The Owners – Strata Plan No 77475 v Walker Group Constructions Pty Ltd & Anor - [2016] NSWSC 1127

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Supreme Court

New South Wales

Medium Neutral Citation:	**The Owners – Strata Plan No 77475 v Walker Group Constructions Pty Ltd & Anor [2016] NSWSC 1127**
Hearing dates:	20 July 2016
Date of orders:	16 August 2016
Decision date:	16 August 2016
Jurisdiction:	Equity - Technology and Construction List
Before:	Bergin C J in Eq
Decision:	Applications for rejection of parts of Referee's Report to be dismissed. Referee's Report (exclusive of the section on preliminaries) to be adopted.
Catchwords:	REFEREES - nature of proceedings on challenge to Referee's Report DAMAGES - where plaintiff relied upon expert's advice in respect of the scope of works to rectify defects - where defendants had warned plaintiff that scope of works was exploratory, speculative and not urgent - where findings made that the work carried out was not urgent - where works found to be unnecessary and excessive - where Referee found that defendants not liable for such work - whether those aspects of Referee's Report should be rejected DAMAGES - where failure to comply with relevant Standard - where technical breach - whether plaintiff entitled to remedial work to achieve contractual conformity
Legislation Cited:	Home Building Act 1989 Uniform Civil Procedure Rules 2005 Strata Schemes Management Act 1996
Cases Cited:	Banco de Portugal v Waterlow & Sons Ltd [1932] AC 452 Bellgrove v Eldridge (1954) 90 CLR 613 Board of Governors of the Hospital of Sick Children v McLaughlin & Harvey Plc (1987) 19 ConLR 25 Chocolate Factory Apartments v Westpoint Finance [2005] NSWSC 784 Clippens Oil Co Ltd v Edinburgh and District Water Trustees [1907] SC (HL) 9 Lodge Holes Colliery Company Limited v Mayor of Wednesbury [1908] AC 323 McGlinn v Waltham Contractors Ltd & Ors (No 3) [2007] EWHC 149 (TCC) Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup & Partners International Ltd & Anor [2007] EWHC 918 (TCC) Radford v De Froberville [1977] 1 WLR 1262 Ruxley Electronics & Constructions Ltd v Forsyth [1996] AC 344 Super Pty Ltd v SJP Formwork (Aust) Pty Ltd (1992) 29 NSWLR 549 Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272 The Owners-Strata Plan 76674 v Di Blasio Constructions Pty Ltd [2014] NSWSC 1067
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 77475 (Plaintiff) Walker Group Constructions Pty Ltd (1st Defendant) Walker Corporation Pty Ltd (2nd Defendant)
Representation:	Counsel: DS Weinberger (Plaintiff) MG Rudge SC/FP Hicks (Defendants) Solicitors: Bannermans Lawyers (Plaintiff) Squire Sanders (AU) (Defendants)
File Number(s):	2012/396904
Publication restriction:	Nil

Judgment

1. These proceedings arise out of disputes in relation to defective residential building works at a development in Rhodes, New South Wales, of which the plaintiff, The Owners-Strata Plan No 77475, is the registered proprietor of the common property, the first defendant, Walker Group Constructions Pty Limited, was the builder and the second defendant, Walker Corporation Pty Limited, was the developer.

2. On 31 October 2014 the proceedings (which were commenced in December 2012) were referred to Mr Barry Tozer (the Referee) under rule 20.14 of the *Uniform Civil Procedure Rules* 2015 (UCPR) to determine the cause and extent of the alleged defects and to report to the Court on the reasonable cost of rectifying those defects. The Referee's report is dated 1 April 2016 (the Report). The parties' competing Notices of Motion seeking orders pursuant to UCPR 20.24 in respect of the adoption and rejection of various parts of the Report were heard on 20 July 2016 when Mr DS Weinberger, of counsel, appeared for the plaintiff, and Mr MG Rudge SC, leading Mr FP Hicks, of counsel, appeared for the defendants.

3. Although guiding principles have been gathered together in later cases under the UCPR (see *Chocolate Factory Apartments v Westpoint Finance & Ors* [2005] NSWSC 784) the ambit of these applications has been settled with certainty since 1992 when in *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549 Gleeson CJ (with whom Mahoney and Clarke JJA agreed) said (dealing with the not relevantly different predecessor to UCPR 20.24) at 563-564:

> In so far as the subject matter of dissatisfaction with a referee's report is a question of law, or the application of legal standards to established facts, then a proper exercise of discretion would require a judge to consider and determine the matter afresh.
>
> Subject to what has just been said, it is undesirable to attempt closely to confine the manner in which the discretion is to be exercised ... [I]f the referee's report reveals some error of principle, some absence or excess of jurisdiction, or some patent misapprehension of the evidence, that would ordinarily be a reason for rejecting it. ... So also would perversity or manifest unreasonableness in fact-finding.

4. There are two areas of the Report that the parties contend should be rejected. The first is the defendants' contention that those parts of the Report in which the Referee allowed the costs of repairs to 189 baths in the complex (paragraphs [183], [185]-[189], [201]-[203], [219]-[221] and [238]) should be rejected (the defective baths costs). The defendants contend that the Referee's conclusions based on his findings of fact are perverse and unreasonable.

5. The second is the plaintiff's contention that those parts of the Report in which the Referee disallowed the greater part of the costs incurred by the plaintiff in remedying the water ingress to a number of units (paragraphs [428], [430]-[434], [475], [481] and [485]) should be rejected (the water damage costs). The plaintiff contends that the Referee's characterisation of some of the correspondence extracted below (MFI C19 before the Referee) was unreasonable and without justification. The plaintiff submitted that these errors led the Referee to a number of unjustified conclusions compounded by the further error of failing to review and apply the applicable authorities and appropriate legal standards to the established facts.

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6. The parties are in agreement that one aspect of the Report in respect of preliminaries in which it is clear that certain figures were taken from the wrong scope of works (paragraphs [458], [469]-[475] and [485]) must be remitted to the Referee for clarification and further report to the Court.

7. Notwithstanding the limited nature of the proceedings on the Report it is necessary to refer in detail to some of the background to appreciate the parties' submissions in context.

Background

8. The development consists of five residential blocks located over an associated common basement car park. The building works were completed by August 2006.

9. By September 2012 the plaintiff had received a number of complaints from lot owners in respect of water coming into their units. At its meeting on 18 September 2012 the Executive Committee of the plaintiff resolved to approve a quotation from Integrated Building Consultancy (Integrated) "for the tender of urgent repairs" at nine units identified in the resolution.

10. The plaintiff commenced these proceedings on 21 December 2012 alleging that the defendants were in breach of the statutory warranties in section 18B of the *Home Building Act* 1989 . In their List Response filed on 15 March 2013, the defendants denied that there were any defects (paragraph [8]) and alleged that the plaintiff could not recover damages as a result of the alleged defects to the extent that it had failed to mitigate its loss by adequately maintaining the common property (paragraph [9]).

11. On 19 March 2013 the plaintiff's solicitors, Bannermans Lawyers, wrote to the defendants' then solicitors, Colin Biggers & Paisley (CBP), inviting the defendants to conduct an inspection of the complex. That letter included the following:

> The background to this invitation is that a number of lot owners have indicated that they intend to commence proceedings against the owners corporation unless the water damage issues affecting their units are rectified.
>
> In order to mitigate its potential exposure in relation to the same the owners corporation has obtained tenders for this rectification work and the work is planned to commence in the next fortnight.
>
> If your client would like to inspect the units that will be the subject of the work before the work commences but is unable to do so in the next 2 weeks please provide me with a date when your clients are able to inspect and an explanation of why they are unable to inspect earlier.
>
> Please also confirm whether your clients would like to inspect the whole property or just the units where rectification work is to be completed in the next fortnight.

> I look forward to your prompt response so that the necessary access arrangements can be made.
>
> Please note that if your clients choose not to inspect the property before the rectification works are carried out my client will rely on this letter.

12. On 26 March 2013 CBP responded to Bannermans' letter in terms that included the following:

> We observe that although your client must have formed the intention to carry out such works some time ago and has already put such works out to tender, you have given our clients less than two weeks (taking into account the Easter holiday) to inspect the premises the subject of those works. This is entirely unsatisfactory.
>
> To the extent that your client conducts works to the premises, it does so of its own volition and at its own risk. In the event that the manner in which such works are conducted prejudices our clients' ability to properly defend the proceedings, we reserve the right to raise such prejudice with the court

13. CBP's letter included a request for copies of various documents including requests for tender; tender responses; and all contracts entered into for the performance of the works. There was also a request for details to arrange access to the premises for inspection.

14. On 27 March 2013 Bannermans wrote by email to CBP in response to the letter of 26 March 2013 in terms that included the following:

> Your Letter states that the Owners Corporation has given your clients less than 2 weeks to inspect the works. On the contrary:
>
> Walker Corporation Pty Ltd has been aware of the claim against Walker Corporation and Walker Group for defects since 27 September 2012, 6 months ago. I refer to your letter of the same date in which Walker Corporation advise that any claim in relation to the defects 'will be strenuously defended'. Such a statement is inconsistent with your claim that Walker Group and Walker Corporation were not aware of the defects.
>
> Walker Group and Walker Corporation were sent details of each of the defects when the Owners Corporation's list statement was filed and served in December 2012, 3 months ago.
>
> Walker Group and Walker Corporation have been able to inspect the building at any time on request. The only reason the Owners Corporation did not specifically invite Walker Group and Walker Construction to do this was based on the denial of the claims received.

15. Bannermans provided CBP with copies of the tender responses received for the rectification work, noting that there were not yet any contracts for the performance of the work. One of the quotations, dated 13 March 2013, was from Polyseal Building and Remedial Services Pty Limited. On 28 March 2013 CBP requested copies of the requests for tender so that they could understand the scope of works proposed to be undertaken.

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16. On 8 April 2013 Bannermans wrote to CBP referring to the "urgent remedial works required at the property" and noting that the defendants intended to inspect the defects to be rectified. On 11 April 2013 Bannermans wrote to CBP once again in relation to the "urgent remedial works" and enclosing the request for tender that was issued for those works. That email also included the itinerary for the inspection of the various units. The tender request included the remedial works that had been recommended by Integrated, in particular its principal, Mr Scott Whitton.

17. On 12 April 2013 CBP notified Bannermans that the person inspecting the units on behalf of the defendants was Mr Peter Karsai. On the same day Bannermans notified CBP that additional lot owners had reported defects requiring "urgent rectification" and that it may be "prudent" for Mr Karsai to inspect those additional units. On the same day CBP responded as follows:

> However, the "additional units" were not the subject of previous correspondence from your firm. Mr Karsai will not be attending those units on Monday's inspection or at any time until we are satisfied that we have received sufficient details of the alleged defects in the scope of work proposed to be performed to those units.

18. On 21 June 2013 Bannermans wrote to the defendants' new solicitors, Squire Sanders (AU), in terms that included the following:

> As you are aware, my client has an absolute duty to repair and maintain the common property pursuant to section 62 of the *Strata Schemes Management Act 1996* ("**Act**").
>
> Due to increasing water damage from recent heavy rain, my client advises that it urgently must undertake repairs to the common proper *(sic)* to prevent further water entry and damage to comply with section 62 of the Act and to mitigate its loss in these proceedings.
>
> Please find **attached** a tender received from Polyseal Building and Remedial Services Pty Limited dated 13 March 2013 ("**Tender**") to undertake rectification works in this regard. This was the successful tenderer identified by Integrated Consulting Group of 3 quotes received in a competitive tender for the owners corporation.
>
> ...
>
> Please be advised, my client has convened an extraordinary general meeting for 8 July 2013 to raise a special levy to undertake the rectification works in the event that your client does not provide written confirmation that it will undertake the rectification works as provided in the Tender.
>
> On this basis, please urgently advise if your client wishes to inspect the abovementioned defects.
>
> If your client wishes to return to the scheme to rectify the defects, it must commence works to do so by 15 July 2013.

> Please note, if I do not receive a response within 7 days from the date of this letter, my client will assume that your client does not wish to inspect or rectify the defects. My client will then carry out the rectification works without further notice to your client and claim the cost of such rectification works from your client.

19. On 28 June 2013 Bannermans wrote again to Squire Sanders referring to the letter of 21 June 2013 and in terms which included the following:

> In that letter I advised that if I do not receive a response within 7 days of this letter, my client will assume that your client does not wish to inspect or rectify the defects.
>
> To date I have not received a response to my letter.
>
> Please be advised that my client will rely [on] my letter as evidence that it has attempted to mitigate its losses by providing your client with the opportunity to rectify the defects.
>
> My client will also rely on my letter as evidence that your client was given the opportunity to inspect the defects before they were rectified.

20. On 5 July 2013 Squire Sanders wrote to Bannermans in response to their letters of 21 and 28 June 2013. The Referee referred to this letter (and two others) as a "warning" that the plaintiff failed to heed. The plaintiff takes issue with the characterisation of the letters as "warnings" and it will be necessary to review the letters (this one and the others dated 26 July 2013 and 19 November 2013) to determine whether such a characterisation is justified. This letter does contain what might reasonably be described as a "warning" that any work performed in accordance with the "purported scope of works" would be at the plaintiff's cost. The letter was in terms that included the following:

> We reject that there can be any urgency as you assert in your 21 June letter about an issue that your client has been well aware of since at least 18 December 2012. If the matter is urgent, it does not explain the leisurely way in which Polyseal's quotation was obtained on 13 March 2013 and your notification to us only recently on 21 June 2013 of the imminent extraordinary general meeting. Any urgency, which seems to be based upon this imminent meeting, appears to have simply been manufactured.
>
> The tender proposal received from Polyseal Building and Remedial Services Pty Limited dated 13 March 2013 (**Tender**) and attached to your 21 June letter, does not appear to enclose the correct material that Polyseal had regard to in preparing the Tender. The document provided with the Tender and prepared by ICG headed Scope of Works and Tender Document (which is in draft form only) bears the date 20 October 2012 (**20 October Scope of Works**). The document that Polyseal had regard to was dated 12 March 2013. Please provide the correct document.
>
> Whilst we are aware of your client's duty to repair and maintain the common property, such work does not automatically arise from any default on the part of our client and is not automatically at the cost of our client. We require your client to prove its case. The 20 October Scope of Works does not support the existence of defects based on any facts (such

as observations of defects made by your client's expert). It is predicated on assumptions that the construction of the building was not in accordance with the Contract and/or the relevant building codes and standards. As such the purported scope of works for remediation can at best be described as exploratory and speculative. Any work performed by Polyseal will be at your client's cost.

…

Our client does not require its expert to inspect these properties [those which had already been inspected] prior to any remediation being performed. Should your client engage Polyseal to carry out remedial works, our client would like its expert to inspect the works during the remediation. Please advise if and when the works commence so that this inspection may occur.

21. On 9 July 2013 Bannermans wrote to Squire Sanders in terms that included the following:

> The defects the subject of the scope of work are all related to external water entry. While the owners corporation has been aware of the need to rectify the defects since they were identified in its expert reports, as stated in my letter dated 21 June, the rectification works have become urgent since then in view of the increasingly high rainfall. The works have also become urgent since a number of the relevant owners have stated their intention to commence proceedings in the CTTT for orders to rectify the work if the works are not completed.

22. On 26 July 2013 Squire Sanders wrote to Bannermans in response to the letter of 9 July 2013. This is the second letter that the Referee described as a "warning". It referred to the plaintiff's evidence in chief and to the plaintiff's intention to commence rectification works. The letter included the following:

> **Inspection of Properties**
>
> We refer to our letter dated 5 July 2013 in which we advised our client did not intend [on] inspecting the properties prior to any rectification works undertaken by your client.
>
> Our client's expert however wishes to inspect the rectification works while they are being carried out. Please advise when the rectification works have commenced and when our client's expert may attend to inspect the rectification works.
>
> **9 July letter**
>
> While we do not propose to respond to every point raised in that letter (having already made our position clear), we note your admission that your client's need for urgent rectification of the alleged defects is primarily caused by *"increasingly high rainfall"* (of which there has been little evidence lately) and also by the threat of legal action against your client (a matter that probably reflects your client's mismanagement of the issue). We reject any suggestion that your client's sense of urgency has been caused by the actions or omissions of our client.

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23. The only aspect of the letter (read alone) that could possibly fall into the category of a “warning” is the last sentence. The defendants did not accept at any stage of its communications that there was any urgent need for the rectification works to be done at that time. Once again the topic of urgency was addressed, this time to claim that any urgency was certainly not something that had been caused by the defendants. It seems to me that the Referee was looking at the cumulative effect of the correspondence, taking the denial together with the warning in the letter of 5 July 2013 that any rectification works carried out in accordance with the scope of works would be at the plaintiff’s cost together as a warning to the plaintiff.

24. On 13 November 2013 Bannermans wrote to Squire Sanders advising that the “substantive remedial works” were scheduled to commence on 14 November 2013 following the estimated programme of works which was attached to the invoice. Bannermans requested Squire Sanders to provide the relevant details if the defendants still wished to inspect the works.

25. On 19 November 2013 Squire Sanders wrote to Bannermans in relation to the scope of works and the inspection of the units. This is the third letter that the Referee described as a “warning”. It was in terms that included the following:

> **Scope of works**
>
> A document marked ‘draft - for review only’ and labelled ‘scope of works and tender document’ by Integrated Consulting Group (**ICG**) dated 20 October 2012, together with what appears to be a tender submission from Polyseal Building and Remedial Services, was provided to us under cover letter from your office dated 21 June 2013. It is not clear from your email whether the remedial works are being undertaken in accordance with that draft document by ICG. Please advise whether this is the document referred to in your email and if the remedial works are being carried out in accordance with the document.
>
> The draft document by ICG makes reference to works to be undertaken in nine units. The programme of works included in your email identifies eight of those nine units but does not refer to unit 401/4 Lewis Avenue, which is the ninth unit referred to in the draft document by ICG. Additionally, the programme of works refers to unit 404/3 Jean Wailes Avenue, which is not one of the nine units identified by ICG. These discrepancies highlight our confusion as to what scope you are referring to.
>
> **Inspection of units**
>
> As advised in our letter dated 1 November 2013, the defendants’ experts inspected a total of 13 units in the first inspection period. According to the programme of works included in your email, your client is currently undertaking remedial works in three of the units which were inspected by the defendants’ experts in the first inspection period (including unit 404/3 Jean Wailes Avenue, which is not identified in the draft document by ICG).
>
> The defendants’ experts were not granted access to inspect the following six units identified in the programme of works:
>
> [Units identified together with dates of remedial works between 14 November 2013 and 20 December 2013.]

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> Please advise how it is that your client was able to arrange access to the units referred to above for remedial works when it was unable to facilitate access, in accordance with the Court's orders, to those units (and many others) for the purpose of inspection by the defendants' experts in the first inspection period.
>
> The next inspection period referred to in order 3 is scheduled to occur from 4 December 2013 to 13 December 2013. What utility will there be in the defendants' experts carrying out inspections on liability and quantum in units where remedial works have been carried out?
>
> We fail to see how the works currently being undertaken by your client are urgent, particularly in circumstances where the draft document by ICG is dated 20 October 2012, where a tender process was concluded circa March 2013, which was not brought to our attention until 21 June 2013, and where the alleged remedial works are being undertaken only now, some 5 months after you advised us they were urgent.
>
> It is important for the reasons we have given you already that the remainder of the units which are the subject of your client's claim are inspected during the next inspection period. Since it is apparent that your client has had no difficulty obtaining access to units for its own purposes, please advise what arrangements have already been made for the defendants' experts to access the remaining units for inspection. This would greatly assist the defendants to make suitable arrangements with their experts.

26. There are a number of areas of complaint in this letter. However it seems to me that in describing this letter as a "warning" the Referee was focusing on the reiteration of the defendants' rejection of the plaintiff's claim that the remedial works were urgent, this time with the additional particulars of the history dating back to October 2012.

27. On 28 November 2013 Bannermans responded to Squire Sanders' letter of 19 November 2013 in terms that included the following:

> Your client was invited to inspect the units the subject of those remedial works on 21.6.13. Had you requested such access the owners corporation would have arranged the same. Instead, you asked to be notified of the commencement date of the works so that your client could inspect during the works. My client has provided that notification. Accordingly, your suggestion that your client has been prevented from inspecting the units is without basis.
>
> ...
>
> Since your client was first invited to inspect the units now the subject of remedial works additional units have been added to the schedule of works required. For details of the scope of works in those units see the revised scope of works attached.

28. On 10 January 2014 Bannermans wrote to Squire Sanders in relation to the remedial works in terms that included the following:

> During the course of completing those works it has become apparent that the defect in the units being inspected is systemic to all units on the southern elevation of 3 Jean Wailes, other than those on the ground floor (which is referred to as level 1).

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> To mitigate the cost of rectifying the defects in those units my client intends to vary Polyseal's scope of works to include all units on the southern elevation of the building that are not already included in the scope of works previously notified so that the required work can be completed while the scaffolding is in place.
>
> This will include 5 units not previously inspected, namely units 212, 403, 606, 608 and 610.
>
> Would you please advise as soon as possible and at the latest by 12 pm on 14.1.14 whether your client would like to inspect one or more of these units. If your client does notify that it wishes to inspect my client will postpone completion of any work on those units until 16.1.14 to enable the inspections to occur.

29. On 14 January 2014 Squire Sanders responded in terms that included the following:

> These units do not form part of your client's claim as presently pleaded and, with the exception of unit 608, are not the subject of any expert report served by your client in these proceedings. Until they are made the subject of these proceedings, we fail to see why what your client intends to do with them ought to be of any concern to our clients.
>
> Presumably, you are telling us about your client's intentions with respect to these units because you wish to make a claim on behalf of your client. If our presumption is correct, then should not you first seek to address the matter of amending your client's claim? Please advise.

30. The correspondence between the parties' solicitors referred to above ([11] to [29]) has some significance to the plaintiff's contentions in relation to the Referee's findings in respect of the water damage costs.

31. The plaintiff completed rectification works in respect of the water damage on the basis outlined in its correspondence in accordance with the scope of works that had been provided to the defendants under cover of the various letters referred to above. The plaintiff identified problems of water pooling in the void underneath a number of the baths in the complex. However at the time of the Reference there had only been minor rectification work in respect of the problems that had been identified with the baths.

The Reference

32. The hearing before the Referee took five days, commencing on 14 December 2015. The parties filed final written submissions by 24 March 2016. As I have said the Report is dated 1 April 2016 and was provided to the Court on that date.

The Report

33. After referring to the very detailed Scott Schedule the Referee recorded his method and approach as follows:

> 33. In those cases where the extent of the defect and the scope of work and method of rectification was not agreed, I have examined the evidence provided and the respective positions of the parties. I have identified the defect in detail and the scope of remedial work as proposed by the experts appointed by the parties. Based on the evidence before me, I have assessed the most probable cause of the defect and the most appropriate rectification method. In doing so, I have applied my knowledge and understanding of the issue in order to explain what I perceive to be the fundamental differences and why I prefer one alternative to the other.
>
> 34. I have then applied the relevant cost calculated for that particular option by the quantum experts and where necessary made adjustments to that cost, taking any alternative scope into account. I have transferred the resulting amount to the summary.
>
> 35. I have explained in the text my reasons for preferring a particular option and any cost adjustment that I have made.

34. The Referee recorded the identity and reports of each of the experts relied upon by the respective parties. Relevantly to the issues in these applications were Mr Peter Copeman who provided a general building defects report on behalf of the plaintiff (at [37]); Mr Scott Whitton who provided expert evidence on general building and waterproofing defects on behalf of the plaintiff (at [38]-[39]); and Mr Stephen Abbott who gave building and waterproofing evidence on behalf of the defendants (at [40]-[41]). The Referee itemised Mr Whitton's nine reports (at [38]) and Mr Abbott's five reports (at [40]). The Referee also referred to the joint report of Mr Whitton and Mr Abbott on general building defects which included waterproofing of the façade and balconies and the bathtub defects (Ex J2) (at [43]).

35. The Referee referred to the quantum evidence of Mr Stephen Chiew prepared for the plaintiff (at [45]). The Referee also referred to the defective roof membrane and the scope of the defects that were agreed (at [45]-[160]). It is not necessary to refer to these aspects of the Report in any detail. It is appropriate to address the aspects of the Report that are relevant to these applications, namely the defective baths costs and the water damage costs.

<u>The defective baths costs</u>

36. In Part 5 of the Report entitled "Defective Baths", the Referee recorded that there are 192 baths in the building complex, 189 of which the plaintiff alleged had a systemic defect and needed to be rectified (at [161]). The Referee recorded that there was no issue between the relevant experts that there was a defect in the baths in that they had not been installed strictly in accordance with the relevant Australian Standard, *AS3740-2004, Waterproofing of Wet Areas with in Residential Buildings* (the Standard) in which the rim of the bath is recessed into the wall studs (at [163]). The Referee recorded that there was no dispute between the experts that the installation of the bathtubs constituted a "technical breach" (at [163]). The defect identified in this regard was that tiling on the

walls above the bath failed to run down over the line of the perimeter waterproofing lip-rim of the bathtub fixture.

37. The Referee also recorded that the experts did not agree that the installation generally constituted a breach of the "purposive or performance requirements" of the *Building Code of Australia* (BCA) (at [164]). The relevant part of the BCA, FP1.7 of Section F, *Health and Amenity, Part F1 Damp and w eatherproofing*, was extracted in the Report as follows (at [165]):

> To protect the structure of the building and to maintain amenity of the occupants, water must be prevented from penetrating:
>
> (a) behind fittings and linings; and
>
> (b) concealed spaces of sanitary compartments, bathrooms, laundries and the like.

38. The Referee referred to the experts' evidence in respect of 10 baths which had exhibited water pooling in the void beneath the bath and a further 14 beneath which there was water staining. The Referee concluded as follows:

> 175. In summary, I find from this evidence that only a small number of baths have exhibited any water ingress to the enclosed void space beneath the bath. Based on the available evidence, the failure may be attributed to cracking of the sealant at the edge of the bathtub adjacent to the wall or to leaking of the waste pipe beneath the bath. Water leakage and ponding in the void space due to failure of the sealant appears to have occurred only at baths with a shower over them. Failure of the sealant may be due to movement of the bath on its supports, poor preparation and application of the sealant or other reasons.

39. The Referee recorded Mr Abbott's scope of work which comprised the removal of any water found in the void beneath the bath and replacement of the silicone sealant and found as follows:

> 183. From the evidence outlined above, I find that where the bath is to be used as a shower, the defect is more than just a 'technical breach' of the performance requirements. There is a systemic defect in the installation of the bath where it has been designed and equipped for use as a shower. This defect is demonstrated by the presence of water pooling in the concealed space beneath baths which would not have been detected but for the invasive investigations undertaken by Granero and Abbott.
>
> ...
>
> 185. I find, from the evidence of Copeman and the provision quoted from the BCA that the performance requirement is to <u>prevent</u> unhealthy water accumulation in concealed spaces such as this void (my emphasis). I do not agree with Abbott that sealant failures will be identified in a manner which will prevent future water ingress from occurring or prevent water from pooling in the concealed space. A regime for replacement of the sealant after failures are identified will not rectify this defect where the bath is used regularly as a shower.
>
> ...

189. I find accordingly that replacement of the failed sealant does not address this waterproofing defect. I find also that the technical defect is not confined to bathrooms where there is a shower over the bath. Although the likelihood of sealant failures and water ingress at other baths with no shower fittings is significantly less, some form of rectification is required to address this non-compliance with the Performance Requirements of the BCA.

40. The Referee addressed two options that had been put forward by the experts for the rectification of the defects in the baths. The Referee concluded that it was not necessary to demolish and reconstruct each bath and that the cost of the work for what was referred to as "option 2" was a reasonable solution which met the performance requirements of the BCA. Option 2 was the installation of a glass splashback as a removable fixture attached to the existing walls, which the Referee concluded provided 'contractual conformity' as the details were equivalent to that shown in the relevant Standard (at [201]). The Referee concluded that the plaintiff was entitled to damages based on the cost of retro-fitting each bath within the scope of work represented by option 2 (at [203]).

41. The Referee analysed the cost of the bath remedial work and concluded as follows:

219. In summary, for the detailed reasons given, I find that the amount of $2,815 as calculated by Thomas should be allowed as the cost of rectification of each bath in accordance with Abbott's option 2.

220. I have therefore allowed for the cost of rectification of 189 baths at $2,815 each in accordance with the scope agreed and cost provided by for (*sic*) option 2. In addition, there were 5 baths where Abbott found water in the void space. The defendant has allowed an amount of $425 per bath for removing the water. The rate was calculated by Thomas and I find that it is reasonable for that additional work. I have allowed an amount of $425 for each bath, a total addition of $2,125.

221. The total of both of these items is **$534,160.00**.

<u>The water damage costs</u>

42. The Referee addressed water entry through the façade of the building and then dealt with the specific units that had suffered water ingress (at [239]-[313]). The Referee concluded that the sole cause of the ingress was the absence of any grey waterproofing membrane on the slab or the hob at the ends of the balconies. The Referee was satisfied that there were no locations where the grey membrane had been breached as a result of a lack of overlap between the two membrane systems at the outside of the external southern wall of the apartments. In another unit the Referee was satisfied that the probable cause of the water ingress beneath the hob at the sliding door of the balcony was due to a discontinuity in the waterproof membrane at the interface and a gap or crack beneath the hob.

43. In a section entitled "The cause of water ingress" the Referee found that if there was no defect or failure in the grey waterproofing membrane, water could not come in contact with the galvanised

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steel sheet. The Referee found that the corrosion of the galvanised steel sheet occurred as a result of water penetration through the waterproofing membrane and was not the direct cause of water entry to the building (at [343]).

44. The Referee concluded as follows:

> 371. In summary, I find that Whitton has wrongly identified the primary cause of the water penetration into the building from the cavity void. There is no evidence that the water ingress occurs from the adjacent balcony to the cavity void and the adjacent wardrobes. There is no evidence of widespread water retention in the wall cavity as a result of any defect in the flashing or membrane at the interface of the external return wall with the balcony. There is no evidence that water moves laterally from the balcony at the corner of the sliding door of these Units into the cavity void. Whitton has likewise provided no evidence that water enters the cavity void from the slab projections which extend beyond the balcony width outside the face of the external wall.
>
> 372. The consistent evidence is that the water ingress occurred at those locations where the cavity flashing was short and there was a secondary defect at the inside waterproofing membrane.
>
> 373. I find from the further exploratory work that there is no evidence that corrosion spotting to the galvanised steel sheet (where this was visible) was associated with or would cause failure of the waterproof membrane at the interface between the hob and the slab. The evidence which Whitton has compiled does not support his opinion that there is a systemic defect in the construction of the southern walls or the interface between the balcony and the external return walls of the respective buildings. There is similarly no evidence of water ingress where the external flashing is installed correctly. I find that, with the exception of Unit 503/12 Shoreline Drive, Unit 503/4 Lewis Avenue and 609/3 Jean Wailes Avenue, the water penetration in the remainder of the Units was caused by the defective installation of cavity flashing and this defect has been rectified.
>
> 374. I find that there is no evidence of any systemic defect to the cavity flashing of any further Units which requires removal of masonry or replacement of the flashing elsewhere on the southern (or more than) elevation of these buildings. Similarly there is no evidence that water ingress to the cavity void has occurred or will occur from the adjacent balcony slab or the slab projections.
>
> 375. Accordingly, I find that there is no defect requiring rectification and no amount of damages to be allowed with respect to the further 87 Units described as the ‘systemic balcony defects’ that have been listed in the Scott Schedule and Annexure F to the plaintiff’s submissions.

45. The Referee detailed the remedial works that had been performed by Polyseal (at [376]-[399]) and concluded:

> 400. I find that the rectification work required was limited to the investigation of water ingress through the southern elevation wall of each Unit by removal of two courses of masonry, repair of the membrane to the slab edge and hob by application of a new

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membrane, installation of a new cavity flashing which extended beyond the external face of the wall and reinstatement of the masonry and making good. I find that it was not necessary to remove the tiles to the entire adjacent balcony in order to undertake that work nor was it necessary to remove the sliding door to the balcony.

> 401. I have considered all the evidence as outlined in these reasons and find that the recommended remedial works proposed by Whitton and incorporation without any further investigation into the scope of work undertaken by Polyseal was excessive and unreasonable in the circumstances. Much of the work undertaken was not necessary to rectify the identified defect.
>
> 402. I find that the removal and replacement of all floor tiles to the balconies and especially the extensive balconies to 503/12 Shoreline Drive and 503/4 Lewis Avenue was not necessary or required to access the defective work. I find that the removal and replacement of the balcony floor tiles locally where required and the application of a membrane bandage at the perimeter of the balcony adjacent to the external wall or the external wall return would have been sufficient to complete the rectification satisfactorily where any work to those balconies was required.

46. The Referee noted that the plaintiff had not provided any breakdown of the amounts that had been paid to Polyseal and it was therefore not possible to calculate an adjustment to the amount paid to Polyseal to reflect the reduced scope of work (at [403]). The Referee also noted that in the alternative, the estimated direct cost of the necessary rectification work based on the scope of work identified by the defendants' expert, Mr Abbott, had been calculated by the quantum experts (at [404]).

47. The Referee set out the history of the correspondence in MFI C19 between the parties from March 2013 to January 2014 (at ([407]-[418]). The Referee referred to the parties' submissions in respect of the documents in MFI C19 recording that: the defendants contended that they are irrelevant because they were not relied upon by the plaintiff to engage Polyseal in August 2013 to carry out the rectification works; and the plaintiff contended that they showed that the defendants had adequate opportunity to inspect the units the subject of the rectification works. The Referee noted the following:

> 426. The plaintiff submitted that, even if the Referee were to find that the work undertaken by Polyseal, was to some extent unreasonable, it was still entitled to recover the cost it incurred as long as it took an honest course and acted on the advice of experts.
>
> 427. The submissions of the plaintiff suggested that it was put in a difficult and embarrassing situation with regard to commencing the repairs. This was inferred by reference to the reasons for urgency stated in two of the letters [Tabs 1 and 10]. As submitted by the defendants, there was no independent evidence that the plaintiff acted because of threatened legal action by the lot owners or damage caused by the occurrence of recent storms. The reasons given for urgency were refuted by the defendant's lawyers in reply to the second letter [Tab 12].

48. The Referee's conclusions on the water damage costs are as follows:

> 428. I find that there did not appear to be any immediate need to act. The 'urgency' was not due to any act or omission of the defendants. The plaintiff undertook the work when it did of its own volition.
>
> 429. The remaining question is whether the plaintiff acted reasonably in accepting the opinion of Whitton regarding the extent of rectification work required. The evidence is that no contrary expert opinion was available to the plaintiff until the report of Abbott dated 27 May 2014 [Exhibit D1]. By that time, almost all of the rectification work had been completed.
>
> 430. However, if the work was not urgent, the plaintiff should have heeded the warnings of the defendants' solicitors [Tabs 12, 14 and 18] that the 'purported scope of works for remediation can at best be described as exploratory and speculative' and that there was no urgency. It could have deferred the work until the defendants had inspected and reported on the defects.
>
> 431. The evidence of Whitton in relation to most of the Units inspected was that the water ingress had been occurring for some time. In some cases attempts had been made to prevent the water ingress to the wardrobes which had not stopped the inflow but had reduced it. In most cases, the wardrobe was dry at the date of inspection although there was evidence of previous water ingress. The evidence provided in Whitton's reports does not indicate any particular urgency for rectification of this particular class of defect.
>
> 432. I find that there was no urgency to proceed with the significant rectification work in the contract with Polyseal or any Variations added to it, prior to receipt of the defendant's expert report on these defects. It was not necessary to proceed without the benefit of the 'second opinion' which was provided by the defendant's expert.
>
> 433. For these reasons, I find that the defendants are not required to pay the actual costs incurred by the plaintiff as detailed in Annexure F for the water ingress rectification work done by Polyseal and administered by Whitton on behalf of IBCN. Those costs were excessive and not reasonably incurred.
>
> 434. The defendants are, however, responsible for the reasonable cost of rectifying the defects based on the reasonable scope of work required as noted by Abbott in his report [Exhibit D1].

49. The Referee dealt with the reasonable costs of rectification based on the scope of work produced by Mr Abbott, concluding that that amount was $88,258 (at [435]-[459]). The Referee then dealt with other quantum matters, alternative accommodation and preliminaries, overheads and contingency and cost escalation before recommending that the Court accept the amount of $1,480,761.50 (excluding GST) as the quantum of damages for the rectification of the respective defects which had been either agreed or found by the Referee to exist or have been repaired as outlined in the Report (at [458]-[485]).

Water damage costs

50. In assessing the damages for the defective works, the plaintiff is to be put in the same position in which it would have been had the contract been performed on the basis of what is reasonable and

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necessary work so as to produce conformity with the contractual requirements. The determination of what remedial work is necessary and reasonable is a question of fact: *Bellgrove v Eldridge* (1954) 90 CLR 613. However the plaintiff is not entitled to recover damages for loss caused by its own unreasonable conduct. The onus is on the defendant to prove that the plaintiff acted unreasonably: *The Owners-Strata Plan 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067.

51. It is accepted by the plaintiff that the water damage costs claimed (and rejected by the Referee) were for rectification works that were "excessive and unreasonable", "inappropriate", based on a wrong assessment as to the cause of water ingress by its expert, and "much of it was not necessary".

52. The plaintiff submitted that the Referee failed to review the relevant authorities in relation to its claims regarding the water damage costs, in particular those authorities that it submitted supported an allowance of those costs where a party has completed the rectification works (albeit unnecessary, excessive and unreasonable works) in reasonable reliance upon expert advice. Although the Referee did not specifically refer to any authorities on this point it is clear that he was cognisant of the authorities from his observations in relation to the plaintiff's submissions relating to the baths costs that "it is not '*unreasonable*', as that expression is defined in the cases" (at [199]). However the Referee encapsulated the plaintiff's contention that it was entitled to such costs on this basis in paragraph [426] of the Report, repeated here for convenience:

> The plaintiff submitted that, even if the Referee were to find that the work undertaken by Polyseal, was to some extent unreasonable, it was still entitled
>
> to recover the cost it incurred as long as it took an honest course and acted on the advice of experts.

53. In this regard both in this application and before the Referee the plaintiff relied upon the following passage in *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 at 506 where Lord Macmillan said:

> Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

54. That was not a case in which the plaintiff bank relied upon advice and acted accordingly. The circumstances of that case were "peculiar and unusual" (at 477 per Viscount Sankey LC) and "very exceptional" (at 503 per Lord Russell of Killowen). The defendant was the bank's official printer and accepted that it should not print notes from plates in their possession except on the direct

orders of the bank (at 505 per Lord Macmillan). In breach of that obligation the defendant printed notes and unwittingly provided them to a criminal who conspired with others in a fraud of a very large scale. When the bank became aware that the forged notes were in circulation it decided that it should withdraw the whole of that type of currency from circulation and pay parties presenting the notes during an announced period, irrespective of whether the notes were genuine or forgeries. The defendant argued that any damages suffered by the plaintiff bank were caused by its own voluntary action and could not fairly and reasonably be considered as arising naturally from the defendant's breach of contract. The plaintiff bank was in effect the National Bank of Portugal, the sole issuing bank in that country and upon which the credit and currency of the country depended. The evidence established that if the bank had refused to pay on the notes there would have been general discredit for all the notes of the bank; and there may have been a general stoppage for the economic life of the country, with panic and a possible revolution (at 469 per Viscount Sankey LC). The Privy Council (Viscount Sankey LC at 478; Lord Atkin at 493; Lord Russell of Killowen at 503; and Lord Macmillan at 513) held that the bank could recover damages from the defendant for the loss suffered in paying on the presentation of the forged notes (Lord Warrington of Clyffe dissented at 485).

55. The circumstances of that case are quite distinguishable from the present case. Viscount Sankey LC found that the bank had "no alternative" but to do what it in fact did (at 471). In the present case, even assuming there was some urgency in rectifying the defects, it was not the case that the plaintiff had "no alternative" but to do what it did.

56. Another case that the plaintiff relied upon before the Referee and in this application was *Clippens Oil Co L td v Edinburgh and District Water Trustees* [1907] SC (HL) 9. That was a case in which a mineral oil company sought to recover damages flowing from the wrongful grant of an injunction preventing it from mining shale in a certain area. It recovered damages less than was claimed and appealed against that finding. Its opponent appealed against the award of damages. The House of Lords unanimously dismissed the appeal and the cross-appeal (Lord Chancellor (Loreburn) at 12; Lord Macnaghten at 12; Lord Atkinson at 15; Lord Ashbourne at 12; Lord James of Hereford at 12; Lord Robertson at 12; and Lord Collins at 15). The passage relied upon by the plaintiff is at 14 where Lord Collins said:

> I think that the wrongdoer is not entitled to criticise the course honestly taken by the injured person on the advice of his experts, even though it should appear by the light of after events that another course might have saved loss. The loss which he has to pay for is that which has actually followed under such circumstances upon his wrong.

57. This passage related to an aspect of criticism of Lord Dunedin's judgment (in *C lippens Oil Co Ltd v Edinburgh and District Water Trustees* (1906) 8 F 731; 13 SLT 957) in which his Lordship had suggested that the oil company could have reverted to a different seam that was not the subject of the injunction (the Broxburn seam) to continue mining and could not rely upon the contention that they were advised by their expert not to do so.

58. The plaintiff also relied upon *Lodge Holes Colliery Company Limited v Mayor of Wednesbury* [1908] AC 323 in this application. However it appears that this authority was not relied upon before the Referee. The plaintiff relied upon the following passage of that decision in which Lord Loreburn LC said at 325 :

> Now I think a Court of justice ought to be very slow in countenancing any attempt by a wrong-doer to make captious objections to the methods by which those whom he has injured have sought to repair the injury. … Errors of judgment may be committed in this as in other affairs of life. It would be intolerable if persons so situated could be called to account by the wrong-doer in a minute scrutiny of the expense, as though they were his agents, for any mistake or miscalculation, provided they act honestly and reasonably. In judging whether they have acted reasonably, I think a Court should be very indulgent and always bear in mind who was to blame. Accordingly, if the case of the plaintiffs had been that they had acted on the advice of competent advisers in the work or reparation and had chosen the course they were advised was necessary, it would go a very long way with me; it would go the whole way, unless it became clear that some quite unreasonable course had been adopted.

59. That was a case in which the surface of a highway subsided as a result of mining works. The local authority restored the level of the highway to its original position and sought damages from the mine owner. At first instance the mine owners succeeded arguing that an "equally commodious road" could have been made at the sunken level for much less cost. On appeal, judgment was entered for the local authority for the cost of restoring the highway at the original level. The mine owners successfully appealed and the judgment at first instance was restored.

60. In the passage immediately after that relied upon by the plaintiff the Lord Chancellor said at 325-326:

> But when the proceedings at the trial and the preceding correspondence are examined, it appears that this was not the plaintiffs' contention at all. They did not in fact consider how they could make an equally commodious road without unnecessary expense. Their position was that they were in law entitled to raise the road to its old level and to charge the defendants with the cost of so raising it.
>
> …
>
> The point of law which was advanced by the plaintiffs, namely, that they were entitled to raise the road to the old level, cost what it might and whether it was more commodious to the public or not, will not, in my opinion, bear investigation. Such a rule might lead to a ruinous and wholly unnecessary outlay. … Even those who have been wronged must act reasonably, however wide the latitude of discretion that is allowed to them within the bounds of reason.
>
> …
>
> The plaintiffs acted quite honestly, but under the mistaken belief that they were bound, or at least entitled, to maintain the ancient level at the defendants' expense. So thinking, they

did not consider whether it was necessary to do so in the interests of the public and did not exercise a discretion on that question, so far as appears from the evidence before us.

61. If the local authority in that case had claimed that it had restored the highway to its original level because it acted on the advice of "competent advisers" who advised that it was necessary, then the Lord Chancellor would have found in its favour unless the course that it adopted was "quite unreasonable". His Lordship did not explore this latter aspect of the matter any further.

62. The plaintiff also relied upon *Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup & Partners International Ltd & Anor* [2007] EWHC 918 (TCC) in which the following was said:

> 27. It follows that if the whole or part of the claim does not arise out of the defendant's wrongdoing but from some independent cause the claimant cannot recover damages arising from that cause. ...
>
> 28. The courts have made it clear that where a claimant has undertaken work to remedy a wrongful act the court should be very slow to accept an objection by the wrong-doer as to the method used by the claimant to repair the injury.

63. I do not regard the authorities relied upon by the plaintiff as *carte blanche* justification to award damages equivalent to that which was expended by the injured party on unnecessary, inappropriate and excessive works simply because an injured party has relied upon expert advice. Even where a party relies upon advice from a competent adviser that steps are necessary, and takes those steps, it is still open to a court in circumstances where the amount of damages claimed is challenged, to decide whether the course taken was "quite unreasonable", and if so to limit the damages recovered to those that are reasonable in the circumstances.

64. The defendants submitted they should not be held liable to pay for costs of rectification that were clearly excessive and unreasonable. In support of this submission the defendants relied upon *McGlinn v Waltham Contractors Ltd & Ors (No 3)* [2007] EWHC 149 (TCC) in which Judge Peter Coulson QC cited *Board of Governors of the Hospital of Sick Children v McLaughlin & Harvey Plc* (1987) 19 ConLR 25 (referred to below as the *Great Ormond Street* case) as authority for the proposition that a claimant who carries out repair or reinstatement work must act reasonably (at [790]). His Lordship then went on to deal with the question of expert advice and said:

> [795]. Slightly different considerations may apply if a claimant has taken professional advice and carried out a remedial scheme on the basis of that advice. As Judge Newey pointed out in the passage of his judgment in the *Great Ormond Street* case, set out at [790] above, in certain cases it would be foreseeable that a claimant would decide which repair scheme to put in hand with the assistance of expert advice, and that it would be foreseeable that the claimant would take such advice and be influenced by it. In such circumstances, it has been said that, prima facie, the claimant is entitled to the cost of the work carried out pursuant to that expert advice, even if, with hindsight, criticism could be made of the scheme that was put in hand. In such a case, in order for a defendant to open up the damages claim based on work actually carried out, the defendant must ordinarily demonstrate that the advice upon which the claimant relied was negligent. Such negligent

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advice would form an independent cause of damage which breaks the chain of causation. To cite again from Judge Newey's judgment in the *Great Ormond Street* case (1987) 19 ConLr 25 at 96:

> 'The independent cause may take the form of an event which breaks, that is to say, brings to an end, a chain of causation from the defendant's breach of duty, so that the plaintiff cannot recover damages for any loss which he sustains after the event. The event may take the form of negligent advice upon which the plaintiff has acted. Another way of expressing the matter might be that the defendant could not reasonably have foreseen that the plaintiff would act on negligent advice. Advice which is not negligent will not by itself break the chain.'

65. The defendants accepted that the Referee did not make an express finding that the advice upon which the plaintiff relied in carrying out the rectification works was "negligent". However they submitted that the Referee's findings that: Mr Whitton had wrongly identified the primary cause of the water penetration into the building (at [371]); it was "not necessary" to remove the tiles to the entire adjacent balconies or the sliding doors to the balconies to carry out remedial works (at [400]); the remedial works proposed by Mr Whitton were "excessive and unreasonable" (at [401]); and much of the work undertaken was "not necessary to rectify the identified defects" (at [401]) amount to a finding that Mr Whitton's advice was negligent.

66. The defendants accepted that they bore the onus of establishing that the course adopted by the plaintiff was quite unreasonable. There will be circumstances where a finding of negligence has not been made but the advice was obviously erroneous and the works undertaken, as here, were excessive, unreasonable and unnecessary. The absence of a particular finding of negligence does not in my view preclude a finding that the course adopted by a party who has relied upon such advice was quite unreasonable. Much will depend upon the circumstances of each case.

67. In cases where damages are claimed for work carried out on the advice of experts it will be necessary to review the circumstances including: whether such advice was notified to the party that caused the injury; whether the party that caused the injury was given the opportunity to suggest (and did suggest) that such advice should not be taken or followed in some or all respects; and whether the party that caused the injury was given the reasonable opportunity to perform the rectification works itself. In this case the advice was notified to the defendants in the form of the scope of works; the defendants took the opportunity to advise the plaintiff that such advice was exploratory and speculative; and the defendants did not take up the opportunity that was provided to them to perform the rectification works in accordance with the scope that was provided to them.

68. The Referee was clearly cognisant of the need to address the plaintiff's claim that it had honestly relied upon the expert advice of Mr Whitton in performing the rectification works. It is also clear that the Referee analysed the surrounding circumstances to determine whether, as the defendants clearly claimed, the course that was adopted by the plaintiff was in any event "quite unreasonable". In this regard the Referee took the view that the correspondence (MFI C19) established that the plaintiff proceeded with the rectification works and had failed to heed certain "warnings" by the defendants, a finding that the plaintiff claims was unjustified.

69. This is not a case in which the party who caused injury has, after the rectification works were completed, complained about the scope of the works or the method used. The defendants made complaints well before any work was carried out. The relevant parts of the three letters that the Referee described as "warnings" (5 July 2013, 26 July 2013 and 19 November 2013) are extracted earlier. In the first letter the defendants' solicitors describe the scope of works as "exploratory and speculative". It was a warning in the clearest of terms that should the plaintiff proceed with the remedial works in accordance with that scope of works, it would be performing work that was not reasonable or necessary in the circumstances and it would be at its own cost.

70. The next two letters do not repeat that particular warning. However both letters reject any need for urgency in carrying out the proposed works. I am not satisfied that the description of these letters as "warnings" is unjustified or perverse. I am satisfied that the Referee was looking at the chronological development of the complaints by the defendants in respect of the proposed rectification works. In doing so I am satisfied that the Referee took into account the clear warning in the letter of 5 July 2013 and regarded the denial of urgency in the letter of 23 July 2013 and the reiteration of that denial in the letter of 19 November 2013 as warnings to the plaintiff that it was proceeding at its own risk because the defendants did not accept that the works were justified or that they were urgent.

71. The Referee recorded the plaintiff's submission that it was put in a difficult and embarrassing situation with particular reference to the reasons for urgency in the two letters, the first dated 19 March 2013 and the second dated 21 June 2013. The reason for urgency given in the first letter was that a number of lot owners had indicated that they intended to commence proceedings against the plaintiff unless the water damage issues affecting their units were rectified. In the second letter the plaintiff referred to its statutory obligations under s 62 of the *Strata Schemes Management Act 1996* and the increasing water damage from "recent heavy rain". It was in this letter that the plaintiff's solicitors advised that an extraordinary general meeting was to be held approximately two weeks later to raise a special levy to undertake the rectification works in the event that the defendants did not provide written confirmation that they would undertake the rectification works.

72. The Referee also referred to the absence of what was described as any "independent evidence" that the plaintiff acted because of threatened legal action by the lot owners or the damage caused by the recent storms. In this regard the plaintiff submitted that the Referee failed to consider the evidence that was tendered in the Reference. The first matter to which the plaintiff referred was the resolution passed at the Executive Committee Meeting on 18 September 2012 which recorded the approval of the quotation for "the tender of urgent defect repairs" at certain units. The plaintiff also referred to the three affidavits affirmed by Phillip Court (30 May 2013, 6 August 2014 and 11 March 2015), a licensed strata managing agent employed by the agency acting as strata managing agent for the plaintiff during the relevant period. In his second affidavit affirmed on 6 August 2014 Mr Court referred to a number of units under a heading "Urgent Works to rectify water ingress to units". Notwithstanding the use of the word "Urgent", the history outlined in the annexures to Mr Court's affidavit included: a request on 20 February 2012 for Integrated to provide a quote; the Executive Committee approval on 14 May 2012 of the quote from Integrated; the quote from Integrated on 13 September 2012; the Executive Committee approval of the quote from Integrated

for the works on 18 September 2012; the scope of works dated 12 February 2013; the receipt of tenders dated 12, 13, and 15 March 2013; and the selection of Polyseal at the Adjourned Extraordinary General Meeting on 7 August 2013. Mr Court's third affidavit affirmed on 11 March 2015 once again used the expression "Urgent Works" referring back to his affidavit of 6 August 2014.

73. Other than the use of the expression "urgent", there is nothing contained in the affidavits by way of communication from any of the lot owners claiming that the rectification works must occur immediately. The records kept by the managing agent include the record of inspection of the various units identifying the presence of water or alternatively moisture with an indication that the "leak is ongoing". The so-called "leak" is into the wardrobes of the various units some of which had the carpet stripped back, others of which had water stained carpet in situ. It would appear that the majority of the staining and leakage was at the back corner of the base of the wardrobe. In one unit (503/12 Shoreline Drive) it was recorded that remedial efforts had been made by the builder reducing the amount of water but not stopping it "according to the owner and evidence gathered during the inspection". It was also recorded that the remedial methods "are temporary at best". The Referee reviewed the expert evidence in relation to the entry of water into 16 units (at [244]-[313]) and also addressed the cause of water ingress to unit 503/12 Shoreline Drive (at [330]).

74. I am of the view that the Referee's reference to a lack of "independent evidence" supporting the conclusion that the plaintiff acted because of threatened legal action was to the absence of any direct evidence from any of the lot owners making such threats of legal action. For instance, there was no evidence from any of the lot owners complaining about the effects of the moisture or stains on the carpet in their wardrobes and the need to address these matters immediately, failing which they would commence proceedings. Obviously there was evidence from the plaintiff that it had received threats, a matter of which the Referee was clearly cognisant in commenting upon the fact that the lot owners did not give "independent evidence" in respect of these threats.

75. The Referee concluded "that there did not appear to be any immediate need to act" and that the plaintiff "undertook the work when it did of its own volition" (at [428]). The Referee also concluded that the plaintiff could have "deferred the work until the defendants had inspected and reported on the defects" and found that "there was no urgency to proceed with the significant rectification work" done by Polyseal and that it was "not necessary to proceed without the benefit of the 'second opinion' which was provided by the defendant's expert" (at [430], [432]).

76. Whether that need was "urgent" was a question of fact, to be determined in the context of all the relevant circumstances including the plaintiff's legal obligations under s 62 of the *Strata Schemes Management Act* 1996 . There is a difference between a need to carry out works in accordance with the statutory obligation under s 62 of the *Strata Schemes Management Act 1996* and a need to carry out works immediately or urgently. The Referee clearly had regard to the history of the exposure of the defects and the steps taken by the plaintiff between February 2012 and August 2013 when Polyseal was contracted to do the works.

77. The fact that the process took 18 months between February 2012 and August 2013 before Polyseal was contracted to complete the works militates against a finding of an urgent or immediate need

for the works to be completed. The plaintiff was taking appropriate steps in accordance with its obligations under s 62 of the *Strata Schemes Management Act 1996* to maintain the property by seeking to hold the defendants liable for the rectification works by commencing the proceedings in December 2012 and obtaining the relevant expert opinions in respect of the work. There was no evidence either before the Referee or in these applications to support the conclusion that the failure to do the work urgently or immediately would be in breach of the plaintiff's obligations under the Act . The parties were in litigation and were subject to a timetable which required the defendants' experts to provide a report in respect of the rectification of the defects.

78. In reaching his conclusions the Referee referred to and took into account: the fact that the defendants had been invited to undertake the rectification works and had declined to do so; the fact that the plaintiff had advised the defendants that it regarded the works as necessary to comply with its obligations under the *Strata Schemes Management Act 1996* ; the fact that the defendants had been provided with the scope of works and had warned the plaintiff that such scope was in their view "exploratory and speculative"; the fact that the defendants had consistently indicated to the plaintiff that the works were not urgent; the fact that in most cases the wardrobe was dry at the date of inspection although there was evidence of previous water ingress; and the fact that the defendants were to provide an expert report.

79. The plaintiff submitted that the Referee did not put a time frame on the receipt of the defendants' expert report and effectively suggested that the plaintiff would have to wait indefinitely for that report. This is not a fair characterisation of the Referee's findings. It is true that the Referee did not refer to a particular date by which the defendants' expert report was due. However as a matter of practicality it is obvious that the parties were aware of the regime for those reports as they were in the Technology & Construction List and there were communications about the inspection dates to enable the experts to prepare the reports. I am not satisfied that this aspect of the plaintiff's complaints has force.

80. The plaintiff also submitted that the Referee failed to give adequate reasons for his conclusion that there was no urgency or immediate need to act. I disagree with that submission. The Referee's analysis of the history and the correspondence, his observations made in respect of each of the units and the analysis of the experts' opinions demonstrates that he was clearly of the view that he could not see any need for immediate action. The Referee referred specifically to the evidence provided in Mr Whitton's reports as failing to indicate "any particular urgency for rectification of this particular class of defect" (water ingress to the wardrobes) (at [431]).

81. The finding that there was no immediate need or urgency to proceed with the significant rectification work in the scope of works was a finding open to the Referee on the evidence. The plaintiff's attack on the Report in this regard fails.

82.

The next question for consideration on this aspect of the Report is the plaintiff's contention that the Referee fell into error in his analysis of whether the plaintiff acted reasonably in accepting Mr Whitton's opinion regarding the extent of the rectification works. The plaintiff submitted that the

Referee elided the question of urgency with the question of whether the plaintiff acted honestly and reasonably in accepting Mr Whitton's advice and thereby fell into error in disallowing the claim for the cost of the rectification works.

83. I do not agree that the Referee fell into error in this regard. Although not stated expressly, the Referee clearly accepted that the plaintiff honestly relied upon Mr Whitton's opinion. The issue of whether the plaintiff was required to act immediately was relevant to the Referee's consideration of whether a reasonable course was adopted. This is not a case similar to the circumstances in *Banco de Portugal v Waterlow & Sons Ltd* where the bank was required to act urgently and immediately to avoid commercial and possible civil unrest. The circumstances of this case, including whether there was a requirement on the plaintiff to act immediately, had to be taken into account in reaching a conclusion as to whether the course adopted was "quite unreasonable" in the circumstances. The plaintiff was on notice that the builder and the developer had suggested that the scope of works, the subject of Mr Whitton's expert opinion that the plaintiff accepted, was "speculative".

84. All the relevant factors were taken into account by the Referee in reaching the conclusion that the works were not reasonable and that they were excessive and inappropriate. Clearly the Referee was of the opinion that notwithstanding the plaintiff's reliance on its expert, the course it adopted was quite unreasonable in the circumstances. That was a finding open to the Referee and one that was justified in the circumstances. The plaintiff's attack on the Report in this regard fails.

The baths costs

85. The defendants contend that paragraphs [183], [184], [185]-[189], [201]-[203], [219]-[221] and [238] in which the Referee allowed the costs for rectification of the baths should be rejected and an allowance should be made for the cost of repair of the silicone seal where it has failed. Alternatively the defendants contend that the cost of repair should be limited to those baths which also function as a shower.

86. There are 192 baths installed in the complex, 92 of which have a shower over the bath. The remaining 100 bathrooms have a separate shower and bath.

87. The experts agreed that the baths had not been installed strictly in accordance with the detail provided for in figure 5.2 of the Standard because the wall tiles do not continue over the edge of the bath and the rim of the bath is not recessed into the wall.

88. The defendants contended that the Referee found that: (a) only a small number of baths had exhibited any water ingress to the enclosed void space beneath the bath; (b) water ingress was due to the cracking of sealant at the edge of the bathtub adjacent to the wall or to leaking of the waste pipe beneath the bath; (c) water leaks had occurred only at baths with a shower over them; and (d) failure of the sealant may be due to the movement of baths on the supports, poor preparation and application of the sealant or other reasons.

89. The defendants submitted that these conclusions cannot be sustained because there was no evidence of any loss or damage by reference to the "technical breach" or non-conformity. It was submitted that the direct cost of rectification as ordered, $534,160, is out of all proportion to the benefits to be obtained by procuring strict contractual conformity. The defendants submitted that this was particularly so where, in respect of baths that did not include a shower, it was found that the risk of water ingress was significantly less and that only "some form of rectification" was required to address the non-compliance with the performance requirements of the BCA (at [189]).

90. The plaintiff emphasised Mr Abbott's agreement that if the tiles on the walls adjacent to the baths had been constructed in accordance with the Standard there would have been two barriers preventing water entry; the tiles themselves and the silicone under the lip. The Referee found that where the bath is to be used as a shower, the defect is more than just a technical breach. The Referee also found that the Standard does not distinguish between baths without a shower and found that the replacement of the failed sealant does not address the waterproofing defect. The plaintiff submitted that in substance the Referee found that all lot owners (irrespective of whether the bath included a shower) were entitled to be placed in the position of conformity with the contract where there was no risk as required by the Standard.

91. In *Bellgrove v Eldridge* the Court said that "not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt" (at 618). The Court did not approve of the expression "economic waste" used in the United States as a test for unreasonableness and said at 618:

> We prefer, however, to think that the building owner's right to undertake remedial works at the expense of a builder is not subject to any limit other than is to be found in the expressions "necessary" and "reasonable", for the expression "economic waste" appears to us to go too far and would deny to a building owner the right to demolish a structure which, though satisfactory as a structure of a particular type, is quite different in character from that called for by the contract. Many examples may, of course, be given of remedial work, which though necessary to produce conformity would not constitute a reasonable method of dealing with the situation and in such cases the true measure of the building owner's loss will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials.

92. In *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, the Court referred to the abovementioned qualifications in *Bellgrove v Eldridge* of necessity and reasonableness and to the decision in *Ruxley Electronics & Constructions Ltd v Forsyth* [1996] AC 344 in which the House of Lords rejected a claim for £21,560 damages for reconstructing a swimming pool that was one foot six inches too shallow. Lord Jauncey of Tullichettle expressed the view (at 354-355) that the cost of demolishing the existing pool and reconstructing a new one would be "wholly disproportionate to the disadvantage of having a pool of a depth of only 6 feet as opposed to 7 feet 6 inches and it would therefore be unreasonable to carry out the works".

93. In *Radford v De Froberville* [1977] 1 WLR 1262 at 1270 Oliver J (in a passage approved by the High Court in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* at [16]) said:

> If he contracts for the supply of that which he thinks serves his interest – be they commercial, aesthetic or merely eccentric – then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.

94. It is true that the experts agreed that there had been a "technical breach". However that does not mean that the plaintiff in this case was seeking to secure an "uncovenanted profit". Not all baths in the complex were inspected. There was evidence of water pooling under some and evidence of water staining under others. The baths that exhibited evidence of water in the void were not confined to one building. This condition was observed in bathrooms in each building in the complex. The Referee concluded that rectification works were required in 189 baths, as three of the 192 had already been rectified. The requisite scope of rectification work is the removal of all taps, spouts and fixings to the back and right-hand side walls of the baths; the supply and installation of colour back glass to both affected walls ensuring compliance with the Standard finishing on the end wall up to the edge of the shower screen blade; and the extension of the spindles to spouts and taps, if required, and reinstallation of taps, spouts and fixing. The Referee recommended this scope of rectification work rather than the replacement of any silicone sealant at the joint which had failed as recommended by the defendants' expert, Mr Abbott.

95. The Referee was satisfied on the evidence that it was necessary and reasonable for the plaintiff to insist on conformity with the contract. That was a finding reasonably open to the Referee. The defendants' attack on the Report in this regard fails.

Conclusion

96. The applications for the rejection of parts of the Report will be dismissed except to the extent of the consensual order for the matter to be remitted to the Referee for clarification and further report in respect of the preliminaries referred to in paragraph [6] of these reasons. The Report will otherwise be adopted.

97. The parties are to prepare Short Minutes of Order for the finalisation of these applications together with a form of order for the preliminaries aspect of the Report to be remitted to the Referee. If the parties are unable to agree on a costs order I will hear argument when the matter is listed on 25 August 2016 at 9.30 am for the making of final orders.

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