Supreme Court

New South Wales

Case Name:	Ippolito v Cesco
Medium Neutral Citation:	[2020] NSWSC 561
Hearing Date(s):	27 to 28 April and 4 May 2020
Decision Date:	14 May 2020
Jurisdiction:	Equity - Technology and Construction List
Before:	Ball J
Decision:	Judgment for the plaintiff in the sum of $380,509.03
Catchwords:	BUILDING AND CONSTRUCTION – Breach of statutory warranties in the Home Building Act 1989 (NSW), s 18B – Application s 48MA of the Home Building Act 1989 (NSW) to proceedings brought before the Supreme Court – Whether the Court will order specific performance of a building contract - Whether damages for loss of rent were in the parties' reasonable contemplation at the time the contract was entered into – Distinction between difficulty of assessing damages and failure to take reasonable steps to prove damages suffered.
Legislation Cited:	Home Building Act 1989
Cases Cited:	Adams v Morellini [2010] WASC 61 Bellgrove v Eldridge (1954) 90 CLR 613 Biggin v Permanite [1951] 1 KB 422 Forrest v Australian Securities and Investments Commission (2012) 247 CLR 486 Graham H Roberts Pty Ltd v Maurbeth Investments Pty Ltd [1974] 1 NSWLR 93 Hadley v Baxendale (1854) 9 Exch 341 JLW (Vic) Pty Ltd v Tsiloglou [1994] 1 VR 237 NCON Australia Ltd v Spotlight Pty Ltd [2012] VSC 604 Owners – Strata Plan No 76674 v Di Blasio

	Constructions Pty Ltd [2014] NSWSC 1067 Owners Strata Plan 78465 v MD Constructions Pty Ltd [2016] NSWSC 162 Placer v Thiess (2003) 77 ALJR 768 The Commonwealth v Amann Aviation Pty Limited (1991) 174 CLR 64
Texts Cited:	JD Heydon, MJ Leeming and PG Turner, Meagher, Gummow and Lehane's Equity Doctrines and Remedies, LexisNexis Butterworths, 5th ed (2015)
Category:	Principal judgment
Parties:	Steffan James Ippolito (Plaintiff) Michael Cesco (First Defendant) Michael Cesco t/as Grid Projects Pty Ltd (Second Defendant)
Representation:	Counsel: DS Weinberger (Plaintiff) L Shipway (Defendants) Solicitors: Project Lawyers (Plaintiff) Robert King (Defendants)
File Number(s):	2018/285545

JUDGMENT

Introduction

1 These proceedings concern alleged defects in a dual occupancy residential development in Willoughby (***the Development***). They raise the following questions:

(a) whether the defects claimed by the plaintiff, Mr Ippolito, the owner of the land on which the Development was erected, exist or existed;

(b) whether, if defects exist, the Court should make an order requiring the contractor to rectify the defects rather than awarding damages for the costs of rectification;

(c) if the Court should award damages, what those damages should be.

Factual background

2 On 13 July 2011, Mr Ippolito entered into a contract with Mr Cesco for the construction of the Development for a total price of $3,283,411.78 (including GST). The contract is in the form of the Australian Institute of Architects/Master Builders Australia ABIC SW-2008 H NSW Simple Works Contract for Housing in New South Wales (***the Contract***). It described the contractor as "Michael Cesco (Grid Projects P/L)" and for that reason both Mr Cesco and "Michael Cesco trading as Grid Projects Pty Ltd" were named as defendants in the proceedings. However, Mr Cesco concedes that he was the contracting party personally and the hearing proceeded on that basis.

3 The contract nominated Mr Greg Anderson as the architect who in respect of some functions was to act as Mr Ippolito's agent and in others as an independent certifier.

4 Work on the Development commenced in September 2011. It is common ground that that work was residential building work within the meaning of the *Home Building Act 1989* (NSW) (***the HBA***) and that consequently the warranties set out in s 18B of that Act were implied into the Contract. In particular, s 18B(1)(a), which is repeated as cl A3.2 of the Contract, implies a warranty "that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract".

5 On 18 September 2012, the parties entered into an amended contract following the replacement of Mr Anderson as architect by Smart Design Studio Pty Ltd. At the same time, they crossed out the reference to Mr Cesco trading as Grid Projects Pty Ltd.

6 Notice of practical completion was issued in respect of one house (***House 1***) on 10 April 2014 and in respect of the other (***House 2***) on 10 September 2014. Mr Ippolito and his family have occupied House 1 since it was completed in April 2014. Between September 2014 and June 2017, his parents occupied House 2. Since 21 August 2017, it has been leased to Mr Desmond Jay at a rent of $5,000 per fortnight.

7 Mr Ippolito's principal complaint relates to water ingress. Mr Ippolito raised the issue of water ingress into the garage of House 2 and through the skylight in

the dining room of House 1 in October 2014. Mr Cesco investigated both leaks and concluded that the leak in the garage was caused by a contractor removing a plug, causing water to enter, and the leak through the skylight was caused by a small gap in the flashing. Both problems were fixed promptly.

8 Problems with water ingress, however, continued and were the subject of a number of emails between Mr Ippolito and Mr Cesco. On each occasion the issue was raised with Mr Cesco, he investigated it promptly. He concluded that the problems were caused largely by blocked gutters and drains; that a further leak into the garage of House 2 was caused by gaps between the garage door, which had been installed by another contractor, and the wall and that a leak in Mr Ippolito's study was caused by a hole in the external wall which had been made by the air conditioning contractor engaged by Mr Ippolito in order to run pipes into the house. Mr Ippolito also raised other issues, such as a blocked sink and toilet, which were dealt with.

9 Although Mr Cesco attended to any problems brought to his attention promptly, problems continued and relations between him and Mr Ippolito started to deteriorate. In August 2015, Mr Ippolito made a complaint to Fair Trading NSW and on 28 October 2015 Mr Pietro Scalise, an inspector with Fair Trading NSW, inspected House 1 and House 2. Following that inspection a rectification order was issued which identified seven items requiring rectification, some of which related to water ingress problems. On 9 December 2015, Fair Trading sent Mr Cesco a letter stating that the defective work had been rectified to Mr Ippolito's satisfaction.

10 On 23 February 2016, a private certifier issued a final occupation certificate.

11 On 5 June 2016, House 1 experienced a large amount of water penetration during a storm. Mr Ippolito asked a builder friend of his, Mr Joe Lameri, for assistance in dealing with the water ingress. Mr Lameri attended the site that day and it appears he made a substantial number of holes in the walls and ceilings to investigate the sources of the leaks. At the same time, Mr Ippolito and Mr Lameri took a large number of video recordings showing the water ingress. Mr Cesco attended the site the following day. He was not shown the

videos but he says that he observed numerous holes that had been made in the walls and ceilings.

12 Following the storm, Mr Ippolito engaged Mr Barry Morris of Kellyridge Homes Pty Ltd t/as Building & Constructions Reports to prepare a building inspection report in respect of the two houses. Mr Morris issued his report on 25 July 2016. A copy of that report was provided to Mr Cesco who provided a detailed response on 12 October 2016. Mr Morris replied to Mr Cesco's response on 8 February 2017. Mr Morris also prepared what is described as a "Supplementary Report" dated 24 November 2017. Each of the reports was expressed to be prepared "assuming that it may [in the case of the second report "will"] be used in future hearings at the NSW Civil and Administrative Tribunal". It is not entirely easy to determine how much Mr Morris charged for his reports from the evidence. Mr Ippolito claims the sum of $25,010.24, which is the total of the invoices issued by Mr Morris. However, a number of those invoices were expressed to include amounts on account of fees. It is apparent from subsequent invoices that Mr Morris generally gave credit for those amounts. However, Mr Morris's first invoice dated 16 June 2016 for an amount of $2,770 included and amount of $2,000 on account of fees and his second account dated 5 December 2016 was for an amount of $2,200 on account of fees. It is not clear from the evidence that Mr Morris ever gave credit for those amounts. On the other hand, there is no invoice in evidence describing the work Mr Morris did in relation to the preparation of his first report and the amount he charged for that work. It is also unclear on the evidence when Mr Morris's invoices were paid.

13 On 6 April 2017, Mr Ippolito's then solicitors, BCP Lawyers, sent a letter to Mr Cesco enclosing Mr Morris's response and demanding that Mr Cesco rectify the defects identified by Mr Morris. After receiving that letter, Mr Cesco engaged Mr Robert King as his solicitor. On 13 April 2017, Mr King wrote to BCP Lawyers proposing a site meeting "so that my client may outline the works that he proposes be undertake [sic] to achieve a resolution of this matter". There was then further correspondence between the solicitors resulting in a site meeting on 28 April 2017. One of the attendees at that meeting was Mr John Worthington, who had been retained by Mr King to prepare a report in

response to those prepared by Mr Morris. Mr Worthington issued his report on 23 May 2017 taking issue with Mr Morris's reports. He concluded that "the water entry to the buildings has not been caused by the Builder but as a result of a lack of regular cleaning, or obstruction to drainage points by the owner".

14 There was then further correspondence between the parties' solicitors, some of it concerned with a possible mediation involving a Fair Trading officer which was rejected by Mr Ippolito, on the basis that a previous mediation involving Fair Trading had failed.

15 In July 2017, Mr Ippolito engaged Stateline Glazing & Shopfitting Pty Ltd t/as Stateline Group, a company through which Mr Lameri operated. The work undertaken by Mr Lameri included a number of temporary repairs which Mr Ippolito says were necessary to bring House 2 into a habitable condition so that it could be rented out. Stateline provided a quote for that work of $63,624.61 (including GST). That work was undertaken between 26 July 2017 and 30 August 2017. It is apparent from the quote provided by Stateline Group that some of the repairs relate to House 1. The repairs largely involved replacing joinery, patching and painting.

16 On 23 November 2017, Mr Ippolito signed two residential cost plus building contracts with Precise Building & Carpentry Pty Ltd. The first contract related to House 1 and provided for work with an estimated cost of $200,000. The second contract related to House 2 and provided for work with an estimated cost of $110,000. The work covered by the contracts related to the rectification work proposed in Mr Morris's reports. Precise Building undertook the work the subject of the contracts between 15 November 2017 and 24 April 2018.

17 Mr Ippolito says that on or about 1 December 2017 he was informed by Mr Anthony Papallo of Precise Building that Precise Building had uncovered further defective work which was outside the scope of works of its contracts. Mr Ippolito instructed Precise Building not to rectify those defects but rather to limit its scope of works to the work necessary to make House 1 and House 2 safe, habitable and watertight.

18 In all, Mr Ippolito paid Precise Building $143,352.91 for the work that it did and paid Stateline $37,587 to supervise that work. In addition, he paid ACOR

Consultants Pty Ltd $2,200.00, although for what exactly is not clear from the evidence.

19 In summary, Mr Ippolito says that he has incurred the following costs:

(a) invoices from Kellyridge Homes Pty Ltd for reports prepared by Mr Morris in the total sum of $25,010.24;

(b) invoices from Stateline Glazing for initial repair work and for work done in supervising work undertaken by Precise Building totalling $101,211.61.

(c) invoices from Precise Building totalling $143,352.91;

(d) an invoice from ACOR Consultants Pty Ltd for $2,200;

20 Mr Ippolito claims those amounts together with interest as damages. He also claims the costs of rectifying remaining defects and the costs of lost rent and alternative accommodation while that is done.

Defects said to require rectification

21 It is convenient to deal first with the defects that are said still to require rectification.

22 Mr Ippolito led evidence from three expert witnesses: Mr Troy Melville, a consultant with ACOR who was called as an expert in façade engineering and waterproofing; Mr Ian Laurie, who is an hydraulic engineer; and Mr George Zakos, a building expert. Each prepared reports identifying defects with House 1 and House 2 in relation to their particular areas of expertise. In addition, Mr Zakos, who has considerable expertise as a quantity surveyor, prepared a report estimating the costs of rectifying the defects identified by each of them. According to Mr Zakos, the total costs of rectification are $460,062.21. Mr Michael O'Donnell, who was called by Mr Cesco, prepared reports in response to the reports prepared by each of the experts called by Mr Ippolito. He accepted a number of the defects identified by them; but he took issue with most of Mr Zakos's costings. According to him, the cost of repairing defects that he accepts exist are $56,168.01, although he expressed the opinion on a number of occasions that Mr Cesco should be permitted to return to the site to rectify the defects himself. As is usual, the experts prepared joint reports following conclaves between them. The joint reports helpfully identified the

outstanding differences between them. It is only necessary in this judgment to address issues on which they continue to disagree.

The façade defects

Item 1

23 Mr Melville expresses the view that there were no cavity flashings or weep holes at the base of the eastern wall adjacent to the kitchen of House 1 contrary to the requirements of AS3700 2001 Masonry Structures paras 4.7.2 and 4.7.3. Those paragraphs provide:

> 4.7.2 Weepholes
>
> Weepholes shall be provided wherever it is necessary to drain moisture from or through masonry construction. Where flashings are incorporated in the masonry, weepholes shall be provided in the masonry course immediately above the flashing, at centres not exceeding 1200 mm.
>
> 4.7.3 Damp-proof courses and flashings
>
> Damp-proof courses or flashings shall be incorporated into masonry construction where it is necessary –
>
> (a) to provide a barrier to the upward or downward passage of moisture through masonry;
>
> (b) to prevent moisture from entering into the interior of a building from the exterior;
>
> (c) to prevent moisture passing across a cavity to the inner leaf; or
>
> (d) to shed moisture through masonry to the outer face.

Mr Melville also gave evidence that there was debris in the cavity wall, which plainly from the photographs in evidence there is.

24 It is not easy to understand Mr O'Donnell's response to this defect. In his original report, he said that he agreed that this was a defect. In the joint report, he appeared to resile from that position on the basis that he had been instructed by Mr Cesco that a damp proof course had been installed and that he had formed the opinion that the installation of flashings was unnecessary in the circumstances.

25 I do not accept Mr O'Donnell's evidence. He cannot give admissible evidence concerning the installation of a damp course. His statement of his instructions in this respect should be understood as an assumption made by him, which has not been proved. It is apparent from the photographs of the wall that the lower part of the wall is discoloured, which I accept is an indication of rising

damp. I accept Mr Melville's evidence that the likely explanation for that is the absence of flashings and weep holes.

Item 2

26 Item 2 relates to the absence of weep holes and flashings in the southern wall outside the kitchen of House 1. It raises similar issues to Item 1. Mr O'Donnell accepts that cavity walls require ventilation and that the installation of weep holes was one way of achieving that. He also says that he was instructed that a damp course was installed. Lastly, he points to the fact that there is no evidence that the absence of flashings and weep holes has caused any problems with this wall.

27 In my opinion, there is no reason to treat this wall any differently from the eastern wall. The fact that no problems have manifested themselves to date does not mean that they will not arise in the future. The view that flashings are unnecessary appears to be based on instructions given by Mr Cesco that a damp course was installed. However, as I have said, Mr O'Donnell cannot give admissible evidence concerning that fact.

Item 3

28 This item relates to the fact that the cavity flashings beneath the fixed window above the ground level hallway on level 1 of the northern façade of House 1 are not turned up. Mr O'Donnell says that he did not observe this defect. However, it is depicted on photographs taken by Mr Melville and the existence of the defect explains water penetration on the internal wall below the window, which has caused the paintwork to bubble and discolour. It is plainly a defect on the evidence.

Item 4

29 This item relates to the external wall above the bedroom balcony in House 1. Again, Mr Melville expresses the opinion that there is an insufficient number of weep holes installed in the wall and the cavity flashing does not extend to the external face of the wall. During the course of giving evidence, Mr O'Donnell accepted this defect.

Item 5

30 This item relates to the flashings in the external walls bounding the bedroom balconies. It is now common ground between the experts that this is a defect.

The hydraulic defects

31 In all, Mr Laurie identified 37 defects. Many of those are now agreed between the experts. It is only necessary to address those that are not. According to Mr Cesco's final written submissions, they are items 1, 4, 5, 6, 7, 8, 10, 11, 14, 15, 16, 26, 27, 29, 32 and 36.

Items 1, 4, 7

32 In the case of these items, Mr O'Donnell says that he was instructed that the relevant work was undertaken by a contractor engaged by Mr Ippolito directly and for that reason he does not regard them as defects for which Mr Cesco is responsible. There is, however, no evidence supporting the relevant instructions. Mr O'Donnell's instructions are nothing more than unproved assumptions made by him. For that reason, I accept Mr Laurie's opinions in relation to these items.

Item 5

33 This item relates to the absence of a floor waste. Mr O'Donnell says that he was instructed that the floor waste was installed but that the supervising architect gave an instruction that it be covered over. There is no evidence of the architect's instruction. Mr O'Donnell cannot give evidence of the instruction. Rather, he has proceeded on the basis of an unproved assumption. For that reason, his evidence must be rejected.

Item 6

34 This item relates to loose toilet pans. They are fixed to a mirrored wall which is likely to crack if they are fixed too tightly. The experts have proposed a solution which involves the removal of the walls and replacement with a more suitable lining. Mr Cesco submits that the conclusion of the experts demonstrates that this was a design flaw. I do not accept that submission. The fact that the experts have recommended a particular solution does not without more demonstrate that the original design was defective. It simply indicates that the experts are agreed on the most cost effective means of rectifying the defect.

Items 8, 10 and 11

35 Each of these items raises a similar issue. The experts agree that in each case there is a defect. However, they have not identified a solution. Instead, they agree that further investigations should be undertaken and Mr Zakos and Mr O'Donnell have made (different) allowances for those investigations. Mr Cesco submits that Mr Ippolito has had ample opportunity to investigate the cause of each of the defects and his failure to do so means that he has not discharged his onus of proof. I do not accept that submission. The experts accept that each is a defect. Mr Ippolito should be compensated for the costs of rectifying those defects. Where those costs have not been identified by the experts, it is appropriate to make some allowance for the costs of carrying out further investigations and rectification work. That is what the experts have done.

Item 14

36 This item relates to a stormwater pit which exceeds the maximum depth. The experts agree that it is a defect. Mr Cesco only takes issue with the costs of rectification.

Item 15

37 This item relates to a step up in a drain. During oral evidence, Mr O'Donnell conceded that it was a defect. The only remaining issue is the costs of rectification.

Items 16 and 27

38 These items are not disputed. They appear to be included in Mr Cesco's list of disputed items because the experts agree in their joint report that no repair work is necessary in relation to them, with the result that any claim in relation to them should be rejected by the Court.

Item 26

39 This item relates to the absence of overflow protection for the external balconies of House 2. It is not easy to understand Mr Cesco's written submissions on this issue. The experts agree in their joint report that this is a defect which should be rectified. The issue was not raised with the experts in oral evidence. The opinion of the experts set out in the joint report should be accepted.

Item 29

40 This item relates to the absence of sumps in three box gutters. The experts agreed that any box gutter should have a sump. However, Mr O'Donnell's position was that, having regard to the area of the roof involved, the absence of a sump was unlikely to lead to water ingress. Based on that evidence, Mr Cesco submits that the cost of rectification is not a reasonable measure of Mr Ippolito's loss, relying on *Bellgrove v Eldridge* (1954) 90 CLR 613. I do not accept that submission. The purpose of the sumps is to guard against the possibility of overflow causing ingress of water into the house. The installation of sumps is the normal means of guarding against that possibility. The fact – if it is a fact – that the relevant gutters have not overflowed to date is not a reason for not guarding against the possibility; and in my view it is reasonable for Mr Ippolito to seek to do so. I accept, therefore, that this is a defect requiring rectification.

Item 32

41 This item relates to the absence of a grated drain across the external doorway entrance to the laundry of House 1. The experts agree that this is a defect, but according to Mr O'Donnell disagree on how it is to be rectified. It is not easy from the material to understand the nature of their disagreement. Mr Laurie proposes a method of rectification which provides for the installation of a grated trench drain in accordance with the approved storm water design drawing. In my opinion, that is the appropriate method of rectification, since it is consistent with the original specification.

Item 36

42 This item relates to the intrusion of tree roots into the stormwater system. Mr O'Donnell expresses the opinion that it is not a defect, since it does not arise from anything Mr Cesco did or failed to do. Mr Laurie, on the other hand, expresses the opinion that the intrusion of tree roots in such a short period of time is indicative of an unsealed or incorrectly sealed joint. I accept Mr Laurie's evidence. He came across as an excellent witness who had a detailed knowledge of his area of expertise. His evidence was plausible and explains how the tree roots could have penetrated the stormwater system in what has been a reasonably short period of time.

The General Building Defects

43 In all, Mr Zakos identified 35 general building defects. I rejected evidence in relation to items 3, 6, 7, 8, 10, 13, 17, 18, 19, 20, 21, 22, 31, 32 and 34. Mr Zakos and Mr O'Donnell agreed on the existence of, and method of rectification for, items 1, 2, 4, 24, 25, 33 and 35. It is only necessary to deal with the balance.

Item 5

44 This item relates to insufficient falls in the tiles of the second bathroom in House 1, causing water to pond. Mr O'Donnell accepted that the falls in the bathroom do not comply with the relevant Australian Standard. His position was that he did not observe any ponding or any other problems in the bathroom and that consequently no remedial work was necessary. Mr Cesco also submitted that, having regard to that evidence, it was not reasonable for Mr Ippolito to recover the costs of rectification, given that rectification would involve removing the existing tiles and laying new ones.

45 I do not accept Mr Cesco's submission. The purpose of the Australian Standard is to ensure that the wet areas in bathrooms drain properly. Mr Zakos, who carried out tests in the bathroom, did observe ponding. As he pointed out, that was a safety concern because of the possibility of soapy water making the floor slippery. There is no certainty that ponding water will not cause other problems in the future. In my opinion, Mr Ippolito is entitled to have bathrooms which comply with the relevant Australian Standard.

Item 9

46 This item relates to insufficient falls in the tiles on the balcony outside the study of House 1. The experts agree that the fall is inadequate. Mr Zakos gives evidence that the defect should be rectified by replacing the tiles. Mr O'Donnell's preferred method of rectification is to insert a spitter in the balcony wall. According to Mr Zakos, that will not provide a solution to the problem because it will only take off any water that reaches above the tile next to the wall. The photograph attached to his report indicated that there was some ponding adjacent to the internal wall.

47 I accept Mr Zakos's evidence. Both experts agreed that some rectification work was necessary to avoid water ingress in a storm. It is not clear that a spitter will do that effectively. Mr Ippolito is entitled to a balcony that complies with the relevant Australian Standard.

Item 11

48 This item relates to insufficient falls in the tiles of the third bathroom in House 1, causing water to pond. Again, both experts agree that the falls do not comply with the Australian Standards. It raises the same issues as Item 5 and should be determined in the same way.

Item 12

49 This item relates to water entry into the glazed door of bedroom 1 of House 1 leading onto the balcony. Mr O'Donnell was instructed not to consider this item. No objection was taken to Mr Zakos's evidence in relation to it. I accept that evidence.

Item 14

50 This item relates to cracks in the concrete floor of the living area in House 1. It appears from his written submissions that Mr Ippolito no longer presses this item. Mr Zakos says in relation to the item that "Further investigation is required by a structural engineer who should express an opinion as to the cause and rectification of the cracks, if required". The effect of this evidence appears to be that there may or may not be a defect which requires further investigation. That itself is not evidence of a defect. No allowance should be made for this item.

Item 15

51 This item relates to blistering paint observed in the north western corner of a skylight in the living area of House 1. The experts agree that it is a defect. Mr O'Donnell makes no allowance for it on the basis that it may have been caused by the installation of a pizza oven by a third party contractor. However, there is no evidence that that is the case. Mr Zakos gives evidence that further investigation is required to identify the source of the moisture causing the defect. On that basis, Mr Cesco submits that Mr Ippolito has failed to discharge his onus of proof and therefore the item should be rejected.

52 Mr Cesco's submission raises a similar issue to the issue he raised in relation to Items 8, 10 and 11 of the hydraulics defects. For the reasons given in that context, I reject the submission.

Item 16

53 This item relates to moisture in a storage area adjacent to an external wall and stairs in House 1.

54 Mr Zakos gives evidence that he observed that there was mineral leaching and water staining on the outside wall adjacent to the stairs and staining where the joints and stairs meet, which is indicative of water penetration. That evidence was supported by photographs taken by Mr Zakos and a moisture reading Mr Zakos took on the inside face of the external wall. Mr O'Donnell takes issue with that evidence. He says that he did not observe staining and his own moisture reading did not show elevated levels of moisture.

55 I accept Mr Zakos's evidence on this issue. The photographs taken by him plainly show staining. There was a dispute between the experts about whether Mr O'Donnell had used an appropriate meter to obtain his reading and whether he obtained it in the appropriate position. Whatever the position, Mr Zakos did obtain an elevated reading and there was no suggestion that the meter he used was inappropriate. It follows that I accept that this was a defect.

Item 23

56 This item relates to missing flashings on external walls and in particular the kitchen courtyard windows above the second floor in House 1 and House 2.

57 The experts were ultimately in agreement that this was a defect because, although flashings were installed, they did not extend beyond the face of the wall, with the result that water was able to get under the flashings. There is some evidence that that arose from an instruction of the architect that the flashings should not be visible. However, that does not alter the fact that the solution that was adopted to comply with that instruction has resulted in work that does not comply with the Building Code of Australia and the relevant Australian Standard. Mr Zakos proposed removing two or three layers of brickwork and replacing the flashing. Mr O'Donnell suggested that the flashing could be extended, although how that could be done was not clear from his

evidence. Ultimately, he suggested that it may be necessary to remove only one layer of bricks. As Mr Zakos pointed out, the flashing is embedded in the brickwork. Consequently, it would not be possible to replace it without removing some brickwork. I accept Mr Zakos's evidence that it is normal practice to remove two or three layers to allow for a sufficient working space.

Item 26

58 This item relates to water damage to a built in wardrobe in the first bedroom of House 2. In his report, Mr Zakos says that "The rectification for this item is subsumed by the rectification works specified by Watermark Services [that is, Mr Laurie] to roof". Mr O'Donnell expresses the opinion that this item is not a defect for which Mr Cesco is responsible because he was instructed that the "box gutter leaf guard was installed by the Owner's own contractor and based on previous investigations it would appear the leaks into the robe are a result of the roofing being punctured in the fixing of the leaf guard". Again, Mr O'Donnell's opinion turns on an unproved assumption. In final written submissions, Mr Cesco suggests that there is no evidence that the water damage was caused by a defect. However, that is the effect of Mr Zakos's evidence. Mr Zakos was not cross-examined on that evidence. Accordingly, I accept that this was a defect.

Item 27

59 This item relates to alleged cracking in the concrete floor of the living area of House 2. It raises the same issues as Item 14. No allowance should be made for this item.

Items 28 and 29

60 These items relate to inadequate falls in the bathroom tiles of the second bathroom and ensuite bathroom of House 2. They raise the same issues as Items 5 and 11. The defects should be rectified in the way proposed by Mr Zakos.

Item 30

61 This item relates to insufficient falls in the tiles on the balcony outside the first bedroom of House 2. It raises the same issues as Item 9. The defect should be rectified in the way proposed by Mr Zakos.

Item 33

62 This item relates to the face brickwork on the western elevation of the dining room of House 2, which allows water to track in from the outside. In their joint report, the experts agreed that this was a defect and agreed on the method of rectification (although not its cost). The experts were not cross-examined about this defect. Nonetheless, in final written submissions, Mr Cesco advances an argument that no allowance should be made for this defect because Mr Zakos did not personally test or observe water ingress. I do not accept that submission. The experts agreed that this was a defect. If a submission was to be made that the Court should reject that evidence the basis for doing so should have been put to the witnesses.

Item 35

63 This item relates to the corrosion of metal angles to the corners of the eastern pool of House 1. It is not clear why it is treated as a disputed defect in Mr Cesco's written submissions. The experts agree that it is a defect and the method of rectification. They do not agree on costs.

Should Mr Cesco be given an opportunity to rectify the defects?

64 Section 48MA of the HBA provides:

> A court or tribunal determining a building claim involving an allegation of defective residential building work or specialist work by a party to the proceedings (the ***responsible party***) is to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome.

65 Section 48MA is a curious provision, at least insofar as it applies to the Court. It is common ground that the section does not give the Court power to order "the responsible party" to undertake rectification work. Section 48O(1)(a) gives the Tribunal power to order that one party to the proceedings pay to the other a sum of money. Section 48O(1)(c)(i) gives the Tribunal power to order a party to proceedings to "do any specified work or perform any specified service". In that context, s 48MA is to be understood as saying that in deciding whether to make a monetary order or order that certain work be performed, the Tribunal should give preference to orders of the latter type.

66 This Court does have power to order specific performance of a building contract, although there is normally a reluctance to do so because of the

difficulties in formulating an appropriate order and the expectation that the order will require continual supervision by the Court: see, *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486 at 527 per Heydon J; *Graham H Roberts Pty Ltd v Maurbeth Investments Pty Ltd* [1974] 1 NSWLR 93 at 105 per Helsham J. It is also generally accepted that an owner has an obligation to give a builder a reasonable opportunity to repair defective work, which is often explained as part of the owner's obligation to mitigate his or her loss: *Owners – Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067 at [44]ff; *Owners Strata Plan 78465 v MD Constructions Pty Ltd* [2016] NSWSC 162 at [27]ff. It is unclear whether and how s 48MA is intended to modify these principles.

67 In the present case, Mr Cesco submitted that the Court could give effect to the principle stated in s 48MA of the HBA in one of four ways.

68 First, he submits that the Court could order rectification by ordering specific performance of cl M14 of the Contract, which relevantly provides:

> 1. If there is any remaining defect or incomplete necessary work … it [that is, the builder, Mr Cesco] must promptly return to the site and correct the defect or finalise the incomplete necessary work. This obligation continues until the defect is corrected or the incomplete necessary work is finalised, and does not come to an end when the defects liability period is over.
>
> 2. The architect cannot give the first instruction to correct an outstanding defect … after the end of the defects liability period, unless it is for the rectification of a latent defect and the final certificate has not been issued.

69 Second, Mr Cesco submits that the Court could indicate which of the alleged defects have been made out and the rectification method that ought to be adopted, decline to award damages and adjourn the proceedings to allow the rectification work to be carried out.

70 Third, it was submitted that the Court could remit the matter to the Tribunal, which has power to make a rectification order in place of an order for the payment of money.

71 Fourth, it was submitted that the Court could grant a mandatory injunction to require Mr Cesco to undertake rectification work in accordance with the order.

72 In my opinion, the Court should not adopt any of these courses of action.

73 Clause M of the Contract is concerned with bringing the building works to completion. Clause M11 requires the contractor (Mr Cesco) to correct any defects, whether before or after the date or practical completion, identified by the architect. Clause M12 provides that, if the contractor fails to correct a defect within the time nominated under cl M11, the owner (Mr Ippolito) may use a third party contractor to do the work. Clause M13 provides for a defects liability period which commences on the date of practical completion. It also provides for an extension of that period by the architect where the works have been significantly corrected within the first liability period.

74 Clause M14 must be read in that context. It provides that the contractor must rectify defects which are notified by the architect or which are apparent to the contractor from observation during the defects liability period. However, the architect is unable to give new instructions to correct a defect after the expiry of the defects liability period or, in the case of latent defects, after the date the final certificate is issued. Any defect must be dealt with in accordance with these provisions so long as they apply. Whether that can be seen as an aspect of the duty to mitigate or as an implied term of the contract does not matter for present purposes. What is relevant is that the operation of cl M14 turns on an instruction from the architect or what is apparent to the contractor from observation. No relevant instruction was given by the architect; and there is no evidence that any of the defects that it is now said Mr Cesco should rectify were apparent to him by observation. It follows that there is no basis for ordering specific performance of cl M14.

75 A further difficulty with an order for specific performance is that it ignores the nature of Mr Ippolito's claim. Mr Ippolito's claim is a claim for damages for breach of contract. He is entitled to that relief as of right if he can make out that claim. Section 48MA of the HBA should not be interpreted as seeking to alter the position. That would be a fundamental change in the law. If the legislature had intended to make that change, it would have done so in clearer terms. At most, s 48MA should be interpreted as requiring the Court to give preference to a remedy of specific performance where one is sought.

76 Similar problems exist with the other alternatives proposed by Mr Cesco. The second presupposes that Mr Cesco has a right to rectify defects and that he should be given an opportunity to exercise that right. But that is not the case. Mr Ippolito has a right to claim damages for breach of contract and to an award of damages if that claim is made out. The Court has no discretion to refuse or delay that right. Nor is it appropriate to refer the matter to the Tribunal when the matter has been heard in this Court and Mr Ippolito has otherwise made out the facts that entitle him to the relief that he claims.

77 Similarly, there is no basis on which the Court could substitute a remedy which Mr Ippolito does not seek (a mandatory injunction) for one that he does. Moreover, it is difficult to see that the Court would grant a mandatory injunction in this case even if one were sought. It appears that the mandatory injunction Mr Cesco says should be granted is in the nature of a restorative mandatory injunction. The purpose of such an injunction is to restore the injured party to the position that party was in before the wrongful conduct occurred. As the authors of *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* point out, a condition of granting a mandatory injunction of that type is that the Court would have granted a negative injunction restraining the threatened conduct which, unless restrained, would have brought about the breach: see JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies,* LexisNexis Butterworths, 5th ed (2015), para [21-450]. But in this case there is no question of restoration to a former position in order to undo the consequences of unlawful conduct. The order that Mr Cesco says the Court should make is an order for specific performance of an obligation to rectify which does not exist.

Quantification of the costs of rectification

78 There is a large difference between Mr Zakos's estimate of the costs of rectification and those provided by Mr O'Donnell. They have used different rates and provided very different estimates for the time it will take to rectify particular defects, even where the method of rectification is agreed. In addition, Mr Zakos has allowed 14 per cent for preliminaries, whereas Mr O'Donnell has allowed 10 per cent. Mr Zakos has allowed 27.5 per cent for builder's overheads whereas Mr O'Donnell has allowed 20 per cent. Mr Zakos has

allowed 10 per cent for contingencies, whereas Mr O'Donnell has allowed nothing. Both experts have provided individual estimates of costs excluding GST, with the result that GST must be added to their estimates.

79 The question for the Court ultimately is what amount will Mr Ippolito reasonably have to pay to have the defects that exist rectified. In the normal course, Mr Ippolito could be expected to put the work out to tender; and the question for the Court is a hypothetical one concerning the likely results of that tender. Although the evidence of the experts is helpful in answering that question, it suggests that there is a degree of precision in assessing the damages to which Mr Ippolito is entitled which does not exist.

80 In answering the question that must be addressed, I generally prefer the evidence of Mr Zakos. I accept Mr Zakos's evidence that builders who tender for the work are likely to adopt a conservative approach to its costing because of the nature of the work and the uncertainties involved. Mr Zakos used Rawlinsons Construction Cost Guide for the rates he adopted. It is not clear how Mr O'Donnell arrived at the rates he used, although in oral evidence he said that he had regard to Cordell's costs estimating guide. Mr O'Donnell gave the impression that he was striving to minimise the extent of the work that would need to be undertaken to rectify the defects. His view that the bathroom and balcony falls did not need to be rectified is an example. Mr O'Donnell also tended to see himself as an advocate for the builder. An example is the view he expressed on a number of occasions that the builder should be permitted to rectify any defects. For those reasons, I prefer the evidence given by Mr Zakos in relation to the work involved and the likely allowance that a tenderer would make in costing that work. A tenderer is likely to make an allowance for contingencies. Consequently, I accept Mr Zakos's evidence on that point as well.

81 The only areas where I do not accept Mr Zakos's evidence is the allowances he makes for preliminaries and builder's overheads and profits. Both those figures strike me as high. Mr Zakos sought to justify them by reference to the conservative approach that any builder would take to costing the job. However, in my opinion, that is likely to involve an element of double counting when the

same justification is used for conservative estimates in the amount allowed for each item of work involved. It is noteworthy that Stateline allowed 20 per cent for builder's margin and profit. That provides a reasonable guide for an appropriate allowance for the rectification work that is required in this case. I would allow 10 per cent for preliminaries.

82 It was not formally submitted that any award for damages should be discounted because Mr Ippolito did not mitigate his loss by giving Mr Cesco a reasonable opportunity to rectify the defects himself, although, as I have explained, Mr Cesco submitted strongly that he should be given that opportunity.

83 It is doubtful that such a submission could be entertained given the way that the case was run. In any event, even if the argument were available, I would not accept it in this case.

84 I accept that Mr Cesco responded promptly to the defects that were raised with him in a way that he thought was appropriate. The fact remains that, although he was alerted to water ingress problems as soon as they occurred, over an extended period of time he denied that any of them were caused by defective workmanship on his part. Even when defects were identified, he has sought to minimise the work involved in correcting them. Again, the falls in the bathrooms and balconies are examples. In that context, it seems to me reasonable for Mr Ippolito to want someone else to carry out the repair work.

85 There are a number of items for which Mr Zakos has made an allowance where, as a result of the evidence I have rejected or the findings I have made, no allowance should be made. They are the General Building Defects Items 10, 14, 27, 31, 32. The total costs estimated by Mr Zakos (before any percentage increases) is $261,587. The total of those five items is $23,351.94, leaving a balance of $238,235.06. Allowing for preliminaries, overhead and profit and contingencies that comes to a total of $345,917.30. Adding GST, the total is $380,509.03.

The claim for costs incurred to date

Invoices from Kellyridge Homes

86 These invoices relate to the costs of obtaining building reports from Mr Morris following the storm on 5 June 2016 leading to substantial water ingress.

87 There is a question of how these costs should be characterised. On one view, they are costs incurred in identifying defects and providing a scope of works to correct those defects, which should be seen as the natural and probable consequence of Mr Cesco's defective work. On another, they were costs incurred in anticipation of court proceedings and should be treated as costs which are recoverable, if at all, in those proceedings. In the present case, in my opinion the latter characterisation is more appropriate. Each of the three reports was expressed to be prepared in anticipation of proceedings (albeit in the Tribunal). The second report was prepared at a time when there was plainly a dispute between the parties and for the purposes of that dispute. As I will explain, none of the reports ultimately provided a scope of works for recoverable rectification costs. Taking those matters into account, in my opinion the costs of the reports are better seen as costs incurred in connection with anticipated proceedings. Had Mr Morris been called to give evidence, they may have been recoverable as costs of these proceedings. But the fact that he was not does not mean that Mr Ippolito should be entitled to recover them as damages.

Invoices from Stateline

88 These invoices fall into two categories. First, there are the invoices totalling $63,624.61 (including GST), which relate to temporary work undertaken by Stateline between 26 July 2017 and 30 August 2017. Second, there are invoices totalling $37,587 for supervising work undertaken by Precise Building. It is appropriate to deal with the second category together with the invoices from Precise Building.

89 The evidence supporting the costs charged by Stateline for temporary repair work is not satisfactory. There is no real evidence explaining what work was performed by Stateline. Nor is there any evidence connecting the costs charged by Stateline to any breach by Mr Cesco of the warranties implied by s 18B of the HBA. Mr Ippolito gives evidence that he engaged Stateline to undertake urgent repairs to House 2 so that it could be rented out. However, as I have said, it is not clear that the work was limited to House 2; and, except at the most general level, it is not possible to tell from the invoices what work was done. It might be inferred that some of the work involved repairing the holes

made by Mr Lameri following the 5 June 2016 storm. But even accepting that, there is no evidence tying the leaks that were investigated with the defects subsequently identified by the experts called by Mr Ippolito. It is likely that some of the leaks investigated by Mr Lameri were connected to defects subsequently identified by the experts. But it cannot be inferred that all were. And it cannot be inferred that all the repair work undertaken by Mr Lameri arose out of those investigations or were otherwise connected to the identified defects. Those connections were matters which were within Mr Ippolito's ability to prove. As was pointed out Mason CJ and Dawson J in *The Commonwealth v Amann Aviation Pty Limited* (1991) 174 CLR 64 at 83, the "mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them as best it can". See also at 102 per Brennan J; 125-6 per Deane J. However, that does not mean the Court should seek to guess what the damages might be because the plaintiff has failed to take reasonable steps to prove the damages it has suffered: see *NCON Australia Ltd v Spotlight Pty Ltd* [2012] VSC 604 at [295] per Robson J, citing *Placer v Thiess* (2003) 77 ALJR 768 [37]–[38] per Hayne J; *Biggin v Permanite* [1951] 1 KB 422 at 438 per Devlin LJ; *Adams v Morellini* [2010] WASC 61 at109 per Blaxell J; *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237 at 241 and 243 per Brooking J. In the present case, there is insufficient evidence connecting the work undertaken by Stateline and the breaches of warranty committed by Mr Cesco to permit the Court to allow an amount for that work.

Costs relating to work undertaken by Precise Building

90 Similar problems arise with the costs relating to work undertaken by Precise Building. Mr Ippolito gives evidence that that work was necessary to fix the defects identified by Mr Morris. However, Mr Morris was not called to give evidence. His reports are not admissible to prove the defects that he identified or that those defects were the result of any breach of the statutory warranties by Mr Cesco. They are only admissible to prove that Mr Ippolito obtained the reports. Likewise, it is not possible from the invoices issued by Precise Building (or from the invoices issued by Stateline for the costs of supervising the work covered by those invoices) to identify what defects that work rectified. Consequently, Mr Ippolito has failed to prove any connection between any

breach of warranty by Mr Cesco and the amounts he has paid Precise Building and Stateline. It follows that Mr Ippolito is not entitled to recover the amounts charged by Precise Building or the amounts charged by Stateline for supervising that work.

Invoice from ACOR Consultants

91 The same is true of the invoice from ACOR Consultants. There is no evidence of how this invoice relates to any breach of warranty by Mr Cesco. Consequently, Mr Ippolito is not entitled to recover the amount of this invoice.

The Claim for alternative accommodation and lost rent

92 In my opinion, both these claims must fail.

93 There is no evidence that Mr Ippolito and his family will need to move out of House 1 while the rectification work is undertaken. Some of the work (such as the replacement of bathroom tiles) will, no doubt, cause Mr Ippolito and his family inconvenience. But there is no evidence that that inconvenience will be so great that it would be reasonable for them to move out. Nor is there any evidence of how long they will be subject to inconvenience. In giving the estimates he gave, Mr Zakos expressed the view that the rectification work was likely to progress slowly because, for example, it was to be expected that one bathroom would be done at a time. That evidence suggests that he, at least, was proceeding on the basis that the houses would be occupied while rectification work is carried out.

94 Similarly, there is no evidence that Mr Jay will move out during the rectification work. It is possible that he will seek a reduction in rent while work is carried out. However, there is no evidence of what that reduction might be. It is noteworthy that it appears that Mr Jay did not move out or seek a reduction in rent during the time that Precise Building carried out its work.

95 In any event, I am not satisfied that the claim for lost rent in this case would be recoverable as damages, even if I were satisfied that Mr Jay will move out while the rectification work is undertaken. At the time the Contract was entered into, it was anticipated that House 2 would be occupied by Mr Ippolito's parents. That is what occurred. It was not anticipated that it would be rented out. In my opinion, a claim for lost rent is not one that flows naturally from Mr

Cesco's breach or is one that ought reasonably to have been within Mr Cesco's contemplation at the time the Contract was entered into so as to fall within the principles stated in *Hadley v Baxendale* (1854) 9 Exch 341.

Conclusion and orders

96 It follows from what I have said that Mr Ippolito is only entitled to recover the costs of rectifying the defects established by the evidence in the case. Those costs are $380,509.03. The order of the Court, therefore, is that there should be judgment for the plaintiff in the sum of $380,509.03.

97 I will hear the parties on costs, if costs cannot be agreed, at a time fixed with my Associate.

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