour awarded a lump sum by way of interest to 1 October 2011 of $30,676.85. On the sum of $480,000, paid 26 July 2011, his Honour awarded a lump sum by way of interest to 1 October 2011 of $5,535.39.

403 As his Honour observed, implicit in his award of damages to the plaintiffs for premature payments was a rejection of the defendants' claim that they were entitled to interest on the basis the payments were late.

404 On appeal the defendants challenged his Honour's approach to the contractual provision as to timing of the payment of $500,000. Whereas that

provision referred to "Handover of Completed Shell", the defendants emphasised that the obligation to pay the second payment of $480,000 arose 60 days "after Handover" without any reference to the Completed Shell, and the obligation to pay the balance arose within 14 days of the "completed Fit out" rather than the Completed Shell.

405 In my view, reading these three provisions together, and against the background of the circumstances known to the parties and the commercial objective or purpose of the contract, the focus is upon the handover of the shell for the purposes of the plaintiffs commencing the fit-out of their apartment. The objective of the payment provisions is not (or not so much) to enable the plaintiffs to secure performance by the defendants of their contractual obligations, but rather to ensure that the defendants receive the first instalment of the contract price prior to them handing over the shell to the plaintiffs for them to commence the fit-out work.

406 Understood in this context, the reference to "Completed Shell" in the provision relating to the first instalment means, in my view, sufficiently completed as to be ready and suitable to be handed over for the fit-out; that is, substantially completed for that purpose. It does not mean completed in all respects, subject only to *de minimis* departures from the contractual specification.

407 In my view, not only does the former construction give effect to the commercial intentions and objectives of the parties, but also the latter construction gives rise to the potential for the plaintiffs to delay handover, and hence the obligation to pay, even if the defects complained of are relatively minor and will not impede the fit-out. I do not consider this to be consistent with the likely commercial objectives and intentions of the parties.

408 Applying this construction, I am satisfied that the obligation to pay $500,000 fell due on 29 September 2010. By that stage, the project architects and Mr Girolamo had certified that the shell was complete or had reached practical completion, and the evidence does not reveal any defect that prevented the fit-out commencing. As a matter of fact, following handover the plaintiffs did proceed with and complete the fit-out. Even if the discrepancy in the ceiling height was a defect that might be said to prevent the fit-out commencing, the parties were not aware of this defect in September 2010. I do not think a latent defect of this nature can be said to prevent the obligation to pay the first instalment from having arisen.

409 Further, and in any event, regardless of whether the shell was substantially complete for the purposes of fit-out as at 29 September 2010, the fact is that handover for this purpose did occur. The obligation to make the second and third payments are expressly referable to handover and completion of the fit-out respectively, and not completion of the shell. But even in respect of the first payment, while defects which might impede the fit-out would justify the plaintiffs delaying handover, if, as here, they accept handover, then in my view

their obligation to make the first payment is triggered. If they accept the benefit of handover of the shell for the purposes of commencing their fit-out, they must accept the burden of payment for that shell. Having accepted the benefit of handover of the shell it is not to the point that they did so, or that they made payments, under protest or purporting to do so without prejudice to their rights. By accepting the benefit of handover of the shell, they triggered the obligation to make the first instalment. They acted inconsistently with, and elected not to pursue, any right they may have had to withhold payment on account of defects of which they were aware and complaining about.

410 For these reasons, I consider that the trial judge erred in holding that the payments of $500,000 and $480,000 were made prematurely so as to entitle the plaintiffs to damages for loss of use of those amounts. It is appropriate that the awards of $30,676.85 and $5,535.39 be set aside.

The set off for interest on late payment of $480,000

411 As a corollary of my conclusion in relation to the time at which the obligation to pay the various instalments fell due, the plaintiffs' payment of the second instalment on 26 July 2011 was late. If fell due 60 days after handover, which occurred on 29 September 2010, and was thus 240 days late.

412 Under the contract, interest is payable on late payments at the rate of 10.61 per cent per annum. On the defendants' unchallenged calculation, this equates to an amount of $33,486.90 in interest. It is appropriate that the cross appeal be allowed to include a set off in the defendants' favour of $33,486.90 on account of interest.

Conclusion and orders

413 On the plaintiffs' appeal, while disagreeing with some aspects of the trial judge's reasoning, I have ultimately rejected the plaintiffs' challenges to the trial judge's refusal to award them damages for the cost of rectifying the ceiling height deficiency, and to the trial judge's refusal to award damages for misleading conduct. My rejection of the latter is based on various grounds which include, but are not confined to, the matters raised in the defendants' notice of contention.

414 On the defendants' cross appeal, I have rejected their challenge to the trial judge's awards of damages for loss of amenity associated with the defective ceiling height and for the defective door frames. However, I have upheld the challenge to the awards of damages on account of the first two instalment payments being premature, and, consequentially, the challenge to the trial judge's refusal to permit a set off for interest owing to the defendants on account of the second payment being late.

415 It follows that I would dismiss the plaintiffs' appeal and allow the defendants' cross appeal to the extent of setting aside the awards of $30,676.85

and $5,535.39 in favour of the plaintiffs on account of damages for loss of use of monies, and include a set off in favour of the defendants of $33,486.90 on account of interest for the late payment of the second instalment of the purchase price.

416 The plaintiffs' reduced entitlement to damages would be calculated as follows:

• loss of amenity	$30,000.00
• cost of rectifying door frames	$19,942.45
• cost of window seals	$445.00
• fire inspection fee	$539.00
• less cost of variations	($6,092.51)
• less interest on late payment	($33,486.90)
Total	$11,347.54

417 Accordingly, I would make the following orders:

1. Appeal dismissed.
2. Cross appeal allowed in part.
3. The judgment for the plaintiffs in the sum of $81,046.98 dated 4 March 2016 be set aside, and there be substituted judgment for the plaintiffs in the sum of $11,347.54.

HINTON J:

418 I have had the benefit of reading the judgment of Doyle J for which I am grateful. I agree with Doyle J for the reasons he gives that the plaintiffs' appeal should be dismissed and the defendants' cross-appeal should be allowed to the extent that his Honour has indicated. I also agree with the dispositional orders that Doyle J would make.

419 With respect to the second, third and fourth grounds of appeal and the application of the rule expounded in *Bellgrove v Eldridge* and, in particular, the qualification to that rule, I prefer to express my own reasons.[159]

420 *Bellgrove v Eldridge* is authority for three propositions.[160] First, the appropriate measure of damages in cases where a builder has departed from specifications forming part of a contract for the erection of a building is "the reasonable cost of rectifying the departure or defect so far as that is possible".[161] Second, that rule is subject to the qualification that the rectification work to be undertaken must "be necessary to produce conformity" with the contract and "must be a reasonable course to adopt"[162] in that it constitutes a "reasonable method of dealing with the situation" (the qualification).[163] Third, if undertaking the necessary rectification work is not a reasonable course to adopt, "the true measure of the building owner's loss will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials".[164]

421 I do not stay to deal with the third proposition beyond accepting that the law of damages is not so inflexible such that in a case where a builder has departed from specifications forming part of a contract for the erection of a building, the only possible awards available are those subject of propositions one and three. More recent authority establishes that an award may be made, as indeed the trial Judge rightly did in this case, for loss of amenity, inconvenience or loss of aesthetic satisfaction.[165]

422 The first proposition reflects a plaintiff's interest in the performance of the contract entered into with a defendant builder. It is also reflects the long standing rule of the common law "that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation,

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[159] (1954) 90 CLR 613.
[160] (1954) 90 CLR 613.
[161] *Bellgrove v Eldridge* (1954) 90 CLR 613 at 617 (Dixon CJ, Webb and Taylor JJ).
[162] *Bellgrove v Eldridge* (1954) 90 CLR 613 at 618 (Dixon CJ, Webb and Taylor JJ).
[163] *Bellgrove v Eldridge* (1954) 90 CLR 613 at 618, 619 (Dixon CJ, Webb and Taylor JJ).
[164] *Bellgrove v Eldridge* (1954) 90 CLR 613 at 619 (Dixon CJ, Webb and Taylor JJ).
[165] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 at 354 (Lord Bridge of Harwich), at 360 (Lord Mustill), at 365, 374 (Lord Lloyd of Berwick).

with respect to damages, as if the contract had been performed."[166] In this regard in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (*Tabcorp*) the High Court explained:[167]

> Oliver J was correct to say in *Radford v De Froberville* that the words "the same situation, with respect to damages, as if the contract had been performed" do not mean "as good a *financial* position as if the contract had been performed" (emphasis added). In some circumstances putting the innocent party into "the same situation … as if the contract had been performed" will coincide with placing the party into the same financial situation. Thus, in the case of the supply of defective goods, the prima facie measure of damages is the difference in value between the contract goods and the goods supplied. But as Staughton LJ explained in *Ruxley Electronics Ltd v Forsyth* such a measure of damages seeks only to reflect the financial consequences of a notional transaction whereby the buyer sells the defective goods on the market and purchases the contract goods. The buyer is thus placed in the "same situation … as if the contract had been performed", with the loss being the difference in market value. However, in cases where the contract is not for the sale of marketable commodities, selling the defective item and purchasing an item corresponding with the contract is not possible. In such cases, diminution in value damages will not restore the innocent party to the "same situation … as if the contract had been performed".
>
> (footnotes omitted).

423 The purpose of damages in cases of defective building is not, therefore, to compensate for financial loss.[168] Rather it is the enforcement of the performance interest that is the primary concern of the law in this area,[169] hence in *Bellgrove v Eldridge* the 'doubtful remedy' involving the removal and replacement of three-foot sections of the foundations at a time "could not in any sense be regarded as ensuring to her the equivalent of a substantial performance by the appellant".[170]

424 With respect to the second proposition, the qualification, in *Bellgrove v Eldridge* the High Court said:[171]

> … No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks. In such circumstances the work of demolition and re-erection would be quite unreasonable or it would, to use a term current in the United States, constitute "economic waste". (See *Restatement of the Law of Contracts*, (1932) par. 346). We prefer, however, to think that the building owner's right to undertake remedial works at the expense of a builder is not subject to any limit other than is to be found in the expressions "necessary" and "reasonable", for the expression "economic waste" appears to us to go too far and would

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[166] *Robinson v Harman* (1848) 1 Exch 850 at 855; 154 ER 363 at 365 (Parke B); *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).
[167] (2009) 236 CLR 272 at [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).
[168] *Bellgrove v Eldridge* (1954) 90 CLR 613 at 617 (Dixon CJ, Webb and Taylor JJ).
[169] See generally, B Coote, 'Contract Damages, *Ruxley*, and the Performance Interest' (1997) 56(3) *Cambridge Law Journal* 537.
[170] (1954) 90 CLR 613 at 620 (Dixon CJ, Webb and Taylor JJ).
[171] (1954) 90 CLR 613 at 618-619 (Dixon CJ, Webb and Taylor JJ).

> deny to a building owner the right to demolish a structure which, though satisfactory as a structure of a particular type, is quite different in character from that called for by the contract. Many examples may, of course, be given of remedial work, which though necessary to produce conformity would not constitute a reasonable method of dealing with the situation and in such cases the true measure of the building owner's loss will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials.
>
> As to what remedial work is both "necessary" and "reasonable" in any particular case is a question of fact. But the question whether demolition and re-erection is a reasonable method of remedying defects does not arise when defective foundations seriously threaten the stability of a house and when the threat can be removed only by such a course. …

425 Thus with respect to the qualification the analysis to be undertaken is two staged. First, is the work necessary to produce conformity? This inquiry focuses upon the departure from the terms of the contract and what is required to produce conformity. The question to be answered is whether the work to be undertaken is "apt to conform with the plans and specifications which had not been conformed with."[172] Second, if it is necessary to undertake the work to produce conformity in the relevant sense, is the performance of the rectification work a reasonable method of dealing with the situation? This inquiry involves a consideration of whether the work method proposed is reasonable and, if it is, whether it is reasonable to make an award of damages sufficient to pay for the work to be done. The former, in a sense, is no more than accounting for the duty to mitigate. The latter, however, constitutes a broader control on the availability of an award of rectification damages.

426 In the illustration given, the use of new bricks and not second-hand bricks constituted a departure from the terms and conditions of the contract. Replacement of the new bricks with second-hand bricks would be apt to achieve conformity. However, the use of new bricks made no material difference to the achievement of the outcome contracted for – the performance interest. The new bricks were a sufficient and suitable substitute with the consequence that the performance interest was met. In those circumstances, despite there being a departure from the terms and conditions of the contract which would necessitate work to rectify, it would be unreasonable to require rectification. That is to say, the extent to which the performance interest was met rendered an award of rectification damages an unreasonable method of dealing with the situation. Different considerations may arise if, for example, the contract specified the use of a particular type of second-hand brick in order to achieve a particular and distinct appearance, one which new bricks would not achieve. No longer can there be any suggestion of a suitable substitute having been supplied. No longer can it be said that the performance interest has been sufficiently or substantially met such that an award of rectification damages would be unreasonable. In these

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[172] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [19] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

circumstances, the performance interest would extend beyond the functional to include a subjective, aesthetic aspect.

427 Whilst *Bellgrove v Eldridge* makes plain that as part of the second stage of the inquiry consideration is given to whether the proposed work method is reasonable and whether it is reasonable to award damages so that the work may be undertaken, it provides little further assistance regarding the content of the latter – the broader control. That said, bearing in mind the primacy to be afforded the enforcement of the performance interest, it may be accepted that the degree of unreasonableness necessary to disentitle a plaintiff to rectification damages will not be inconsiderable. It may also be accepted that rarely will it be unreasonable for the plaintiff to seek no more than what he or she hoped to obtain by entering into the contract in the first place. Further, bearing in mind the outcome in *Bellgrove v Eldridge*, an award of rectification damages will not be unreasonable just because the award may total an amount greater than the value of the contracted end.

428 It is also important to observe the rejection in *Bellgrove v Eldridge* of the qualification as incorporating consideration of economic wastage.[173] That would be to "go too far" as it would "deny to a building owner the right to demolish a

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[173] (1954) 90 CLR 613 at 619-620 (Dixon CJ, Webb and Taylor JJ). The Court refers to paragraph 346 of the American Law Institute, *Restatement of the Law of Contracts* (American Law Institute Publishers, 1932) ch 12 at 572-574. Paragraph 346 provided:

> (1) For a breach by one who has contracted to construct a specified product, the other party can get judgment for compensatory damages for all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable, determined as follows:
>
> (a) For defective or unfinished construction he can get judgment for either
>
> (i) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or
>
> (ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.
>
> …

The difference in approach under the *Restatement* is readily apparent in the commentary accompanying paragraph 346 subsection (1a). It stated (at 574-575):

> The purpose of money damages is to put the injured party in as good a position as that in which full performance would have put him; but this does not mean that he is to be in the same specific physical position. Satisfaction for his harm is made either by giving him a sum of money sufficient to produce the physical product contracted for or by giving him the exchange value that that product would have had if it had been constructed. In very many cases it makes little difference whether the measure of recovery is based upon the value of the promised product as a whole or upon the cost of procuring and constructing it piecemeal. There are numerous cases, however, in which the value of the finished product is much less than the cost of producing it after the breach has occurred. Sometimes defects in a completed structure cannot be physically remedied without tearing down and rebuilding, at a cost that would be imprudent and unreasonable. The law does not require damages to be measured by a method requiring such economic waste. If no such waste is involved, the cost of remedying the defect is the amount awarded as compensation for failure to render the promised performance.

structure which, though satisfactory as a structure of a particular type, is quite different in character from that called for by the contract."[174]

429 Rectification damages and the qualification were not considered further by the High Court for some 55 years, until *Tabcorp*.[175] In between times the House of Lords decided *Ruxley Electronics & Construction Ltd v Forsyth* (*Ruxley*).[176] Doyle J has dealt with *Ruxley* in detail. For present purposes it is sufficient to observe that in *Ruxley* all of their Lordships assumed that rectification damages as a remedy was subject to the qualification of reasonableness. Lord Bridge of Harwich considered acceptance of the proposition that an award of rectification damages was appropriate "however unreasonable it would be to incur that cost" to "fly in the face of common sense".[177] Lord Mustill spoke of the qualification being decisive "when the cost of reinstatement would be wholly disproportionate to the non-monetary loss suffered".[178] His Lordship considered that there was "no need to remedy the injustice of awarding too little", that would be reflected in an award equal to depreciation value, "by unjustly awarding far too much", as an award of rectification damages may be in some cases.[179] Lord Lloyd of Berwick considered an award of rectification damages inappropriate if "the expenditure would be out of all proportion to the benefit to be obtained".[180]

430 The language of their Lordships suggests that the qualification will only apply where the disproportion is high. Accepting this, one way to state the qualification would be that rectification damages are not to be awarded where the cost of the work to be undertaken is such that no reasonable person would expend that sum bearing in mind the benefit that would be generated.[181] A difficulty arises, however, in framing the qualification in this way because it does not account for the truly subjective performance interest, that which is aesthetic or eccentric. The qualification must take into account a plaintiff's particular performance interest. I do not understand any of Lords Keith, Bridge, Mustill or Lloyd as requiring otherwise, hence all accept an award of rectification damages appropriate for the folly defectively constructed that would reduce the value of an estate.[182]

431 Lord Jauncey of Tullichettle's approach was slightly different. His Lordship said:[183]

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[174] *Bellgrove v Eldridge* (1954) 90 CLR 613 at 619 (Dixon CJ, Webb and Taylor JJ).
[175] (2009) 236 CLR 272.
[176] [1996] 1 AC 344.
[177] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 at 354.
[178] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 at 361.
[179] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 at 361.
[180] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 at 367, 369.
[181] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 at 353 (Lord Bridge of Harwich).
[182] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 at 353 (Lord Bridge of Harwich).
[183] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 at 357; at 370-371 (Lord Lloyd of Berwick; Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Mustill agreeing).

> Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate. A failure to achieve the precise contractual objective does not necessarily result in the loss which is occasioned by a total failure. This was recognised by the High Court of Australia in the above cited passage in *Bellgrove v Eldridge,* 90 CLR 613, 617-618, where it was stated that the cost of reinstatement work subject to the qualification of reasonableness was the extent of the loss, thereby treating reasonableness as a factor to be considered in determining what was that loss rather than, as the respondents argued, merely a factor in determining which of two alternative remedies were appropriate for a loss once established. …

432 And:[184]

> What constitutes the aggrieved party's loss is in every case a question of fact and degree. Where the contract breaker has entirely failed to achieve the contractual objective it may not be difficult to conclude that the loss is the necessary cost of achieving that objective. Thus if a building is constructed so defectively that it is of no use for its designed purpose the owner may have little difficulty in establishing that his loss is the necessary cost of reconstructing. Furthermore in taking reasonableness into account in determining the extent of loss it is reasonableness in relation to the particular contract and not at large. Accordingly, if I contracted for the erection of a folly in my garden which shortly thereafter suffered a total collapse it would be irrelevant to the determination of my loss to argue that the erection of such a folly which contributed nothing to the value of my house was a crazy thing to do. As Oliver J said in *Radford v De Froberville* [1977] 1 WLR 1262, 1270:
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> > If he contracts for the supply of that which he thinks serves his interests – be they commercial, aesthetic or merely eccentric – then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.
>
> However where the contractual objective has been achieved to a substantial extent the position may be very different.
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> It was submitted that where the objective of a building contract involved satisfaction of a personal preference the only measure of damages available for a breach involving failure to achieve such satisfaction was the cost of reinstatement. In my view this is not the case. Personal preference may well be a factor in reasonableness and hence in determining what loss has been suffered but it cannot per se be determinative of what that loss is.

433 For Lord Jauncey an award of rectification damages would only be unreasonable where rectification was not needed. If rectification is not needed that must be because the performance interest has been substantially satisfied, has been abandoned or can no longer be achieved. In each of those circumstances, rectification damages would not truly reflect the loss sustained.

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[184] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 at 358.

434 Lord Jauncey's approach emphasises the proper characterisation of the loss – the extent to which the performance interest has not been met – in the individual case. His Lordship agreed with the trial Judge that Mr Forsyth's loss did not extend to the cost of rectification.[185] His Lordship's approach can perhaps best be understood by his treatment of an illustration raised in argument. He said:[186]

> I take the example suggested during argument by my noble and learned friend, Lord Bridge of Harwich. A man contracts for the building of a house and specifies that one of the lower courses of brick should be blue. The builder uses yellow brick instead. In all other respects the house conforms to the contractual specification. To replace the yellow bricks with blue would involve extensive demolition and reconstruction at a very large cost. It would clearly be unreasonable to award the owner the cost of reconstructing because his loss was not the necessary cost of reconstruction of his house, which was entirely adequate for its design purpose, but merely the lack of aesthetic pleasure which he might have derived from the sight of blue bricks. Thus in the present appeal the respondent has acquired a perfectly serviceable swimming pool, albeit one lacking the specified depth. His loss is thus not the lack of a useable pool with consequent need to construct a new one. Indeed were he to receive the cost of building a new one and retain the existing one he would have recovered not compensation for loss but a very substantial gratuitous benefit, something which damages are not intended to provide.

435 The house was fit for purpose despite not having the lower course of blue brick just as the swimming pool was fit for purpose despite not being of the depth specified. That is, that aspect of the performance interest that reflected functional considerations was satisfied – the house provided all the normal benefits of a house and the swimming pool provided all the normal benefits of a swimming pool.

436 Turning to that aspect of the performance interest bound up in the subjective value to a plaintiff of a swimming pool or house built in conformance with contractual specifications, the question becomes whether that value, over and above the value of the functional which has been satisfied, is such that an award of damages in an amount other than equal to the cost of rectification would be disproportionate to the loss of the subjective value of the house or swimming pool built in conformity with the specifications, bearing in mind the extent to which the performance interest has otherwise been met. Accepting this, the qualification is confined in its ambit and does not embrace unreasonableness at large.

437 The swimming pool and the house with a lower course of blue brick may be contrasted with the construction of a "folly" that is of little if any utility, save the aesthetic contribution it makes. The value of the folly may be considered coextensive with its subjective value. It has no real functional value. In such circumstances to award other than rectification damages would be to make an

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[185] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 at 359.
[186] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 at 358.

award disproportionate to the loss of the subjective value of the folly – disproportionate to the unsatisfied performance interest.

438 In *Ruxley,* the notional proportion of the subjective value of the swimming pool built in conformance with the contract specifications to the functional value of that built was such that, bearing in mind the extent to which the performance interest had been met by that built, to award rectification damages would be to make an award that the reasonable person would consider disproportionate to the unsatisfied performance interest.[187] It follows that to characterise the performance interest at a high level of abstraction – she contracted for, but did not get, a house with a lower course of blue brick therefore she should have whatever she needs to get a house with a lower course of blue brick – risks mischaracterising the performance interest and overlooking the extent to which the performance interest was satisfied.

439 In *Tabcorp* the High Court reaffirmed the paramountcy of the performance interest in agreeing with Oliver J in *Radford v De Froberville* that damages for breach of contract are intended to put a plaintiff in "the same situation" as if the contract had been performed and not "as good a financial position".[188] In dealing with the breach of a negative covenant within a lease the Court considered that the applicable principles governing the relevant measure of damages reflected that belying the thinking in *Bellgrove v Eldridge* and what I have referred to above as the first proposition.[189] The Court accepted the qualification to that proposition. The Court referred to the illustration reproduced above[190] from *Bellgrove v Eldridge* and commented:[191]

> That tends to indicate that the test of "unreasonableness" is only to be satisfied by fairly exceptional circumstances. The example given by the Court aligns closely with what Oliver J said in *Radford v De Froberville*, that is, that the diminution in value measure of damages will only apply where the innocent party is "merely using a technical breach to secure an uncovenanted profit". It is also important to note that the "reasonableness" exception was not found to exist in *Bellgrove v Eldridge*. Nothing in the reasoning in that case suggested that where the reasoning is applied to the present circumstances, the course which the Landlord proposed is unnecessary or unreasonable.

440 The High Court then referred to *Ruxley* noting that their Lordships did not disagree with the principles expressed in either *Bellgrove v Eldridge* or *Radford v*

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[187] Here it is to be borne in mind that Mr Forsyth did not notice anything untoward until nine months after the pool was completed; *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 at 362 (Lord Lloyd of Berwick).

[188] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ). Contrast paragraph 346 of the *Restatement of the Law of Contracts* and related commentary quoted at fn 173 above.

[189] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13]-[15] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

[190] At [424].

[191] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [17] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

De Froberville and purported to apply those principles.[192] The Court then observed that "on one view" the result in *Ruxley* was "inconsistent with those principles".[193] Such comment calls into question, without deciding, whether the circumstances in *Ruxley* were fairly exceptional such as to make an award of rectification damages unreasonable. *Ruxley* was in any event, the Court concluded, distinguishable on its facts. Referring back to *Bellgrove v Eldridge* the Court said:[194]

> Further, the Landlord correctly submitted that the Tenant's submission misconstrued what this Court said in *Bellgrove v Eldridge*. The "qualification" referred to in the passage quoted above that the "work undertaken be necessary to produce conformity" meant, in that case, apt to conform with the plans and specifications which had not been conformed with. Applied to this case, the expression "necessary to produce conformity" means "apt to bring about conformity between the foyer as it would become after the damages had been spent in rebuilding it and the foyer as it was at the start of the lease". And the Landlord also correctly submitted that the requirement of reasonableness did not mean that any excess over the amount recoverable on a diminution in value was unreasonable. The Tenant's submissions rested on a loose principle of "reasonableness" which would radically undercut the bargain which the innocent party had contracted for and make it very difficult to determine in any particular case on what basis damages would be assessed. That principle should not be accepted.
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> (footnote omitted).

441 In *Tabcorp* there was no sense in which it could be contended that the negative covenant contained in cl 2.13 of the lease under consideration had been substantially complied with. The tenant's actions had set the respondent's performance interest at nought. It could not be said that the performance interest was substantially satisfied, had been abandoned or could no longer be achieved. It could not be said, bearing in mind the nature of the respondent's performance interest as expressed in the negative covenant, that the cost of rectification was disproportionate to the benefit to be attained or that an award of rectification damages would be disproportionate to the unmet proportion or aspect of the performance interest. Similar to Lord Jauncey, the High Court in *Tabcorp* rejects the suggestion that the qualification is of broad application.

442 In this analysis I have not dealt with the question of the relevance of a plaintiff's intention to carry out the rectification works. In view of the trial Judge's finding that the plaintiffs wanted to undertake the work it is unnecessary to do so.[195] Nor have I dealt with the question of impossibility of rectification. It was not contended that it would be impossible in this case to undertake the rectification works.

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[192] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [18] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).
[193] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [18] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).
[194] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [19] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).
[195] *Stone v Chappel* [2016] SASC 32 at [167].

443 I agree with Doyle J for the reasons he gives that the trial Judge erred in holding that the plaintiffs were precluded by the common law doctrine of election from seeking rectification damages. I turn to the application of the qualification.

444 The trial Judge gave five reasons for concluding that this case fell within the qualification. First, bearing in mind the impact upon the appearance of the interior living space of the apartment, rectification damages in the amount of $331,188.00 (the cost of demolishing the ceiling, making structural adjustments and installing a ceiling that conformed to the contract) was disproportionate to the benefit to be obtained.[196] Second, the proposed rectification works would cause considerable nuisance to other residents in the apartment complex for between five weeks and two months that may result in the respondent breaching contractual obligations owed to those residents, including the obligation not to interfere with their reasonable peace, comfort and privacy.[197] Third, the rectification work would involve an unacceptable fire risk.[198] The trial Judge considered that if a fire were to be caused it could be catastrophic to persons and property. Bearing in mind that the ceiling height was, in the trial Judge's opinion, substantially compliant with the contract, "incurring the risk of a catastrophic fire is disproportionate to the benefit to be obtained."[199] Fourth, having concluded that the lower ceiling did not have a significant impact on the appearance of the interior of the apartment the trial Judge considered the breach of contract "technical", although causative of a small loss of amenity.[200] Fifth, the trial Judge considered that to award rectification damages would result in the Court also ordering that the work be undertaken which could then result in the Court being placed in the undesirable position, in effect, of supervising the work.[201]

445 There is no contest that the proposed rectification work is necessary in the sense that it is apt in the relevant sense to bring about conformity with the contract.

446 I agree with Doyle J that the trial Judge's fifth reason was irrelevant and may immediately be put to one side. In my view the second and third reasons expose what may be considered consequential costs that would likely be incurred in effecting the rectification work and thus could form a component of an award of rectification damages. I do not understand the award sought in this case to include any allowance for such costs. Two things flow from this. First, it calls into question the likelihood that the plaintiffs would undertake the rectification work. In view of the conclusion I have arrived at it is unnecessary to consider this further. Second, it suggests that the award sought is less than required. This is significant in that for the purposes of the second stage of the analysis required

[196] *Stone v Chappel* [2016] SASC 32 at [162].
[197] *Stone v Chappel* [2016] SASC 32 at [163].
[198] *Stone v Chappel* [2016] SASC 32 at [164].
[199] *Stone v Chappel* [2016] SASC 32 at [164].
[200] *Stone v Chappel* [2016] SASC 32 at [165].
[201] *Stone v Chappel* [2016] SASC 32 at [166].

by *Bellgrove v Eldridge* the sum sought is not the true cost of rectification but something greater.

447 I agree with Doyle J that the trial Judge's first and fourth reasons are of the greatest relevance to the second stage of the inquiry.

448 The plaintiffs' performance interest was not simply aesthetic. It included the functional. I agree with Doyle J that with respect to the functional, there was compliance with the contract.

449 Mr Stone gave evidence that the ceiling height was important to him and his wife. They wanted the "ambience and the volume" that they were used to. Mrs Stone described feeling "like it's coming down on me".

450 Ceiling height was also important to such things as the height at which artwork was hung on walls in addition to the height of cupboards. The plaintiffs were concerned with matters of presentation and appearance and the relativity of space above such things as artwork and cupboards.

451 It may be said that for the plaintiffs cupboard height and hanging height cannot be considered in isolation of the other fittings, finishes and furnishings. The totality of the fit out was important. There is no evidence, however, of the extent to which the failure to provide a ceiling at a height that conformed to the contract compromised or frustrated the fitout and the aesthetic appeal it was intended to achieve generally beyond the perception associated with the gap between the top of the cupboards and the ceiling being described as looking "mean" and being "wrong", disappointment at the visual space around certain artwork (but not all), and Mrs Stone's perception of the ceiling "coming down on me". Mrs Stone did add that the "finishes were wrong" but exactly what she meant, and whether it was anything more than the gap between ceiling and cupboard tops or the space around artworks, was not pursued. The fitout was completed despite the lower ceiling becoming known relatively early in the piece. That suggests the value of the subjective aspect of the performance interest not met was not significant overall. So too does the fact that the spatial impact of the lower ceiling was not appreciated before the installation of the kitchen cupboards commenced.

452 This case is not unlike Lord Bridge's blue brick/yellow brick illustration. It differs to the High Court's new brick/second-hand brick illustration, but not greatly – the apartment supplied is not a perfect substitute. As Doyle J has indicated, analogies can be drawn in this case with the circumstances in *Ruxley*. The extent to which the performance interest was met in this case and the limited benefit to be gained for the money that would need be spent to produce conformity distinguish this case from *Bellgrove v Eldridge*, *Tabcorp*, *Willshee v*

Westcourt Ltd,[202] *Wheeler v Ecroplot Pty Ltd*[203] and *Unique Building Pty Ltd v Brown*.[204]

453 Bearing in mind the benefit to the plaintiffs that rectification work is likely to provide, I think the trial Judge was right to conclude that the cost of such work would be disproportionate to the benefit to be attained. Put slightly differently, this case falls within the category of the exceptional in that despite the departure from the contract specifications, the performance interest was substantially met such that an award of rectification damages in the amount sought would be disproportionate to the benefit to be achieved. It was not a reasonable method of dealing with the situation. In the language of one commentator, the cost of rectification would be out of all proportion to the loss of the consumer surplus.[205]

454 For these reasons I would dismiss the second, third and fourth grounds of appeal.

[202] [2009] WASCA 87.
[203] [2010] NSWCA 61.
[204] [2010] SASC 106.
[205] D Harris, A Ogus and J Phillips, 'Contract Remedies and the Consumer Surplus' (1979) 95 *Law Quarterly Review* 581 at 606.