Supreme Court

New South Wales

Case Name:	Owners of Strata Plan 80458 v TQM Design & Construct Pty Ltd
Medium Neutral Citation:	[2018] NSWSC 1304
Hearing Date(s):	30 April, 1, 2, 3, 7 May, 24, 25, 26, 30, 31 July, 6 August 2018
Decision Date:	23 August 2018
Jurisdiction:	Equity - Technology and Construction List
Before:	Hammerschlag J
Decision:	Proceedings dismissed
Catchwords:	BUILDING AND CONSTRUCTION – ss 18B, 18D of the Home Building Act 1989 (NSW) – statutory warranties as to quality of home building work – where plasterboarding, air conditioning and acoustic installation work in apartments is defective – whether the defendant builder did defective building work – the defendant suspended building work under the Building and Construction Industry (Security of Payment) Act 1999 (NSW) before being excluded from the site and not being allowed to complete the work – whether the defects are 'temporary disconformities' and therefore not in breach of the implied warranties contained in s 18B – loss or damage occasioned by defective building work is to be assessed by reference to established contractual principles of breach and causation – whether the plaintiffs' loss was caused by the defendant's building work – STATUTORY CONSTRUCTION – s 18D(1) – meaning of the phrase 'the same rights as the person's predecessor in title in respect of the statutory warranty' – whether s 18D gives a successor in title no rights where loss was not suffered by the predecessor in title caused by breaches

	of s 18B – DAMAGES – rule against double compensation – the plaintiffs entered into a Deed of Settlement with the developer's home building insurer and received payment in respect of defective work to the apartments – concurrent claim – claims made against the defendant were made in the same terms as those against the developer's insurer – whether plaintiffs have already been compensated for the loss which they allege was caused by the defendant; HELD plaintiffs failed to establish that defective work the subject of their claim was done by the defendant and the extent of the defects attributable to the defendant – defective work was not a temporary disconformity – the developer suffered no loss because it broke the chain of causation between any defective work done by the defendant and damage suffered by the developer, by taking the work out of the hands of the defendant – the right of the plaintiffs to sue the defendant for breach of the implied warranties is unaffected by the position between the developer and the defendant under their building contract
Legislation Cited:	Home Building Act 1989 (NSW) Building and Construction Industry (Security of Payment) Act 1999 (NSW)
Cases Cited:	P & M Kaye Ltd v Hosier & Dickinson Ltd [1972] 1 All ER Rep 121 (HL) Lintest Builders Ltd v Roberts [1980] 13 BLR 38 Allianz Australia Insurance Ltd v Waterbook at Yowie Bay Pty Ltd [2009] NSWCA 224 Boncristiano v Lohmann [1998] 4 VR 82
Category:	Principal judgment
Parties:	Owners of Strata Plan 80458 - Plaintiff TQM Design & Construct Pty Ltd (ACN) 091 508 422 - Second Defendant
Representation:	Counsel: G.A. Sirtes SC and P. Barham F.C. Corsaro SC and A.R. Vincent Solicitors: Dea Lawyers - Plaintiffs

Salim Rutherford Lawyers - Second Defendant

File Number(s): 2014/169729

JUDGMENT

INTRODUCTION

1 HIS HONOUR: This is a claim for damages for defective building work at 88 Lagoon Street, Narrabeen on the Northern Beaches, a 12 luxury residential apartment building of which the first plaintiff is the Owners Corporation.

2 The Owners Corporation came into existence on 26 November 2008 when the strata plan for the development was registered.

3 The other plaintiffs own individual apartments in the building.

4 The second defendant (TQM) is a builder. TQM, as will more fully appear below, built a significant part of the building under a written building contract with the developer of the building.

5 The plaintiffs claim that work done by TQM is defective. They claim damages from TQM for breach of the warranties imposed on TQM under Part 2C of the *Home Building Act 1989* (NSW) (the Act) that residential building work will be performed in a proper and workmanlike manner and that all materials supplied will be good and suitable for the purpose for which they were used.

6 The claim fails.

7 The plaintiffs have failed to establish that the work claimed to be defective was done by TQM. They have failed to establish that TQM caused them any loss, or if it did, the quantum of it. In relation to part of their claim, the plaintiffs have received compensation from another party which they must bring to account.

8 The thirteenth plaintiffs, Annette and Rex Horne, are the owners of apartment 1. They purchased it on 17 April 2009 and have resided there since 5 June 2009. Mr Horne affirmed an affidavit dated 21 May 2014.

9 The second plaintiff, Susan Gale Horton, owns apartment 2. She purchased it on 21 May 2009 and has resided there since July 2009. Ms Horton affirmed an affidavit dated 21 May 2014.

10 The third plaintiff, M & D Manassen Pty Ltd, owns apartment 3. It acquired it on 15 June 2012. Mr Michael Manassen, the sole director, his wife and two children have resided there since 16 June 2012. Mr Manassen swore an affidavit dated 22 May 2014.

11 The fourth plaintiffs, Maxwell and Barbara Burlington, own apartment 4. They purchased it on 26 May 2006 and have resided there since 10 December 2008. Mr Burlington, who is the chairman of the executive committee of the Owners Corporation and who has extensive experience in the building industry, swore affidavits dated 20 May 2014 and 3 August 2015.

12 The fifth plaintiffs, Trevor and Sharon Murdoch, own apartment 5. They purchased it on 8 February 2006 and have resided there since 22 January 2009. Mr Murdoch swore an affidavit dated 18 May 2014.

13 The sixth plaintiff, Glenda Carter, owns apartment 6. She acquired it on 16 February 2009. Ms Carter swore an affidavit dated 26 May 2014.

14 The seventh plaintiffs, Ross and Terrie Janssen, own apartment 6. They acquired it on 6 August 2010. Mr Janssen swore an affidavit dated 29 May 2014.

15 The eighth plaintiff, Hannele Ryan, owns apartment 8. She purchased it on 4 March 2009 and has resided there since 14 April 2009. Mr Lee Ryan, the husband of Mrs Ryan, swore affidavits dated 17 June 2014 and 25 September 2015.

16 The ninth plaintiffs, Robert and Kerry Rigg, own apartment 9. They purchased it on 1 March 2008 and have resided there since 28 January 2009. Mr Rigg swore an affidavit dated 26 May 2014.

17 The tenth plaintiffs, Stephen and Julie Brookes, own apartment 10. They purchased it on 25 January 2010 and acquired the property on 22 March 2010. Mr Brookes swore an affidavit dated 21 May 2014.

18 The eleventh plaintiff, James Hersee, owns apartment 11. He acquired it on 9 October 2009 and has resided there since 9 October 2009. Mr Hersee swore an affidavit dated 27 May 2014.

19 The twelfth plaintiffs, Karen and John McLachlan, own apartment 12. They purchased it on 13 August 2009 and acquired the property on 30 October 2009. Mrs McLachlan swore an affidavit dated 27 May 2014.

BACKGROUND

20 PVD No.16 Lagoon Street Pty Ltd (PVD) was the developer of the strata scheme. It sold the apartments to the plaintiffs or to earlier owners.

21 On 16 June 2006, PVD (as Principal) retained TQM (as Contractor) to construct the building under a written Formal Instrument of Agreement (the Contract). The terms of the Contract included the Standards Australia AS4902-2000 general conditions of contract for design and construction. The Contract price was $5,492,000.

22 Clause 29.3 of the Contract provided that if the Superintendent becomes aware of work done by the Contractor that does not comply with the Contract, the Superintendent shall, as soon as practicable, give the Contractor written details thereof. It provided that if the subject work has not been rectified, the Superintendent may direct the Contractor to correct it. It provided that if the Contractor fails to comply with the Superintendent's direction and that failure has not been made good within 8 days after the Contractor has received written notice from the Superintendent that the Principal intends to have the subject work rectified by others, the Principal may have the work so rectified.

23 Clause 35, read with item 32 of the Annexure to the Contract, provided for a defects liability period of 12 months commencing on the date of practical completion. It provided that as soon as possible after the date of practical completion, the Contractor should rectify all defects existing at the date of practical completion.

24 The Contract defined the date for practical completion, relevantly, as a period of 12 months from the date that the Principal gives possession of the site to the Contractor, but if any extension of time for practical completion was directed by the Superintendent, the date resulting therefrom.

25 The Contract defined practical completion, relevantly, to mean the stage when the works are complete except for minor defects, those tests which are

required to be carried out before the works reach practical completion have been carried out and passed, and the Contractor has obtained an Occupancy Certificate (a term which is not defined in the Contract).

26 Clause 39.2 of the Contract provided that if the Contractor commits a substantial breach, the Principal may give the Contractor 'notice to show cause'. It provided that substantial breaches include failing to proceed with due expedition and without delay.

27 Clause 39.4 provided that if the contractor fails to show reasonable cause by the stated date and time by which the Contractor must show cause, the Principal may, by written notice to the Contractor, take out of the Contractor's hands the whole or the part of the work remaining to be completed and suspend payment until it becomes due and payable pursuant to cl 39.6.

28 Clause 39.6 provided for a procedure for assessment by the Superintendent after work taken out of the Contractor's hands was completed.

29 Mr Martin Cork was PVD's authorised person. Mr Maroun Taouk, an engineer and director of TQM, was its authorised person. An organisation called Provent was the Superintendent.

30 TQM started construction of the works in about July 2006. TQM would have had possession of the site from at least that time.

31 Beginning on 16 April 2007, TQM served on PVD a succession of payment claims under the *Building and Construction Industry (Security of Payment) Act 1999* (NSW) (*Security of Payment Act*). It served claims numbered 9, 10 and 11 totalling $2,025,103.30 on 16 April 2007, 14 May 2007 and 15 June 2007, respectively.

32 On 17 July 2007, TQM served payment claim 12. On 23 August 2007, it served payment claim 13 and on 16 October 2007, it served payment claim 15.

33 As at 28 February 2008, TQM had not received from PVD a payment schedule under the *Security of Payment Act* or payment from PVD for payment claims 9, 10 and 11.

34 On 29 February 2008, TQM gave PVD further notice of its intention to suspend the works for failure to pay those claims.

35 By 4 March 2008, TQM had not received a payment schedule or payment in respect of payment claims 12 and 13. By this time the amount claimed by TQM and unpaid was $2,524,931.33. On that day, TQM gave PVD notice of its intention to suspend works.

36 By 28 March 2008, TQM had not been paid claims 9,10,11,12,13 and 15.

37 On that day, TQM gave PVD notice of suspension of works, and it suspended works. Mr Taouk says that '[b]y no later than on or about 7 April 2008, TQM did not attend the property'.

38 On 8 April 2008, PVD gave notice to TQM alleging breaches of the Contract by TQM in wrongfully suspending the works and failing to proceed with due expedition and without delay.

39 On 18 April 2008, PVD gave a further notice requiring TQM to show cause in writing why PVD should not exercise a right to terminate. TQM responded by asserting that the notices were invalid and denying any breach.

40 On 21 April 2008, TQM served payment claim 21 for $606,238.73. Mr Taouk signed the claim. TQM claimed amounts on the basis of the percentage of particular trades said to be complete. It claimed that 100% of the amount for suspended ceilings was done, 100% of the amount for waterproofing and tiling was done, and 98% of the amount for mechanical and hydraulic services was done.

41 On 21 May 2008, PVD gave TQM notice that it was exercising its right to take out of TQM's hands the whole of the work that remained to be completed as at that date. TQM disputed PVD's purported exercise of such a right.

42 Mr Taouk says that from about 22 May 2008, TQM was refused access to the site.

43 There is no evidence of any formal termination of the Contract. Before me, the parties seemed to agree that at some stage it must have been abandoned.

44 In late May 2008, PVD commissioned a series of reports from Mr Neil Monteith, a building consultant, who inspected the building and produced reports dated June 2008,[1] 22 July 2008 and 13 August 2008.

45 By a written building contract entered into on 1 June 2008 (the Intek Contract), PVD engaged Intek Solutions Pty Ltd (Intek) to complete the works for a price of $650,000 plus GST. The Intek Contract provided for practical completion by 19 August 2008.

46 An Intek site inspection report dated 22 May 2008, that is, before the Intek Contract was signed, establishes that from at least that date TQM was locked out of the site.

47 Intek was related to PVD. Mr Cork was a director and the signatory on behalf of Intek.

48 A special condition of the Intek Contract was that Intek was 'to complete all of the works as contained in the building contract between [PVD] and [TQM] dated 26 June 2006 which as of the date of this contract remain incomplete'.

49 Intek was placed into liquidation on 9 September 2009.

50 The first defendant (AAI) was Intek's home building insurer. AAI used the trading name Vero.

51 PVD itself was deregistered on 10 January 2012, following a creditors' winding up application.

52 On 4 March 2013, the Owners Corporation sued AAI and TQM in the District Court of New South Wales, alleging significant defects in the construction of the building.

53 The remaining plaintiffs were joined to the proceedings on 28 June 2013.

54 Although both AAI and TQM were defendants to the action, AAI was the principal target. The claim against TQM was made conditional on a finding by the Court that AAI was not liable with respect to the claimed defective work.

[1] The date in June is not specified.

55 On 6 June 2014, the District Court proceedings were transferred to this Court because the claimed damages exceeded the jurisdiction of that Court.

56 There were numerous directions hearings between that date and 26 May 2016. Various expert reports were served in the proceedings.

57 Then, on 26 May 2016, the plaintiffs and AAI settled their dispute. Under a written Deed of Settlement, AAI paid the plaintiffs $1,100,000 and the plaintiffs released AAI from all claims in connection with any loss arising from the works, the District Court proceedings and these proceedings.

58 At the time, the plaintiffs' claims were identified in an Amended Scott Schedule which had been served on or about 25 July 2014. The Deed of Settlement recited that the Owners (meaning the plaintiffs) had lodged various claims arising from defective and or incomplete works in the Building Work, for which Intek was engaged, and they agreed that the 'Claims' consisted, amongst others, of the Amended Scott Schedule served on or about 25 July 2014.

59 The plaintiffs then shifted focus. TQM became their target. This produced procedural and substantive difficulties.

60 The plaintiffs' evidence, both lay and expert, had been prepared in support of the claim against Intek. TQM had been largely ignored.

61 Between 24 October 2016 and 18 September 2017, when I fixed the case for hearing to start on 30 April 2018 (with an estimate of 15 days), there were no less than 12 directions hearings. It could hardly be said that the plaintiffs did not have an adequate opportunity to prepare their case.

62 On 23 December 2016, the plaintiffs served a Second Further Amended Scott Schedule (2FASS) and a schedule of evidence they did not intend to read. Claims previously made against Intek, but apparently not against TQM, were now directed to TQM for the same allegedly defective work. The plaintiffs must have been acutely conscious that there would be difficulty in establishing that TQM did this defective work.

63 The 2FASS incorporated a claim, not made against Intek, for a systemic plasterboard defect to general areas and wet areas described as 'cracked and debonding plasterboard on walls within lots 1-12'.

64 The Technology and Construction List Statement does nothing more than assert that in carrying out the construction works, TQM breached various obligations (defined as the TQM defects) to which the particulars given are 'the TQM Defects are itemised in the Second Further Amended Scott Schedule'. To itemise defects is not to allege any breach. The 2FASS contains copious references to allegedly supporting material which is not relied upon. It does not relate any particular defect to any particular breach of any particular obligation. But TQM made no complaint about it and nothing further need be said.

65 The hearing commenced before me on 30 April 2018.

66 The plaintiffs sought to deploy against TQM the bulky expert reports which had been framed to be employed against AAI. Which parts of the reports were pertinent to the present claim could not be easily identified (if at all) or fairly be separated out in any intelligible way. At an early stage, TQM had notified its objection to the deployment of this material, but the plaintiffs did not adjust. In the result, much of the plaintiffs' expert evidence was rejected. This had no effect on the ultimate result because the plaintiffs would have lost anyway.

67 The case limped on until the fifth day when the plaintiffs were forced to move for an adjournment, which I granted. Contrary to the practice in this list, the case became part heard. I fixed the case to resume on 23 July 2018 on an estimate of four days. The plaintiffs requested a further day's delay for the convenience of their senior counsel, to which request TQM consented and I acceded. The three days which remained were not enough. A further three days were needed. Only junior counsel for the plaintiffs appeared on the last three days.

RELEVANT STATUTORY ENACTMENTS

Home Building Act 1989 (NSW)

68 The following are the relevant sections of the Act which apply in casu:

> **18B Warranties as to residential building work**
>
> The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work:

(a) a warranty that the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract,[2]

(b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,

(c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,

(d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,

(e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,

(f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.

18D Extension of statutory warranties[3]

(1) A person who is a successor in title to a person entitled to the benefit of a statutory warranty under this Act is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty.

(1A) A person who is a non-contracting owner in relation to a contract to do residential building work on land is entitled (and is taken to have always been entitled) to the same rights as those that a party to the contract has in respect of a statutory warranty.

(1B) Subject to the regulations, a party to a contract has no right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency by a non-contracting owner.

(2) This section does not give a successor in title or non-contracting owner of land any right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency, except as provided by the regulations.

[2] This provision was amended in 2014 and now requires work to be done with due care and skill. The amendment was not retrospective and does not apply to the present dispute.

[3] Inserted into the Act by the Home Building Amendment (Warranties and Insurance) Act 2010 No 53 (NSW) with retrospective effect.

69 References below to sections are, unless the context otherwise indicates, references to the Act.

Building and Construction Security of Payments Act 1999 (NSW)

70 The *Security of Payment Act* provides for a claimant to make a payment claim for a progress payment on the person who, under a construction contract, is or may be liable to make the payment (s 13(1)). A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract (s 13(5)). A reference date in relation to a construction contract is a date determined under the contract as the date on which a progress payment may be made, or if the contract makes no express provision, the last day of the named month on which the construction work was first carried out under the contract, and the last day of each subsequent named month (s 8).

71 The respondent to a claim may reply by providing a payment schedule, which must indicate the amount of the payment (if any) that the respondent proposes to make (s 14). Where no payment schedule is served, the claimant may recover the unpaid portion of the claimed amount as a debt due in a court of competent jurisdiction, or make an adjudication application in relation to the claim. Where the payment schedule indicates a scheduled amount which the respondent proposes to pay, and the respondent does not pay it, the claimant has the same option with respect to the unpaid portion of the scheduled amount (s 17). It is not uncommon for a respondent to indicate a nil amount.

72 The adjudication process entails the making of an adjudication application by the claimant and the appointment by an authorised nominating authority of an adjudicator (s 19). The respondent may lodge an adjudication response (s 20). It provides for adjudication procedures (s 21) and for the adjudicator to determine the amount of the progress payment (if any) to be paid by the respondent to the claimant (s 22) and the issue of an adjudication certificate (s 24).

73 The following are the presently relevant sections of the *Security of Payment Act* which existed at the time of the Contract:

14 Payment schedules

(1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule:

(a) must identify the payment claim to which it relates, and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***).

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(4) If:

(a) a claimant serves a payment claim on a respondent, and

(b) the respondent does not provide a payment schedule to the claimant:

(i) within the time required by the relevant construction contract, or

(ii) within 10 business days after the payment claim is served,

whichever time expires earlier,

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

15 Consequences of not paying claimant where no payment schedule

(1) This section applies if the respondent:

(a) becomes liable to pay the claimed amount to the claimant under section 14 (4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant:

(a) may:

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or

(ii) make an adjudication application under section 17 (1) (b) in relation to the payment claim, and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

(3) A notice referred to in subsection (2) (b) must state that it is made under this Act.

(4) If the claimant commences proceedings under subsection (2) (a) (i) to recover the unpaid portion of the claimed amount from the respondent as a debt:

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and

(b) the respondent is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract.

27 Claimant may suspend work

(1) A claimant may suspend the carrying out of construction work (or the supply of related goods and services) under a construction contract if at least 2 business days have passed since the claimant has caused notice of intention to do so to be given to the respondent under section 15, 16 or 24.

(2) The right conferred by subsection (1) exists until the end of the period of 3 business days immediately following the date on which the claimant receives payment for the amount that is payable by the respondent under section 15 (1), 16 (1) or 23 (2).

(2A) If the claimant, in exercising the right to suspend the carrying out of construction work or the supply of related goods and services, incurs any loss or expenses as a result of the removal by the respondent from the contract of any part of the work or supply, the respondent is liable to pay the claimant the amount of any such loss or expenses.

(3) A claimant who suspends construction work (or the supply of related goods and services) in accordance with the right conferred by subsection (1) is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, as a consequence of the claimant not carrying out that work (or not supplying those goods and services) during the period of suspension.

THE PARTIES' POSITIONS

The Plaintiffs' Case

74 The plaintiffs claim damages from TQM for breach of the warranties imposed on TQM by s 18B(a) and (b). They claim as the immediate successors in title to PVD under s 18D(1). Their standing is not in issue.

75 By the end of the hearing, the plaintiffs' claim had shrunk significantly. Manifestly untenable claims in connection with the bathrooms, tiling and excessive air conditioning noise in the garage were abandoned. It ought to have been clear from a much earlier stage that they would encounter insuperable difficulties in establishing that TQM, rather than Intek, did this work.

76 In the end, they make only three complaints:

- the plasterboard, sometimes called gyprock,[4] which is the name of a specific proprietary product but is commonly used to denote plasterboard, was defectively installed
- the air conditioning in the apartments is too noisy and does not comply with applicable noise level standards
- the drainage and sanitary pipework does not have acoustic insulation and does not comply with applicable noise level standards.

77 The plaintiffs bear the onus on each element of their case. They must show that TQM did the work, that the work was defective, that they consequently suffered loss and what the amount of that loss is.

TQM's Defences

78 TQM abandoned a number of untenable propositions. Ultimately it only argued four matters.

79 First, it put that the plaintiffs had failed to establish that TQM did the work which is the subject of their claim.

80 Second, it put that the plaintiffs failed to prove that they were caused loss or damage by any breach by TQM of the statutory warranties.

81 Third, in respect of the air conditioning and drainage and sanitary pipework claims, it put that by taking the work out of TQM's hands, PVD acted unlawfully and deprived it of the opportunity of completing the work and rectifying any defects. TQM puts that it would have rectified all defects either before practical completion or during the defects liability period. It puts that any loss which PVD suffered was caused by PVD's own acts. It puts that PVD had no claim and that the plaintiffs as successors in title to PVD are in no better position than PVD was.

82 An element of this contention is that if TQM had been given the opportunity to rectify defects, it would have done so. It is clear that the extent of the plasterboard problem was not known until much later. TQM could not fairly put that if it was responsible for a systemic defect in the plasterboarding, as the

[4] The actual name of the product used was Lafarge plasterboard.

plaintiffs aver, a finding that it would have redone the lot is fairly open on the evidence. This led it to abandon this contention in relation to the plasterboard.

83 Finally, TQM put that under the Deed of Settlement, the plaintiffs received compensation from AAI for loss or damage in respect of the air conditioning and drainage and sanitary pipework claims for which it claims against TQM so that its claim against TQM involves an impermissible attempt at double recovery.

THE DEFECTS

84 References to items are references to items in the 2FASS.

Plasterboard – items 6, 7, 8, 9, 13, 14, 15, 16, 17, 23, 26, 27, 28, 29, 30, 32, 33, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 58, 59, 60, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 89, 91, 92, 93, 94, 95, 96, 98, 99, 101, 113, 116, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 134, 142, 143, 144, 145, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 165, 195, 196, 198, 200, 201, 202, 203, 204, 211, 212, 225, 226, 229, 230, 231, 232, 233, 234, 235, 236, 240, 242, 243, 262, 263, 264, 265, 266, 267, 268, 269, 273, 274, 275, 276, 277, 278, 279, 280, 289, 294, 302, 305, 306, 307, 308, 309, 310, 311, 312, 313, 316, 317, 318, 319, 320, 321, 322, 331, 332, 334, 335, 336, 337, 338, 341, 342, 343, 344, 345, 346, 135, 146, 197, 227, 228, 333, 334, 10, 11, 12, 31, 36, 39, 40, 53, 54, 55, 83, 97, 108, 110, 130, 136, 159, 163, 167, 168, 199, 205, 213, 216, 237, 238, 239, 241, 246, 270, 271, 272, 291, 292, 300, 314, 315, 339, 340, 347

85 The plaintiffs contend that the plasterboard was completed by TQM and is systemically defective. The defect is described as 'Wall lining vibrates when tapped indicating debonding of the adhesive in areas and/or spacing of adhesive daubs exceeds the maximum spacing of 450mm recommended in AS/NZS 2589 and manufacturer's guidelines.'

86 But they had to concede that they are unable to establish that TQM completed this work. More than this, the evidence is clear that TQM did not do so.[5]

87 That the plasterboard installation is defective in a very significant measure is evident. It is coming off the walls at an ever increasing rate.

88 The plaintiffs called Mr Eamonn Madden, a structural engineer, who gave evidence, which I accept, that possible causes of the de-bonding are poor

[5] Mr Joannides expressed the opinion that based on the current extent of cracking and debonding to 75% of all exposed walls (as at July 2016); all walls are likely to have been constructed at the same time by the same installers. It is not known whether, when Intek took over, it used the same tradesmen who had been employed by TQM. What is clear is that TQM did not install it all.

preparation, poor cleaning of brick work, inadequate cleaning of the back of the plasterboards and poor application of the adhesive.

89 There are mortar dags over substantial areas of the walls and there appears to have been random application of daubs of adhesive and they are unevenly spaced.

90 Plasterboard lining should, if properly installed, last for the lifetime of a building. Here, after ten years, 75% of the panels were de-bonding and this process is continuing. The rate of de-bonding escalated exponentially between 2013 and 2016.

91 Who installed it?

92 The evidence as presented does not enable the Court to determine where TQM's work ended and the work of others began. Put another way, the plaintiffs have failed to discharge their onus of proving that TQM did the defective work for which they claim. Correspondingly, they have failed to prove what loss, if any, they suffered as a consequence of TQM's defective work.

93 Mr Burlington, the owner of apartment 4, is an architect and has extensive experience in the building industry. He swore a lengthy and detailed affidavit reflecting a close involvement with the progress of the building work.

94 The plaintiffs adduced the following affidavit evidence from him:

> At around the end of 2007, I had a conversation with Martin Cork on site where he said words to me to the following effect: 'We are having problems with the builder, but I have arranged for tradesmen to continue works on site for Provent in the meantime so that I can show you and other purchases [sic] off the plan that work is continuing despite the issues I am having with the builder.'
>
> From around the Christmas shut down period of 2007, I did not see TQM's tradesmen on site, and understood from my conversation with Martin Cork, as set out above, that the workmen I saw on site from that time were employed by the Developer.

95 Mr Burlington gave evidence that on 6 December 2007 he attended the site and saw that the interior ceiling of his apartment had been painted with an undercoat. He inspected apartment 7 and saw that the tiling and gyprock finishes had been partially completed. He gave no further evidence of the gyprock position as it stood 'at around the end of 2007' or 'around the

Christmas shutdown period' (which could presumably be as at 6 December 2007) or as to the gyprock position in any apartments beyond his own and apartment 7.

96 From 7 January 2008, he attended the site on numerous occasions. He gave evidence of the work done on his apartment from 7 January 2008 to 19 March 2008. His evidence was that on 19 March 2008, Mr Cork told him that TQM's contract had been determined for non-performance and that Intek would be carrying out the works.

97 On the basis of his evidence, the work done between the Christmas 2007 break and the entry into of the Intek contract would not have been done by TQM.

98 There is no evidence as to who PVD might have arranged to be on site, but it was clearly in its commercial interest for work to progress, given that there were purchasers of the apartments waiting in the wings.

99 Significantly, Mr Burlington did not recognise the workmen he saw as being those employed by TQM.

100 The plaintiffs, however, now seek to distance themselves from their own evidence because evidence prepared against Intek no longer suits them, but exonerates TQM. They now wish to contend that TQM was still doing work on site in April 2008.

101 The plaintiffs rely heavily on the Monteith reports and photographs taken by Mr Monteith in May 2008, not long before the Intek contract was entered into, as showing the state of the works when TQM left the site.

102 Their first difficulty is that it is not possible to gauge from the Monteith reports how much gyprocking was done and still to be done.

103 Their second difficulty is that there is evidence that there were tradesmen on site at the behest of PVD much earlier than May 2008.

104 Their third difficulty is that there is evidence in the form of site diary extracts prepared by Mr Burlington which record gyprock repairs and completion carried out by Intek or their sub-contractor over the period 1 July 2008 to 17 November

2008 totalling 349 person hours. The Court is not in a position to gauge how much gyprocking this entails, but 349 hours is not an insubstantial number on any view. On a seven hour working day, it is almost 50 person days (that is 10 working weeks) of work. The plaintiffs' only riposte to TQM's reliance on this material (which the plaintiffs themselves adduced) was to submit that I should ignore it.

105 Consistently with Mr Burlington, Mr Taouk says that TQM ceased substantial works in early October to early November 2007. Mr Taouk gave unchallenged evidence that when TQM suspended works, the plasterboard works had not been completed.

106 An attempted attack on the credit of Mr Taouk was made based mainly on an asserted divergence between his affidavit evidence on the state of incompleteness of the work when TQM left the site, and what was claimed as being complete in payment claim 21.

107 I observed Mr Taouk closely in the witness box. The attack failed. I consider that Mr Taouk gave honest evidence of his recollections.

108 The plaintiffs rely heavily on payment claim 21. They rely on the fact that by this time, TQM's claims for work amounted to $5,192,000, that is, 94.5% of the total contract price of $5,492,000. Also, on 3 February 2009, TQM's then solicitors wrote to the solicitors acting on the purchase of apartment 9 setting out the building works that were not completed by TQM. These did not include the installation of gyprock walling. This material falls far short of establishing the state of the works when TQM effectively left the site at the end of 2007. The Monteith reports themselves show that the gyprocking was not complete in May 2008.

109 Payment claim 21 does not provide a basis, let alone a sound one, for a factual finding with respect to what work was completed or to what extent. In any event, other evidence undermines it. For example, payment claim 21 claimed 100% for waterproofing and tiling. It is clear that waterproofing and tiling were still to be done when TQM left and that Intek did it.

110 An exaggerated claim, given the circumstances which then pertained, is not justifiable and not to be condoned, but is explicable given PVD's failure to pay significant amounts of money. The plaintiffs sought to rely on the payment claim as an admission. If it is an admission, which I do not think it is, it is an entirely and manifestly unreliable one. It does not reflect adversely on Mr Taouk's credit in a relevant way and his evidence is corroborated. Moreover, PVD did not accept the claim and if anybody had known that it was exaggerated it would have been PVD.

111 The events under examination happened more than 10 years ago. Mr Taouk gave affidavit evidence by way of an affidavit sworn 24 April 2015, seven years after the event. In his affidavit, he gives his recollection of an inspection of the property in early April 2008, after TQM had suspended works at the property. He provides a long list of works which remained incomplete. He says the installation of plasterboard was not complete and had not been subject to final checks. No doubt because of the passage of time and the lack of accurate records, he provides no detail.

112 In his affidavit, Mr Taouk responded to the plaintiffs' Amended Second Scott Schedule as it then stood. He assumed that the matters in respect of which the owners complained are accurate because he had not inspected the property since about the time that TQM suspended works. As a consequence of the passage of time, Mr Taouk would have had difficulty in providing more detail.

113 The items in the Scott Schedule and Mr Taouk's response were as follows:

- Item 48: Lot 2 living room and kitchen – the plasterboard mounted to the north wall had dislodged from the masonry wall.

  Response: TQM did not complete these works. Intek carried out further structural and other works after TQM was excluded from the site.

- Item 58: Lot 3 – the plasterboarding to the eastern dividing wall had bowed out and dislodged due to water entry from lot 3 ensuite or inadequate fixing of the board sheets to the wall.

  Response: TQM did not complete these works. As to waterproofing, neither TQM nor its subcontractor completed these works.

- Item 64: Lot 4 entry – the internal plasterboard wall is delaminating due to inadequate fixing of the wall lining to the masonry substrate.

Response: TQM did not complete these works. Intek carried out further structural works after TQM was excluded from the property.

- Item 69: Lot 4 master bedroom – vertical crack in plasterboard wall due to movement of the sheeting.

  Response: TQM did not complete these works and was not notified of the crack prior to being excluded from the property or thereafter. Mr Taouk gave evidence that in his experience where cracking of this kind is not evident throughout the property, is not systemic, or only occurs in localised areas, the cracking is more likely to be attributable to use or be impact related.

- Item 110B: Lot 6 entrance hallway – the horizontal sheet joints to the wall lining have cracked due to movement in the sheeting.

  Response: TQM did not complete these works and was not notified of the crack prior to being excluded from the property or thereafter. Mr Taouk gave evidence that in his experience where cracking of this kind is not evident throughout the property, is not systemic, or only occurs in localised areas, the cracking is more likely to be attributable to use or be impact related. Cracks no greater than 1mm are not considered defects.

- Item 162B: Lot 11 kitchen/lounge – the plasterboard sheeting is coming away from the wall on top of the skirting along the southern wall of the kitchen/lounge area.

  Response: TQM did not complete these works and was not notified of the crack prior to being excluded from the property or thereafter. Mr Taouk gave evidence that in his experience where cracking of this kind is not evident throughout the property, is not systemic, or only occurs in localised areas, the cracking is more likely to be attributable to use or be impact related.

- Item 168A: Lot 12 ensuite – vertical and horizontal cracks in the southern wall tiles and plasterboard sheets.

  Response: TQM did not complete these works and was not notified of the crack prior to being excluded from the property or thereafter. Mr Taouk gave evidence that in his experience where cracking of this kind is not evident throughout the property, is not systemic, or only occurs in

localised areas, the cracking is more likely to be attributable to use or be impact related.

114 At the time of the responses, the extent of the plasterboard problem was more modest than it is now.

115 TQM read the affidavit of Mr Anthony Sukkar sworn on 19 December 2008. Mr Sukkar is the owner of Ultra Seal Waterproofing. TQM retained Ultra Seal as a sub-contractor to do waterproofing work. He gave the following evidence:

> Ultra Seal continued with the carrying out of the waterproofing works under the subcontract for the period July 2007 to late March/early April 2008.
>
> In late March/early April 2008 I returned to the site. However, upon arrival at the site I was declined access and asked to leave. I did not know the person who asked me to leave and I had not seen him at the site before. Accordingly, from April 2008, Ultra Seal ceased to carry out any further work and has not returned to the Project site.

116 Mr Sukkar gave further evidence that, as at April 2008, Ultra Seal had carried out and completed waterproofing works to ensuites of four apartments and laundries and some balconies, rooftops, entertaining areas, planter boxes and retaining walls.

117 The plaintiffs sought to deploy Mr Sukkar's evidence as establishing that TQM was doing work on site until March/April 2008. This evidence does not establish this and if it does, it does not establish that TQM was doing the work which is the subject of the claim. Mr Sukkar's evidence is that he returned to the site in late March/April 2008. It follows that he must have left the site some time earlier. His evidence does not establish when he left. He was not cross-examined.

118 The plaintiffs have fallen well short of establishing how much of the gyprock was installed by TQM (and how much by others).

119 If I had found liability on the part of TQM, it would have been necessary to deal with the appropriate method to be employed in rectifying this defect, an issue upon which the parties are divided. Although it is not necessary to do so, I will nevertheless deal with it.

120 Australian standards distinguish between the methodology to be used with respect to gyprocking walls less than 3 metres high and walls higher than 3

metres. The daubing method of affixation is not sufficient for walls exceeding 3 metres in height.

121 Mr Madden proposes the traditional method according to the installation guides published by the manufacturers of plasterboard which involves installation of a lining sheet. This entails removing the unbonded boards, cleaning and preparing the masonry walls and installing new linings to which the boards are attached. Where the walls exceed 3 metres in height, battens/furring channels are to be installed and the boards attached using daubs of stud adhesive and nailing at specified intervals.

122 The plaintiffs called Mr George Drakakis, a building expert, on the subject. Mr Drakakis proposed a rectification method using a proprietary system known as 'Insofast'. This involves drilling holes into the existing boards in situ and pumping glue into the apertures and pressing the boards so as to stick to the glue. A caulking gun is used to inject the adhesive under pressure. A fastener in the nature of a fixing screw with an 18mm diameter head is then inserted with a special tool attached to a rotary hammer at specified intervals. Where there is a gap between the board and the masonry wall where the fastener is to be inserted, expanding foam is inserted to enable the fixing to occur.

123 One of the benefits of using this system, according to Mr Drakakis, is that the residents could survive it without vacating. Mr Madden considered that the residents would still have to vacate. I tend to agree with Mr Madden.

124 I prefer Mr Madden's evidence on the appropriate rectification method.

125 The Drakakis method is novel in Australia. It has not previously been encountered by Mr Madden or Mr Nicholas Joannides, a chartered professional engineer, called by the plaintiffs. Mr Madden and Mr Joannides have both had many years of experience in the field. It has also not been used in Europe. Mr Madden described it as an unproven methodology. Mr Drakakis himself had not previously deployed it or seen it done by anyone else.

126 Mr Madden proposes a tried and tested conventional method, whereas Insofast is attendant with an unknown risk of failure, which risk I would not consider it reasonable to impose on the plaintiffs.

127 Mr Madden was unable to obtain a specification for Mr Drakakis' methodology published in any literature by manufacturers of plasterboard. The manufacturers' literature, which deals with the spacing of the fasteners, appears to deal with only insulated plasterboard which apparently has different characteristics to that of conventional 10mm plasterboard.

128 One of Mr Madden's significant reservations is that the masonry walls must be free from dust, oil and other contaminants which may adversely affect the adhesive to be pumped into the void. Mortar dags would need to be cleaned of loose material to ensure correct adhesion.

129 Mr Drakakis accepted that the masonry walls and the back of the plasterboard sheeting may contain dust which may cause an adhesion problem. His response is that where dust is apparent, compressed air may be blown into the wall cavity to remove it. The adhesive injection is undertaken from the bottom up so that dust on the masonry walls or the back of the plasterboard will gravitate downwards. This, it seems to me, is a speculative exercise when it comes to dust, especially where it is in a cavity to which there is no direct access or vision.

130 Added to what is said above, there may well be difficulties in obtaining proper contractual warranties for this system.

131 It is not necessary, nor indeed on the state of the evidence possible, to determine what it would cost to repair the gyprock installed by TQM.

132 The plaintiffs framed their quantum claim based, and based only, on the cost to redo the gyprock entirely. Although the plaintiffs did not establish the necessity to do the gyprock entirely and although given my earlier findings it is unnecessary to do so, I will nevertheless deal with quantum, but on this footing.

133 There was some debate about the scope of work. On behalf of TQM, it was put that the gyprock walls could be replaced without removing suspended ceilings. They relied on what was said to be a scope of works provided by Mr Joannides in a report prepared in 2014, in which he made no reference to taking down the ceilings, merely to the removal of wall linings.

134 Each party called a quantity surveyor. The plaintiffs called Mr John Barker, the defendants, Mr Doug Martin. The Court encountered difficulty in extracting joint reports from them. It is not a regular occurrence in this list that experts, in particular, quantity surveyors, will simply not cooperate with one another for the benefit of the court, but this is such a case. A joint report was produced on the final day of the hearing. The quantity surveyors gave evidence in concurrent session.

135 There was some agreement between them.

136 The subject of whether ceilings had to be removed came up.

137 Mr Barker was stridently of the view that the work could not be done properly unless the ceilings were removed. Mr Martin suggested that where wall linings were higher than the ceiling levels – the apartments have a shadow line ceiling installation – the plasterboard could be cut with a tool. There was some debate about what tool could do this job and to what degree of accuracy it could do it. This process would require very precise work and would create a lot of dust and debris. Some of this work would have to be done in extremely confined spaces. Mr Martin has never seen his suggested process implemented. I prefer Mr Barker's evidence on the topic. To the extent that this reflects a scope of work beyond that referred to in Mr Joannides' report, I consider that Mr Barker is well qualified to express the view that he did.

138 The experts differed on the rates to be used in determining the cost of this work. The work has not been put out to tender. No doubt, contractors would view this job wearily, not least of all, because the development has been mired in litigation for years.

139 Mr Barker adopts a higher rate than Mr Martin who, in significant measure, merely used the well-known Rawlinsons Australian Construction Cost Guide.

140 In certain places, unapproved CFC sheeting instead of approved fibre cement sheeting was used. One thing upon which the experts are agreed is that this needs to be replaced with approved fibre cement sheeting and that aspect will cost $49,400.

141 As to the remainder of work to fix the plasterboarding, the exercise is to divine what a contractor would charge for this work. I think there is merit in Mr Barker's position that Mr Martin's rates do not sufficiently recognise the complexity of this work. Mr Martin accepted that it would be reasonable to adopt the mid-point between them. I propose to do this. I have had the benefit of a further joint report carrying out calculations on this footing.

142 The quantity surveyors are agreed that preliminaries should be at 20%, builders' overhead and profit at 15%, there should be a contingency of 10% and that home warranty insurance should be $20,000. Mr Barker makes provision for consultant's fees at 7.5%. Mr Martin opines $20,000. There was no cross-examination of the consultant's fee. The plaintiffs have the onus and Mr Martin was not challenged on this. I propose to adopt $20,000 for this item.

143 On the footing that the suspended ceilings must be removed, the following would be the cost to remedy the entirety of the plasterboard defects:

Basic repair cost	$702,140
CFC as agreed	$49,400
	$751,540
Preliminaries at 25%	$150,308
	$951,188
Overhead and profit at 15%	$135,277
Contingency at 10%	$103,713
	$1,140,838
Consultant fees	$20,000
Home warranty insurance	$20,000

Total	**$1,180,838**

Air conditioning – items 5, 25, 43, 90, 118, 140, 193, 223, 259, 329

144 This is a complaint that the air conditioning system produces excessive noise.

145 Ultimately, the plaintiffs framed this complaint as one that the ducting is too narrow and the grilles are inadequate and must be replaced. They rely on this as establishing a breach of the warranties in ss 18B(a) and (b).

146 This claim fails.

147 Once again the plaintiffs have been unable to show where the TQM work finished and the Intek work began. The plaintiffs ask the Court to infer that all of the duct work and grilles had been installed by TQM. The evidence does not support such a finding.

148 The plaintiffs have not established that the problem extends to all apartments.

149 The plaintiffs have not established that replacement of ducts is the reasonable solution that should be adopted.

150 The plaintiffs called Dr Michael Hayne, an acoustic engineer, who gave unchallenged evidence, which I accept, that:

- the acoustic separation between drainage and sanitary pipe work and habitable room in apartments 2 and 4 does not satisfy Building Code of Australia requirements
- the air conditioning noise in bedroom 3 and the living room of apartment 2 exceeds the recommended standard
- the air conditioning noise in apartment 4 exceeds maximum recommended levels and noise associated with the carpark exhaust fan intrudes into the private outdoor recreational area of this lot
- the noise from the exhaust fan in the bathroom of apartment 8 exceeds recommended standards as does the noise in the master bedroom and living room.

151 Somewhat surprisingly, Dr Hayne gave evidence of not being able to have access to apartments 1, 3, 5, 7, 10 and 11 to take air conditioning noise measurements. He gave no explanation for why the plaintiffs did not give him access. He opined that the measurements can be considered to be

'representative' of the air conditioning systems in other apartments which share the same basic design.

152 Dr Hayne was not cross-examined on the apparent anomaly that apartments which he says have the same basic design, have varying test results.

153 Dr Hayne gave evidence that some of the ducts are too small so that the flow velocities are too high and flexible ducts 'which get squished' have been used which creates noise. He explained that it is comparable to putting a kink in a hose. If bigger ducts were used, the standards could easily be complied with.

154 He gave oral evidence that the air conditioning noise is a relatively simple fix. The flow velocity has been too high 'so they just need to be marked' (meaning adjusted). His evidence was 'so if someone went in there and actually fixed up the ducts, replaced them, being bigger, got the flow velocities down, these, they, they would comply with the standard'. I do not regard this evidence as persuasive that all ducts need to be replaced without every apartment being tested and every duct inspected so as to ascertain that replacement is in fact necessary.

155 TQM's position is that it did not complete the air conditioning works and it did not commission or certify them. This was done by Intek. This was clearly the case.

156 The grilles issue can be disposed of briefly. Dr Hayne's evidence is that they should be moved, not replaced.

157 The evidence does not permit a finding as to what part Intek played, but it was clearly not inconsequential. Long after TQM had left the site, a certificate dated 10 December 2008 was issued by a mechanical engineer certifying construction of the mechanical exhaust ventilation to the carpark and mechanical ventilation to bathrooms. It is not necessary to consider the efficacy of the certificate. The relevant facts are that Intek issued it in December 2008.

158 There was an email exchange on 24 and 25 May 2010 between Intek and the owners of apartment 10 which exchange reveals that there were difficulties then being experienced with the air conditioning and that Intek was arranging for Vogue Air Conditioning (presumably a sub-contractor) to rectify a problem

with the heating. The emails show that there were ‘a couple of other units which needed air con work’.

159 The plaintiffs have not established the extent of defective work, if any, done by TQM. It is not necessary, nor indeed on the state of the evidence possible, to determine what it would cost, as a consequence of what TQM did, to put the air conditioning in order.

160 If TQM were liable for the entirety of air conditioning defect as a discrete claim, I would find, in accordance the joint report of the quantity surveyors dated 6 August 2018, that the cost of remedying it is:

Agreed amounts	$62,500
Preliminaries at 20%	$12,500
	$75,000
Overhead and profit at 15%	$11,250
Contingency at 10%	$8,625
	$94,875
Consultant fees at 7.5%	$7,000
Total	**$101,875**

161 This claim fails for a further reason which is dealt with later.

Acoustics – items 4, 24, 42, 64, 84, 117, 370

162 This is a complaint that the drainage and sanitary pipe work in apartments 1, 2, 3, 4, 5, 6 does not have acoustic insulation (in this case, lagging).

163 Claims in the plaintiffs’ written submissions that the walls between the ceiling and lining of the ensuite suite and bedroom in apartments 2, 4, 5 do not meet applicable acoustic standards and that the exhaust fan noise in the carpark is excessive were not pressed in final argument. This is unsurprising because there is in evidence an acoustic certificate for the carpark exhaust fan procured

by Intek dated 22 October 2008 and an installation certificate dated 14 January 2009 from Intek that the sound and transmission insulation had been designed and constructed to achieve the level of specified standards of performance.

164 The existence of the claimed pipe insulation defects is not seriously in contest.

165 Despite Intek's contract being for the completion of works not completed by TQM, acoustic insulation for the pipes has never been installed. At least in one apartment, Intek apparently made a perfunctory attempt at insulation.

166 Mr Rex Horne of apartment 1 gave evidence of meeting with Mr Mark Levett of Intek and complaining about noise of toilet flushing and shower drainage waste from the apartment above. Mr Levett told him that he would attempt to remedy the situation by wrapping the pipes that could be reached by his arm inside the ceiling space. He granted access to Mr Levett and saw him working on and wrapping the pipework in a synthetic substance, but Mr Horne noticed no difference.

167 This claim fails.

168 The difficulty once again for the plaintiffs is that they have not established which of the piping work was installed by TQM. It may be accepted that TQM installed some, but the evidence does not show that it installed all of it.

169 The plaintiffs argue that it is to be inferred that where TQM had installed suspended ceilings, they must have installed the piping above them. So much can also be accepted. The difficulty is that the plaintiffs have not established which ceilings TQM installed.

170 The Monteith photographs show very little of the ceilings. Undoubtedly, some ceilings had been installed. At best, the plaintiffs have payment claim 21 which claimed 100% for suspended ceilings. I have dealt with payment claim 21 above. One would usually expect ceilings to be installed only after gyprock walling is complete. On 6 December 2007, according to Mr Burlington, the gyprocking in apartments 10 and 7 was not complete.

171 If TQM were liable for the entirety of acoustics as a discrete claim, I would find, in accordance the joint report of the quantity surveyors dated 6 August 2018, that the cost of remedying it is:

Agreed amounts	$15,810
Preliminaries at 20%	$3,162
	$18,972
Overhead and profit at 15%	$2,846
Contingency at 10%	$2,182
	$24,000
Consultant fees at 7.5%	$1,800
Total	**$25,800**

172 The claim fails for a further reason which is dealt with later.

TEMPORARY DISCONFORMITY THEORY?

173 Senior Counsel for TQM invoked as an answer to the plaintiffs' claim what he described as a principle enunciated by Lord Diplock in *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER Rep 121 (HL) as the 'temporary disconformity theory'.

174 As I understood it, this is a suggested rule of law that where a builder under a building contract does defective work, no action for damages lies if the builder still has the opportunity to remedy it, which the builder can do at any time before it is to hand over the works or during any defects liability period. Until this opportunity passes, the defective work, whatever its nature or extent, is treated merely as a 'temporary disconformity' with, and not a breach of, the contract.

175 TQM argues that it was denied the opportunity to remedy any defects because PVD took the work out of its hands unlawfully. It puts that applying the temporary disconformity theory, any defects were merely temporary and, therefore, not a breach of the Contract for which PVD could sue.

176 It argues that the effect of s 18D(1) is to place the plaintiffs in the same position with respect to their claim that TQM did defective work in breach of s 18B.

177 I reject this submission.

178 First, Lord Diplock expounded no such principle, and there is no such rule of law in this State.

179 Second, s 18D(1) does not place the plaintiffs in PVD's position with respect to TQM as regards the warranties. The fact that PVD does not have a claim against TQM does not mean that the plaintiffs do not have one.

180 *P & M Kaye v Hosier & Dickinson* concerned whether a provision in the standard RIBA form of building contract, which provided for an architect's certificate that work had been properly carried out and completed in accordance with the terms of the contract to be conclusive evidence in any proceedings arising out of the contract, was effective to preclude a claim made in proceedings begun before the date of the certificate.

181 Before the House of Lords, an issue which had not been raised or argued in the Court of Appeal arose for the first time. This was whether the architect's certificate precluded a claim for damages for defective work which had been remedied before the certificate was issued. In other words, whether the certificate referred only to the state of the works at the date of the certificate and did not amount to a statement, known in that case to have been false in fact, that at no time during the construction of the works or during the defects liability period, defective work had been done by the contractor in breach of contract which had caused consequential damage to the employer before the defects were made good.

182 If the contract and certificate operated only as to the state of works at the date of the certificate, the question would arise whether the employer had a claim for damages for defective work which had subsequently been remedied.

183 The majority declined to entertain the new issue, amongst others, because their Lordships had not had the benefit of assistance from the Court of first instance or the Court of Appeal on what they considered to be a difficult point

of wide significance because it concerned the construction of a standard form of building contract.

184 Lord Diplock, however, in dissent, dealt with the issue because he considered it to be one of clear contractual construction.

185 His Lordship's view was that on the construction of the relevant provision of the building contract, the issue of the certificate was not to be taken as conclusive evidence that at no time previously had there not been defects in the works which required remedying. It was merely conclusive evidence that any remedial measures which had been necessitated by reason of defects in the works had been executed by the time of its issue.

186 Theoretically, this would leave it open to the employer to sue for damages in respect of once defective, but now rectified work. No doubt for this reason, his Lordship went on to say the following, which is where the plaintiffs say the temporary disconformity theory is revealed:

> During the construction period it may, and generally will, occur that from time to time some part of the works done by the contractor does not initially conform with the terms of the contract either because it is not in accordance with the contract drawings or the contract bills or because the quality of the workmanship or materials is below the standard required by cl 6(1). The contract places on the contractor the obligation to comply with any instructions of the architect to remedy any temporary disconformity with the requirements of the contract. If it is remedied no loss is sustained by the employer unless the time taken to remedy it results in practical completion being delayed beyond the date of completion designated in the contract. In this event the only loss caused is that the employer is kept out of the use of his building beyond the date on which it was agreed that it should be ready for use. For such delay liquidated damages at an agreed rate are payable under cl 22 of the contract.
>
> On a legalistic analysis it might be argued that temporary disconformity of any part of the works with the requirements of the contract even though remedied before the end of the agreed construction period constituted a breach of contract for which nominal damages would be recoverable. I do not think that makes business sense. Provided that the contractor puts it right timeously I do not think that the parties intended that any temporary disconformity should of itself amount to a breach of contract by the contractor.

187 The passage is self-evidently of limited application: see *Lintest Builders Ltd v Roberts* [1980] 13 BLR 38 at 44.

188 It expounds no principle, let alone one of general application. It concerns the construction of specific provisions in a specific form of building contract against

particular factual circumstances which had arisen, namely, where a conclusive certificate was issued after defective work had been remedied.

189 In such a case, if there had been a disconformity, it would at the time of the certificate have been known to have been temporary. The passage says nothing of where defective work is not remedied for whatever reason. In such a case, the disconformity may be permanent.

190 It is not difficult to understand why his Lordship found it unattractive to permit the owner to sue the contractor for damages for breach of an obligation to do non-defective work where the defective work had been remedied within a period provided for by the contract and no delay had been caused by the initial defective work. No damage would have been suffered as a consequence of the breach. A finding of no damage would have accorded with conventional contractual analysis which imposes on a plaintiff seeking damages (beyond nominal damages) the onus of establishing that the conduct complained of caused it loss.

191 However, the fact that no loss had been suffered does not mean that there was no breach.

192 On the particular terms of the contract, his Lordship found that the parties intended that temporary disconformity should not be a breach.

193 The passage is not without its difficulties.

194 If a contract requires work to be done in a proper and workmanlike fashion and the builder does defective work, it is difficult to understand why, even if the work is later remedied, there was no initial breach. The contract might provide a mechanism to assuage the breach and avoid loss which might otherwise be suffered if the breach were not remedied, but the initial breach still occurred. The conventional approach would be to consider whether given other contractual provisions and the conduct of the employer, the employer has an exigible claim for damages.

195 In any event, the present case is markedly different from *P & M Kaye v Hosier & Dickinson*. The builder suspended work under a statutory entitlement given

to it by s 27(3) of the *Security of Payment Act* after PVD failed to pay payment claims to which it served no payment schedules in response.

196 PVD then took the work out of TQM's hands relying on an asserted failure on TQM's part to show cause why it had not proceeded with due diligence and without delay. TQM had every cause. It had not been paid amounts in respect of which it was, under the *Security of Payment Act*, entitled to judgment.

197 For present purposes, it can be assumed that TQM's work was defective and in breach of the warranty in s 18B(a), as the plaintiffs allege.

198 I observed earlier that TQM ultimately abandoned, correctly, this argument in relation to the plasterboard defects. It is difficult to describe a systemic plasterboard defect as a disconformity, let alone a (potentially) temporary one. After all, it was not even known to exist.

199 The most that can be said for TQM is that PVD itself may not have been caused any damage by TQM's default. TQM was denied its contractual entitlement to complete the work in circumstances where, in connection with the air conditioning and acoustic issues, TQM says it would, if it had been paid in accordance with the Contract, have remedied the defects. I interpolate that I believe Mr Taouk when he says that TQM would have done so. This would be sufficient to break any chain of causation between TQM's default and PVD's loss. PVD may also be said to have failed to mitigate any loss which might have been caused by TQM's breach.

200 Mr Taouk gave evidence that had TQM not suspended the work and not been excluded from the site, he would have caused any defects to have been rectified, either prior to practical completion or otherwise in the defects liability period under the contract following practical completion of the works (I interpolate that this evidence clearly could not relate to remedying a systemic plasterboard defect which was not then known and which would have involved substantial rebuilding, which I am not confident TQM would have carried out).

201 Those defects would have become apparent when the necessary testing was done to obtain the certificates needed for an Occupancy Certificate. I also

believe him with respect to the air conditioning and acoustic issues that they would otherwise have been remedied during the defects liability period.

202 TQM puts that where s 18D(1) provides that the plaintiffs, as successors in title to the benefit of the statutory warranties, are entitled to ***the same rights*** as PVD in respect of the statutory warranties, this means that the plaintiffs are put in the same position as PVD under the contract between them which incorporates the statutory warranties.

203 It argues that section 18B implies warranties into a building contract and the successor's right is to have the warranties as if they were in that contract. It argues that the legislation envisages that the statutory warranties are to be 'grafted on' and to operate within the existing legal framework of the building contract under which residential building works were undertaken by TQM.

204 I reject this argument. It misconstrues what the words of s 18D(1) say. It incorrectly ascribes to the section an intention to bring about a statutory assignment of rights under a contract, subject to equities. It is well established that this is not how the section operates. It creates new rights: *Allianz Australia Insurance Ltd v Waterbook at Yowie Bay Pty Ltd* [2009] NSWCA 224 at [65].

205 Under s 18D(1) the successor has the same rights as the predecessor in respect of a statutory warranty. It is not ***the*** rights of the predecessor. The section uses the word ***same*** in the meaning of equivalent.

206 The right is to hold the warranty giver to the obligation to meet the warranty. It is a stand-alone right not dependent on, part of, or affected by any provision of any contract between the original players.

207 The only limitation which the section places on the right is that it cannot be exercised with regard to work and materials where the predecessor has enforced the warranty with respect to that work and those materials. It is to be observed that this limitation is expressed in terms of the predecessor having enforced the warranty, not the right.

208 There is nothing unfair in a builder being responsible to a successor for defective work done in breach of its statutory warranty. After all, the basic object of s 18D(1) is to hold builders accountable for defective work.

209 TQM's entitlement to sue for damages for breach by PVD of the building contract is unaffected. Those damages could conceivably include the amount of TQM's exposure to a successor in title.

DOUBLE COMPENSATION AND THE DEED OF SETTLEMENT

210 Unlike the temporary disconformity theory, there is a legal rule against double compensation.

211 In *Boncristiano v Lohmann* [1998] 4 VR 82, an authority to which the Court was properly referred by junior counsel for the plaintiffs, the Victorian Court of Appeal after referring to *Townsend v Stone Toms & Partners* (1984) 27 BLR 26 (a decision of Oliver LJ and Purchase LJ), said at 89 in a lucid passage:

> Oliver LJ said at 38:
>
> > The starting point, and one on which there is a good deal of clear authority, is that where a plaintiff with concurrent claims against two persons has actually recovered all or part of his loss from another, that recovery goes in diminution of the damages which will be awarded against the defendant.
> >
> > A plaintiff can never, as I understand the law, merely because his claim may lie against more than one person, recover more than the total sum due.
>
> Purchas LJ at 48 stated the principle in similar terms. The principle so stated is sometimes called the "rule against double compensation". The law, which now embraces equity, will not permit a plaintiff, whatever procedural device is used, to recover more than the damages which have been suffered, no matter what the cause of action upon which he proceeds against the various defendants: see per Purchas LJ in *Townsend's case* at 49. This principle was accepted by Steyn J (as he then was) in *Banque Keyser Ullman S.A. v Skandia (UK) Insurance Co Ltd (No. 2)* [1988] 2 All ER 880 at 881-2.
>
> It is not to the point to argue, as Mr. Ritter who appeared on this appeal with Mr. Wilmoth for the owners was inclined to argue, that the claims made against the various defendants proceed from different causes of action. The fundamental question is whether the claims against the various defendants are "concurrent" in the sense that the relief sought is the same. Nor is it to the point that the damages received from one defendant have been received pursuant to a compromise of the claim against that defendant, by way of acceptance of moneys in court or otherwise: cf. *Townsend's* case*; Bryanston Finance Ltd v De Vries* [1975] QB 703 at 722 per Lord Denning MR.
>
> It was contended by Mr. Ritter that the learned judge was in no position in this case to call upon the owners to bring to account a portion of the settlement sum paid by the solicitors because there was nothing in the material before him which could have enabled him to find what, if any, portion of the settlement sum was attributable to the satisfaction of the substance of the owners' claim as distinct from a claim, say, for the costs of that claim. However the paucity of that material cannot, as I understand the law, affect the

application of the principle to which I have referred. Quite apart from the fact that the terms of the settlement between the owners and the solicitors stipulated that the sum paid was "in settlement of the claim made" against the solicitors (as to which compare the terms of settlement in the *Banque Keyser* case at 881), it seems to me that the fact of payment raises against the owners a presumption that the amount of the settlement was offered and accepted in satisfaction of the concurrent claim made by the owners against the solicitors and the builders. As Oliver LJ said in *Townsend's* case at 41:

> It is said that the burden lies on the defendant to show that a part of the claim against him has already been satisfied and to demonstrate the extent to which recovery has already been completed by the plaintiff … Allowing this, however, it seems to me that the initial burden is discharged when the defendant shows acceptance of a payment-in, in causes of action where there are concurrent claims against him. If it is to be said that the payment-in relates to some claims which are not concurrent, or which could not succeed against the defendant, the only person capable of providing that guidance is the plaintiff himself, who has accepted the payment.

212 The Deed of Settlement recites that the plaintiffs (defined as the Owners) entered into the Intek Contract with Intek (defined as the Builder) to complete the construction of the apartment complex and basement car park (defined as the Building Works) situated at 88 Lagoon Street. It recites that Building Works were commenced by TQM on or about 26 June 2006, but TQM abandoned the Building Works that remained incomplete on or about 1 June 2008.

213 The recital that TQM abandoned the Building Works does not accord with the facts.

214 The Deed of Settlement recites that Intek carried out residential Building Works and that AAI issued Home Owners Warranty Insurance policies.

215 It recites that Intek was placed into external administration on 9 September 2009.

216 Recitals G, H(j), M and O are in the following terms:

> G. To date, the Owners have lodged various notifications and claims against the Insurer for alleged defects arising from defective and/or incomplete works in the Building Work ("**the claims**")
>
> H. The Parties agree that the Claims consist of:
>
> (j) Amended Scott Schedule served on or about 25 July 2014
>
> M. Throughout the course of the Claims, the District Court Proceedings, and the Supreme Court Proceedings, the Owners have served on the Parties a number of documents said to contain all claims made on the Insurer. The Owners now acknowledge by the entry into this Deed that the Insurer's liability

did not and does not extend to liability for defective workmanship of TQM and by entry into this Deed the Owners waive all allegations and claims to the contrary effect made in the District Court Proceedings and the Supreme Court Proceedings.

O. The Parties have agreed to the Insurer paying the Owners the total sum of $1,100,000.00 (one million, one hundred thousand dollars) ("**the Settlement Sum**") inclusive of legal costs in full and final settlement of all claims made or which may have been made upon the Insurer and to extinguish any future rights to claim against the Insurer in respect of the Building Work.

217 Clauses 3.1, 3.2 and 3.3 provide:

3. SUBROGATION AND ASSIGNMENT

3.1 The Insurer and the Owners hereby acknowledge that by reason of the Insurer paying the Settlement Sum to the Owners, the Insurer is subrogated to all rights, remedies and causes of action which the Owners have or may have in respect of the Building Work with the exception of the Owners rights as against TQM in the District Court Proceedings and the Supreme Court Proceedings.

3.2 The insurer acknowledges that this Deed does not seek to affect any claim the Owners presently have or which it may have as against TQM or against any person or persons who undertook work on the Premises the subject of the District Court Proceedings and the Supreme Court Proceedings for or on behalf of the TQM or against its Home Owners Warranty Insurer in respect of the building work the subject of the District Court Proceedings and the Supreme Court Proceedings ("**Lumley**") or any successor in title.

3.3 The Parties agree that if there is any inconsistency or ambiguity with respect to Clauses 3.1 and 3.2, then Clauses 3.1 and 3.2 are to be read down as to remove any inconsistency or ambiguity with respect to the Owners rights to pursue any claim against TQM or against its Home Owners Warranty Insurer in respect of the building work the subject of the District Court Proceedings and the Supreme Court Proceedings. The Insurer does not seek to restrict any right the Owners have as against TQM or against its Home Owners Warranty insurer in respect of the building work the subject of the District Court Proceedings and the Supreme Court Proceedings.

218 Clause 4.1 provides:

4. RELEASE BY THE OWNERS

4.1 The Owners hereby, jointly and severally, release, remit and forever quit claims unto the Insurer all manner of actions, suits, causes of action and suit arbitrations, debts due to costs and demands whatsoever at law or in equity or pursuant to any statute which the Owners or any of them have or could, would or might have or have had upon or against the Insurer by reason or on account of or in any way in connection to any loss or damage arising from the Building Work, the Policies, the Claims, the District Court Proceedings, the Supreme Court Proceedings and the Defects.

219 The claims now made against TQM for the air conditioning and acoustic defects were made in precisely the same terms against AAI (standing in Intek's shoes) in the Amended Scott Schedule served on about 25 July 2014. They were part of the Claims which were settled under the Deed of Settlement. The Claims against AAI and TQM are concurrent in the sense used in *Boncristiano v Lohmann.*

220 Although the Deed of Settlement records an acknowledgement by AAI that the Deed of Settlement did not seek to affect any claim the owners may have had against TQM, it clearly does so because the plaintiffs received compensation for concurrent claims made against both AAI and TQM. Correspondingly, the plaintiffs released AAI from all claims. Recordals in an instrument to which TQM is not a party do not, of course, bind it.

221 The plaintiffs must bring to account the payment they received as compensation for the same defects.

222 It is apt to observe that the Intek contract price was $650,000, supposedly for all of the work left to do. The settlement sum was nearly double this.

223 In total the plaintiffs received $1,100,000. The Deed of Settlement does not apportion any amounts to any particular defects. The plaintiffs did not suggest any particular apportionment or produce any evidence of any.

224 In the circumstances, it having been established by TQM that the plaintiffs received payment including for the air conditioning and acoustic defects, the only persons capable of providing guidance as to the amount which was received for those defects are the plaintiffs, and they have provided none.

225 It follows that it is to be inferred that from the $1,100,000 they received, the air conditioning and acoustic defects were paid for in full.

CONCLUSION

226 The proceedings are dismissed.

227 I provisionally order that the plaintiffs are to pay TQM's costs of the proceedings. Any party who seeks a different order is by 12 noon on 30 August 2018 to notify my Associate of the form of order sought and to provide a brief statement of the basis upon which it is sought. If neither party provides such

notice, the provisional order will solidify. If notice is received, the provisional order will not take effect and the matter will be relisted for directions on 31 August 2018.

228 The exhibits are to be returned.

****

Amendments

27 August 2018 - Paragraph 43 moved to become paragraph 46

Amendment of dates in paragraph 61