The Owners of Strata Plan 76888 v Walker Group Constructions Pty Ltd - [2016] NSWSC 541

Supreme Court

New South Wales

Medium Neutral Citation:	**The Owners of Strata Plan 76888 v Walker Group Constructions Pty Ltd [2016] NSWSC 541**
Hearing dates:	10 March 2016
Decision date:	02 May 2016
Jurisdiction:	Equity
Before:	Meagher JA
Decision:	(1) Order that the Referee's Report dated 21 August 2015, with the exception of paragraph [357], be adopted, subject to the following: (a) In support of the Referee's conclusions at [169], [212], [268] and [287], and that the damages for item 23 should be assessed by reference to the cost of pursuing the small gaps alternative solution, I make the additional finding in [59] of these reasons. (b) The Referee's findings in [332]-[337] are adopted only to explain the way in which he reached the conclusions in those paragraphs, which are not otherwise challenged by the defendants. (2) Dismiss the plaintiff's notice of motion filed 24 September 2015. (3) Otherwise dismiss the defendants' notice of motion filed 25 September 2015. (4) Direct the parties within 7 days to lodge with my Associate, Short Minutes of Order which provide for the entry of judgment for the plaintiff in accordance with these reasons and which address the costs of the proceedings, including those of the reference and the adoption proceedings. If the parties cannot agree on the form of these orders, each within a further 7 days should submit the form of orders for which it contends, together with written submissions (not exceeding 4 pages) supporting the orders contended for. The question of the appropriate orders will then be decided on the papers.
Catchwords:	BUILDING AND CONSTRUCTION – breaches of statutory warranties in s 18B of Home Building Act 1989 (NSW) – adoption of referee's report under Uniform Civil Procedure Rules 2005 (NSW), r 20.24 – where contract required building work comply with provisions of Building Code of Australia – where Code complied with by work in accordance with deemed-to-satisfy provision or alternative solution – where experts agreed that alternative solutions capable of achieving compliance with Code – where referee allowed additional damages to reflect possibility that alternative solution not accepted by certifying authority – whether referee erred in adopting as measure of damages the amount required to pursue alternative solution – whether referee's finding that real possibility alternative solution not be accepted justified by evidence
Legislation Cited:	Home Building Act 1989 (NSW), ss 18B, 18C, 18D Environmental Planning and Assessment Act 1979 (NSW), ss 76A, 80A, 109C, 109E, 109H Environmental Planning and Assessment Regulation 2000 (NSW) Strata Schemes Management Act 1996 (NSW), ss 65, 65A Supreme Court Rules 1970 (NSW), Pt 72, r 13
Cases Cited:	Bellgrove v Eldridge (1954) 90 CLR 613 Chocolate Factory Apartments v Westpoint Finance [2005] NSWSC 784 Malec v JC Hutton Pty Ltd [1990] HCA 20; 169 CLR 638 Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8; 236 CLR 272 The Owners - Strata Plan 21702 v Krimbogiannis [2014] NSWCA 411 Robinson v Harman (1848) 1 Ex 850; 154 ER 363 Stolfa v Hempton [2010] NSWCA 218; 15 BPR 28,253
Category:	Principal judgment
Parties:	The Owners of Strata Plan 76888 (Plaintiff) Walker Group Constructions Pty Ltd (First Defendant) Walker Corporation Pty Ltd (Second Defendant)
Representation:	Counsel: D Weinberger (Plaintiff) MG Rudge SC with FP Hicks (Defendants) Solicitors: Bannermans Lawyers (Plaintiff) Squire Patton Boggs (Defendants)
File Number(s):	2013/302145

Judgment

1. The plaintiff owners' corporation claims damages for work undertaken in the construction of a residential apartment building in the Sydney suburb of Rhodes. The first defendant builder, Walker Group Constructions Pty Ltd, constructed the building, known as 'Tanner', for the second defendant developer, Walker Corporation Pty Ltd under a building contract dated 23 August 2005. The latter was the registered proprietor of the land prior to the registration of Strata Plan 76888. That strata plan includes 42 residential apartments.

2. The plaintiff alleged breaches of the statutory warranties implied in that contract by s 18B of the *Home Building Act 1989* (NSW) . It seeks to enforce those warranties against the second defendant developer under s 18C and against the first defendant builder under s 18D . At the relevant time and prior to their amendment in March 2015, the warranties included:

> (a) a warranty that the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract,
>
> ...
>
> (c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,
>
> ...
>
> (e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,

3. The allegations made include that the works as built did not comply with the Building Code of Australia (**BCA**). It was a condition of the development consent that they do so and s 76A of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) prohibited the carrying out of the development other than "in accordance with the consent".

4. On 21 November 2014, an order was made pursuant to Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**), r 20.14 referring the whole of the proceedings to Mr Barry Tozer (the **Referee**) for inquiry and report. Following a five day hearing commencing on 15 June 2015, the Referee delivered his report dated 21 August 2015 (the **Report**). The parties now seek to have various parts of that Report adopted or rejected under UCPR, r 20.24 .

5. By its notice of motion dated 24 September 2015, the plaintiff claims an order that the Report be adopted, except for specified paragraphs. Those paragraphs concern two categories of alleged defects. The first relates to the waterproofing of bathtub and shower recesses in the residential units. The second concerns compliance with fire safety requirements for the building.

6. By their notice of motion filed 25 September 2015, the defendants seek an order that the Report be adopted, except for the Referee's inclusion of an allowance for GST, being 10% of the cost of the rectification works.

7. The parties are now agreed that any order adopting the Report should not include an allowance for GST. It is accepted that the Referee proceeded on the mistaken basis that the plaintiff was not registered for GST and accordingly, not entitled to claim a credit for GST paid in relation to the rectification works. For that reason, paragraph [357] of the Report should not be adopted.

Relevant Provisions and Principles

8. The source of the Court's powers in relation to the adoption (or otherwise) of a referee's report is UCPR, r 20.24 , which provides:

> (1) If a report is made under rule 20.23, the court may on a matter of fact or law, or both, do any of the following:
>
> a. it may adopt, vary or reject the report in whole or in part,
>
> b. it may require an explanation by way of report from the referee,
>
> c. it may, on any ground, remit for further consideration by the referee the whole or any part of the matter referred for a further report,
>
> d. it may decide any matter on the evidence taken before the referee, with or without additional evidence
>
> and must, in any event, give such judgment or make such order as the court thinks fit.
>
> (2) Evidence additional to the evidence taken before the referee may not be adduced before the court except by leave of the court.

9. McDougall J summarised the principles relevant to the exercise of these powers (albeit with respect to the equivalent provision in the Supreme Court Rules 1970 (NSW), Pt 72, r 13) in *Chocolate Factory Apartments v Westpoint Finance* [2005] NSWSC 784 at [7] . Those principles include:

> (2) The discretion to adopt, vary or reject the report is to be exercised in a manner consistent with both the object and purpose of the rules and the wider setting in which they take their place. Subject to this, and to what is said in the next two sub paragraphs, it is undesirable to attempt closely to confine the manner in which the discretion is to be exercised.
>
> (3) The purpose of Pt 72 is to provide, where the interests of justice so require, a form of partial resolution of disputes alternative to orthodox litigation, that purpose would be frustrated if the reference were to be treated as some kind of warm up for the real contest.
>
> (4) In so far as the subject matter of dissatisfaction with a report is a question of law, or the application of legal standards to established facts, a proper exercise of discretion requires the judge to consider and determine that matter afresh.
>
> (5) Where a report shows a thorough, analytical and scientific approach to the assessment of the subject matter of the reference, the Court would have a disposition towards

acceptance of the report, for to do otherwise would be to negate both the purpose and the facility of referring complex technical issues to independent experts for enquiry and report.

(6) If the referee's report reveals some error of principle, absence or [excess of] jurisdiction, patent misapprehension of the evidence or perversity or manifest unreasonableness in the fact finding, that would ordinarily be a reason for rejection. In this context, patent misapprehension of the evidence refers to a lack of understanding of the evidence as distinct from the according to particular aspects of it different weight; and perversity or manifest unreasonableness mean a conclusion that no reasonable tribunal of fact could have reached. The test denoted by these phrases is more stringent than "unsafe and unsatisfactory".

...

10. The issues before the Referee included the assessment of damages. In relation to that subject he identified the relevant measure as stated in *Bellgrove v Eldridge* (1954) 90 CLR 613 at 617, namely that where non-compliance with contractual requirements has been established, the plaintiff is entitled to the "reasonable cost of rectifying the departure or defect so far as that is possible": Report at [15] .

11. As the High Court noted in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8; 236 CLR 272 at [17] , the 'rule' stated in *Bellgrove* is expressly subject to the qualification "that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt"; a test which the Court observed "is only to be satisfied by fairly exceptional circumstances".

12. The Referee considered that the plaintiff's entitlement to 'contractual conformity' was satisfied in this case by work which complied with the Performance Requirements of the BCA: Report at [16]. That was wholly consistent with the way in which the parties finally presented the questions for determination in the 'Defendants' Response to Second Amended Scott Schedule'. Relevantly, in relation to each of the items in issue in this application, the question for the Referee was formulated by reference to compliance or non-compliance with the requirements of the BCA, and where there was non-compliance, how compliance could be achieved.

13. At this point it is convenient to make further reference to the statutory provisions which required that the building work comply with the BCA; and to the provisions of that Code which explain how compliance may be achieved.

14. Section 80A(11) of the EPA Act provides that a development consent is subject to such conditions as may be prescribed by the regulations. The conditions prescribed by reg 98 of the Environmental Planning and Assessment Regulation 2000 (NSW) (**EPA Reg**) in relation to a development consent for development involving building work include:

that the work must be carried out in accordance with the requirements of the *Building Code of Australia*.

15. Section 81A of the EPA Act required that work not commence until a construction certificate was issued for the development pursuant to s 109C(1)(b) . That certificate could not be issued unless the certifying authority was satisfied that the proposed building works "will comply" with the relevant requirements of the BCA: EPA Reg, reg 145. As will shortly be seen, building works will comply with the BCA if they comply with a 'deemed-to-satisfy' provision of that Code or an 'alternative solution' that as formulated is assessed to comply with the relevant Performance Requirements.

16. An application for a construction certificate must be accompanied by plans and specifications for the building work that include a statement as to how the BCA is to be complied with if an alternative solution is to be used to meet any Performance Requirements: EPA Reg, reg 139(1)(a); Sch 1, Pt 3, cll 6(1)(a)(ii), 6(3)(c). In this case it is apparent that before or during the construction phase of the development, some alternative solutions were proposed in Fire Safety Engineering Reports prepared by Norman Disney & Young in March 2004 and July 2005.

17. Part A0 of the BCA describes how compliance with its requirements may be achieved:

> **[A0.4] Compliance with the BCA**
>
> A *Building Solution* will comply with the BCA if it satisfies the *Performance Requirements*
>
> **[A0.5] Meeting the Performance Requirements**
>
> Compliance with the *Performance Requirements* can only be achieved by –
>
> (a) complying with the *Deemed-to-Satisfy Provisions*; or
>
> (b) formulating an *Alternative Solution* which -
>
> (i) complies with the *Performance Requirements*; or
>
> (ii) is shown to be at least *equivalent* to the *Deemed-to-Satisfy Provisions*; or
>
> (c) a combination of (a) and (b).
>
> ...
>
> **[A0.7] Deemed-to-Satisfy Provisions**
>
> A *Building Solution* which complies with the *Deemed-to-Satisfy Provisions* is deemed to comply with the *Performance Requirements*.
>
> **[A0.8] Alternative solutions**
>
> (a) An *Alternative Solution* must be assessed according to one or more of the *Assessment Methods*.
>
> (b) An *Alternative Solution* will only comply with the BCA if the *Assessment Methods* used to determine compliance with the *Performance Requirements* have been satisfied.
>
> ...

[A0.9] Assessment Methods

The following A*ssessment Methods*, or any combination of them, can be used to determine that a *Building Solution* complies with the *Performance Requirements*:

(a) Evidence to support that the use of a material, form of construction or design meets a *Performance Requirement* or a *Deemed-to-Satisfy Provision* as described in **A2.2**.

(b) *Verification Methods* such as -

(i) the *Verification Methods* in the BCA; or

(ii) such other *Verification Methods* as the appropriate authority accepts for determining compliance with the *Performance Requirements*.

(c) Comparison with the *Deemed-to-Satisfy Provisions*.

(d) *Expert Judgement*. [Emphasis in original]

18. *Expert judgement* is defined in [A1.1] to mean:

... the judgement of an expert who has the qualifications and experience to determine whether a *Building Solution* complies with the *Performance Requirements*.

19. Paragraph [A2.2] is headed "**Evidence of suitability**" and includes:

(a) ... evidence to support that the use of a material, form of construction or design meets a *Performance Requirement* or a *Deemed-to-Satisfy Provision* may be in the form of one or a combination of the following:

(i) A report issued by a *Registered Testing Authority*, showing that the material or form of construction has been submitted to the test listed in the report, and setting out the results of those tests and any other relevant information that demonstrates its suitability for use in the building.

(ii) A current *Certificate of Conformity* or a current *Certificate of Accreditation*.

(iii) A certificate from a *professional engineer* or other appropriately qualified person which –

A. certifies that a material, design or form of construction complies with the requirements of the BCA; and

B. sets out the basis on which it is given and the extent to which relevant specifications, rules, codes of practice or other publications have been relied on.

...

20. The development consent for the building was first issued in July 2004 and modified in August 2005 and March 2006. The first construction certificate was issued in May 2005 and the final construction certificate was dated 31 March 2006.

21. An interim occupation certificate was issued on 19 April 2006 for the residential building, retail area and child care centre. Before that certificate could be issued the principal certifying authority (EPA Act, s 109E) was required to be satisfied that there was a development consent in force (s 109H(3)(a)); that a construction certificate had been issued with respect to the plans and specifications for the building (s 109H(3)(b)); that the building was suitable for occupation or use in accordance with its classification under the BCA (s 109H(3)(c)); and that an interim or final fire safety certificate had been issued for the relevant parts of the building (s 109H(3)(d); EPA Reg, reg 153(2)).

22. That fire safety certificate was to be issued by the owner of the building and to certify that each essential fire safety measure specified in the current fire safety schedule for the building had been assessed by a properly qualified person and found to be capable of performing to the standard required by the current fire safety schedule: EPA Reg, regs 170, 173. Ordinarily, as the proposed fire safety schedule attached to that interim occupation certificate shows, the 'required' standard is specified for the fire safety measures (which include forms of construction) implemented or to be implemented in the building.

23. Finally, and addressing the position after the issue of an occupation certificate, the combined effect of EPA Reg, regs 175 (requiring, for the purpose of an annual safety statement, that fire safety measures be assessed by a properly qualified person); 177(1) (requiring building owners to provide an annual fire safety statement to the council); 181(2) (requiring a fire safety statement to be accompanied by the building's fire safety schedule); and 182(2) (providing for council to issue a new fire safety schedule where the essential fire safety measures adopted are not reflected in the building's current schedule) is to require the owner, at least annually, to have the fire safety measures adopted in the building assessed and approved, and an up-to-date fire safety schedule issued.

Issues arising from the Report

24. The matters in issue in this application were the subject of expert evidence before the Referee. In relation to the first dispute, concerning waterproofing defects, Mr Copeman gave evidence for the plaintiff and Mr Abbott for the defendants. A joint report was then prepared. That report recorded where there was agreement that a particular item was defective and as to the scope of works regarded as reasonably necessary to rectify that defect.

25. The second area of dispute concerned alleged fire safety defects. Mr Whitton gave evidence on behalf of the plaintiff and Mr Grubits on behalf of the defendants. These experts also prepared a joint report. Where their evidence conflicted, the Referee generally preferred the opinion of Mr Grubits. He considered that Mr Whitton did not have the same "depth of understanding of the fire

engineering concepts which support the particular requirements in the BCA in relation to fire safety matters": Report at [155]-[156].

26. The Referee described his general approach to reconciling differences of opinion between the experts at [33]:

> In each case where they disagreed, either on the cause of the defect or the scope of rectification work, I have considered the reasons given by the expert for that opinion. I have explained my reasoning in each case based on my view of which alternative opinion better reflects conformity with the contract requirements and the performance requirements of the BCA.

Systemic waterproofing defect in bathroom

27. This dispute concerns the scope of works necessary to rectify the waterproofing defect in the bathrooms of each of the 42 apartments.

28. The relevant BCA Performance Requirement was that water "must be prevented from penetrating - (a) behind fittings and linings; and (b) into concealed spaces, of sanitary compartments, bathrooms, laundries and the like": BCA, [FP 1.7] ("Waterproofing of wet areas in building").

29. The plaintiff's case was that the installation of the bathtubs failed to comply with Australian Standard 3740-2004 (to be satisfied by the relevant deemed-to-satisfy provision) which provided (at 5.6):

> Baths and spas recessed into the wall shall be installed to allow the water-resistant surface materials of the wall to pass down inside the rim of the bath or spa.

30. The plaintiff's written submissions in this Court describe the waterproofing defect as being:

> ... that the baths were not recessed into the relevant adjacent walls as required by the Standard. The result is that the silicone sealant lying in the junction of the tub and the wall tiles is the only method of waterproofing and preventing water from entering the enclosed space under and around the bathtub.

31. The experts could not agree as to whether there was a breach of the Performance Requirement. Mr Abbott considered it had been achieved by the application of an appropriate sealant to the area between the bath and the tiled surfaces of the two walls adjoining the front or side of each bathtub. Mr Copeman disagreed because the sealant, if not maintained, would periodically fail to prevent water penetrating and pooling in the space under the bath.

32. The Referee found that notwithstanding the application of the sealant, the design of each bathtub was such that water would pool on the horizontal surface at the bottom of the two walls where

they connected to the bath rim: Report at [48]. As the bathtub was used as part of the shower recess, he considered that defect was "more than just a 'technical breach' of the performance requirements". There was an "ongoing and uncontrolled risk of water penetration in all the bathrooms where the sealant is subjected to water ponding during showers": Report at [50].

33. The remaining issue was as to the appropriate method of rectification. Mr Abbott suggested two methods. The first involved re-lining the back and side walls of the recess with villaboard over the existing tiles and then re-tiling over the new villaboard. The second involved fixing a glass splashback over the existing tiles on those two walls. Mr Copeman in his report proposed that the existing construction elements surrounding the bathtubs be demolished and that the bathtubs be removed and then reinstalled so as to comply with the Australian Standard. In their joint report the experts agreed that if rectification work was required "either of the two rectification methods in Abbott's report are acceptable".

34. Accordingly, the Referee noted at [55]-[56]:

> ... that Copeman accepts that either of these alternative rectification methods is an appropriate method ... [B]y his agreement to these options, Copeman concedes that full demolition and reconstruction of each bath, as he originally proposed, is not required. [Emphasis in original]

35. The plaintiff submitted that the proposed alternatives did not achieve 'contractual conformity' because they involved either two layers of tiles or the splashback being fixed over the tiled walls; and that it was not reasonable to adopt such alternatives as both would reduce the size of each lot by 3 or 4 mm, something that could not be done without the consent of each lot owner.

36. The Referee rejected each of these arguments. Contractual conformity was achieved by compliance with AS 3740-2004 and each of the proposed alternatives would do that. Rectification by one or other of those methods was a reasonable course to adopt. Neither involved any substantial or significant compromise in terms of amenity and utility. And while each might result in a reduction in the as-built size of the lots by 3 or 4 mm, the size of each lot was likely to remain larger than it would have been if the baths had originally been constructed in accordance with the detail in AS 3740-2004: Report at [59]. The Referee did not consider whether, as the plaintiff suggested, the consent of each lot owner would be required before the rectification works could proceed.

37. Noting that "the intent of the options is to provide a means of achieving the 'shower recess' conditions required for use of a shower over the bath", the Referee favoured the installation of a glass splashback: Report at [61].

38. On this application, the plaintiff maintains that the Referee's conclusion involves error because it was made on the basis of Mr Copeman's concession and by reference to the method which would enable use of the shower, rather than by reference to whether the proposed work was necessary to achieve contractual conformity. It submits that "[r]ectification so as to achieve 'contractual

conformity' while not compromising the size of the bathrooms and so as to avoid any aesthetic difference/compromise was the only reasonable course to adopt". In its oral submissions, the plaintiff added that it was not reasonable that the proposed rectification work be undertaken in a way that 'appropriated' lot property.

39. In response the defendants contend that the Referee's Report does not reveal any error of principle or obvious misapprehension of the evidence. I agree. It was accepted in argument that the contractual obligation was to construct the bathrooms so that they complied with the waterproofing requirements of the BCA. As I have already observed, that was how the relevant question was formulated in the final version of the Scott Schedule.

40. The Referee addressed that question and found that each rectification option proposed by the experts achieved compliance with those requirements. There was no evidence that either option involved any substantial or significant compromise in terms of amenity, utility or value so as to suggest it was not reasonable to adopt it.

41. It remains to consider the submission that each of those options would involve, in the absence of the lot owners' consent, an unlawful or unreasonable expropriation of property. That suggestion is unfounded. The owners' corporation is entitled, pursuant to s 65(1)(a) of the *Strata Schemes Management Act 1996 (NSW)* to enter each of the units in order to maintain and repair the common property in accordance with its obligation under s 62(1). See *The Owners - Strata Plan 21702 v Krimboqiannis* [2014] NSWCA 411 at [15]-[22] (Basten JA).

42. It is entitled to do so notwithstanding that the undertaking of the repair and rectification work may add to the common property. Section 65A(1) of that Act does not require that the owners' corporation be authorised by a special resolution of the lot owners in order to do repair work which has that consequence. In *Stolfa v Hempton* [2010] NSWCA 218; 15 BPR 28,253 at [10] Allsop P said (Basten and Young JJA agreeing):

> If, as a matter of fact, all the works satisfied the description in s 62 as repair and maintenance, they were not subject to any requirement of a special resolution in s 65A . The statute should not be construed so as to require the owners corporation to act, but then to place a voting barrier in its path in complying with the statute.

43. Paragraphs [41] to [64], [150] and [151] of the Report should be adopted.

General fire defects

44. There are six items (treating items 10 and 11 as one item) in relation to which it is submitted that the Referee erred. They are items 1, 7, 9, 10/11, 16 and 23. In relation to each, Mr Whitton's evidence was that the building work did not comply with any relevant deemed-to-satisfy provision of the BCA. In the absence of that item otherwise complying with the relevant Performance

Requirement and being the subject of an alternative solution, the plaintiff's case was that the as-built work did not comply with the BCA. As such there was a breach of the statutory warranty that the work comply with a relevant law (see [2] and [3] above).

45. In the case of five of those six items (item 9 being the exception), Mr Grubits considered that the building work did comply with the relevant Performance Requirements of the BCA (see [A0.5] extracted in [17] above) and that that could readily be determined by the formulation and assessment of an alternative solution (see [A0.8]). This would also achieve compliance with the BCA. For that to occur, a Fire Engineering Report would have to be prepared by an accredited C10 fire engineer. It would also be necessary to make amendments to the fire safety schedule for the building to reflect the revised fire safety measures adopted (see [23] above).

46. The experts agreed that the implementation of alternative solutions for those five items was the appropriate method of rectifying the building's non-compliance with the BCA. Specifically, they were asked to identify the items of work considered "necessary to achieve" compliance and to describe the work with sufficient particularity to allow a quantity surveyor to cost it. With respect to items 1, 7 and 10/11, the description of the "necessary" items of work commenced "Prepare an Alternative Solution …". With respect to items 16 and 23, they stated that the defects would be "covered by the Alternative Solution" for small gaps; a reference to an alternative solution proposed by Mr Grubits in relation to several items (not limited to these two) where there was a small gap (less than 70cm) in a wall or other element which did not affect the building's fire-resisting construction.

47. The joint report also recorded that it was Mr Whitton's position that "such [alternative] solutions are speculative until such time as they are produced and accepted by the relevant approval authority". The particular authority was not identified and Mr Whitton's comment did not draw any distinction between uncertainty as to whether the solution would be determined to satisfy the Performance Requirements, and uncertainty as to whether the authority would accept that was so.

48. The Referee found that the documentation and approval of the alternative solutions proposed for the five items was the "appropriate" means of achieving compliance with the BCA and allowed a sum of $28,010 for the cost of preparing an alternative solutions report that covered those and other items: Report at [323]-[327].

49. In its submissions in reply before the Referee, the plaintiff contended that if the alternative solutions approach agreed by the experts was accepted, an allowance also should be made, in accordance with the principles discussed in *Malec v JC Hutton Pty Ltd* [1990] HCA 20; 169 CLR 638, "for the chance that the plaintiff will be required to carry out rectification" work if any of the alternative solutions was "not accepted by the relevant authorities": Report at [209] .

50. The Referee dealt with that argument and awarded the plaintiff additional damages to take account of the chance that one or more of the alternative solutions would not be approved and included in the fire safety schedule: Report at [330]. In those circumstances, the plaintiff would have to carry out the rectification work necessary to comply with the applicable deemed-to-satisfy

provision. For each item the Referee assessed the likelihood that the alternative solution would not be "accepted", and awarded additional damages equal to that percentage of the cost of complying with that provision. He assessed that possibility as being not more than 20% with respect to items 7, 16 and 23 and less than 10% for items 1 and 10/11: Report at [332], [334], [335], [336].

51. It is to be noted that these findings are not that there is, or is at least, a 10 or 20% chance that any particular alternative solution will not be approved and included in the fire safety schedule. The finding in each case is of a possibility that is not more than 10 or 20%.

52. In this application, the plaintiff submits that there is no evidence supporting these assessments; that on the evidence all that can be said is that there is a doubt that any particular solution will be accepted; and that by reason of that doubt, the Referee erred in assessing damages as the cost of pursuing alternative solutions. In oral argument the plaintiff's counsel described these percentages as "plucked... out of thin air".

53. In response the defendants point out that the experts agreed that the work considered "necessary to achieve" compliance with the BCA was that involved in the pursuit of the proposed alternative solutions and that there is no evidence that any of those solutions will not be, or is unlikely to be, accepted by any relevant authority. Whilst the defendants do not challenge the adoption of the part of the Report awarding those additional damages, they contend that the fact of the Referee's assessment said to support that award, does not justify the rejection of his earlier conclusion as to the basis on which damages should be assessed.

54. It is fundamental that the purpose of an award of damages for breach of contract is to place the innocent party, so far as money can, in the same situation, with respect to damages, as that party would have enjoyed if the contract had been performed: *Robinson v Harman* (1848) 1 Ex 850 at 855 (Parke B); 154 ER 363 at 365 . Where there has been a breach of a building contract, the prima facie measure of loss is "the amount required to rectify the defects complained of and so give to [that party] the equivalent of a building ... which is substantially in accordance with the contract": *Bellgrove* at 617 .

55. Had there been performance of the building contract in relation to the items in question here, three things would have followed. First, that building work would have complied with the BCA, either because it was in accordance with a deemed-to-satisfy provision or an alternative solution which had been proposed in the statement forming part of the plans and specifications for the building work (see [16] above). It is to be noted that at a time before any work is commenced, the certifying authority has to be satisfied that the work as proposed "will comply" with the requirements of the BCA (see [15] above). That is so even if an alternative solution is proposed.

56. Secondly, the fire safety measures to be implemented in the building as proposed, and as built, would have been the same and in accordance with the fire safety schedule issued with the construction certificate (EPA Reg, reg 168(1)). Thirdly, the final fire safety certificates issued at the time of the final occupation certificate would have addressed the same fire safety measures (EPA Reg, regs 153(1), 170).

57. In other words, had the contract been performed the plaintiff would have had a building that complied with the BCA and a fire safety schedule that recorded the fire safety measures adopted in its construction.

58. Payment to the plaintiff of the amount required to formulate, assess and give effect to the relevant alternative solutions would not put it in the same position, with respect to damages, as if the contract had been performed if there is a realistic possibility that any solution will not be determined to comply with the relevant Performance Requirements, or that the council or other certifying authority will not accept that is so.

59. In my view the evidence before the Referee justified a finding in relation to the building work which is the subject of items 1, 7, 10/11, 16 and 23, that it complies with the relevant Performance Requirement and that there is no apparent or suggested reason why the council or any other certifying authority would reach any different view. The relevant evidence is that of Mr Grubits, and Mr Whitton's agreement in their joint report that each of those solutions was a "suitable method" of achieving compliance with the BCA. Although Mr Grubits' evidence was that he did not have the C10 engineering qualification necessary for the preparation of the Fire Engineering Report, he was a qualified and experienced fire engineer.

60. Mr Grubits' evidence as to his qualifications and experience included:

> I am an internationally recognised expert in fire safety, a practising fire-safety engineer competent on the subject of fire safety applied to the subject building from both a BCA Deemed-to-Satisfy and performance-based perspective. I pioneered the introduction of fire safety engineering in Australia, developing the methodology and tools whilst employed by CSIRO to manage their Fire Science & Technology Centre. The centre undertook both research and testing of fire safety systems and products for industry.

61. The Referee observed at [154]:

> … [i]t was clear from [Mr Grubits'] evidence at the hearing that he was knowledgeable both as a scientist in the experimentation and testing undertaken for or related to the drafting and development of the relevant parts of the BCA and the *Australian Standards* and as a fire safety engineer in the application of fire safety compliance as required by the BCA to buildings generally.

62. As to Mr Whitton's understanding of the fire engineering concepts which support the requirements of the BCA, the Referee recorded at [156]:

> [H]is lack of specialisation in fire engineering was evident during cross-examination on some of the issues on which there was disagreement. In other cases, it was clear that [Mr] Whitton deferred to the specialist knowledge and expertise of [Mr] Grubits in the interpretation of the BCA.

63. Mr Grubits' evidence was that in relation to each of these five items, the as-built work satisfied the relevant Performance Requirement. His conclusion and unqualified opinion was that the preparation of a further Fire Engineering Report would, with respect to these and other items, make the building compliant with the BCA. Mr Whitton's evidence was to the same effect. And, as the defendants submit, there was no evidence pointing to any reason why the council or other certifying authority would not accept that to be the position and act accordingly.

64. The fact that an interim occupation certificate had been issued was consistent with there being no obvious respect in which the building did not comply with the Performance Requirements of the BCA. Whilst the issue of that certificate did not constitute an assessment that any of the proposed alternative solutions complied with those requirements, the certificate included a statement that a final fire safety certificate had been issued. Mr Grubits' evidence confirmed that such a certificate had been issued. It could not have been issued unless each of the fire safety measures specified in the fire safety schedule had been assessed by a qualified person and found to be capable of performing to the required standard (EPA Reg, reg 170).

65. For the purpose of deciding whether to adopt the Referee's assessment of damages, I make the finding in [59] above. To the extent that it is inconsistent with the findings made by the Referee at [332]-[337], I do not adopt those findings. They are as the plaintiff submits not supported by the evidence.

66. I should at this point address the second argument made by the plaintiff as to why the Referee erred in assessing damages by reference to the cost of alternative solutions. The argument proceeds as follows. First, that the contract and statutory warranties required not only that the work comply with the requirements of the BCA, but also that it do so in the manner stated in the plans and specifications accompanying the application for the construction certificate (see [16] above). Secondly, that those plans and specifications indicated how the builder proposed to meet the BCA requirements in relation to the five items now said to be capable of complying by means of an alternative solution. If no alternative solution was originally proposed, the work was taken to be complying by means of a deemed-to-satisfy provision. Thirdly, that the as-built work does not comply with any originally proposed alternative solution or deemed-to-satisfy provision. Finally, that the work necessary to produce contractual conformity is that which achieves compliance with the BCA in the manner originally proposed.

67. In oral argument the plaintiff was unable to say what the proposed building solution was. Nor was any attempt made to develop this argument by reference to the "plans and specifications set out in the contract" (which were not in evidence before the Referee), the terms of the contract or any relevant statutory provisions. The more fundamental reason why the argument must be rejected is that the parties accepted in the way the issues were formulated in the final Scott Schedule that work which produced contractual conformity was work that complied with the Performance Requirements of the BCA, as distinct from its deemed-to-satisfy provisions, and the experts and the Referee proceeded on that basis.

68. In what follows I deal with the specific arguments made concerning the five items, and the remaining item 9.

Item 1: Smoke detectors in fire stairs

69. The asserted defect was that there was only one smoke detector installed (on Level 8) in the fire isolated stairwell of the building. The relevant deemed-to-satisfy provision required smoke detectors at each floor level having access to the stairwell: Report at [160]. Mr Grubits accepted that there was non-compliance with the deemed-to-satisfy provision. However, he maintained that the smoke detector as installed conformed with Performance Requirement [EP 2.2] of the BCA.

70. Mr Whitton's preference was for a solution which conformed with the deemed-to-satisfy provision, but he accepted that an alternative solution could achieve compliance with the BCA "equally as well" as that provision: Report at [164]. On that basis, the joint report noted that the asserted non-compliance could be addressed by the preparation of an alternative solution, which would involve a C10 qualified fire engineer documenting the reasons why the present arrangements were satisfactory: Report at [162].

71. The Referee concluded at [168]-[169]:

> I note that the experts agree that an 'alternative solution' is appropriate to achieve the Performance Requirements of the BCA and compliance. I find that there is only a '*remote possibility*' of a fire in the stairwell and that the 'alternative solution' is almost certain to be accepted by the certifying authority in this case.
>
> Accordingly, I find that documentation and approval of the 'alternative solution' is the appropriate means for achieving the performance requirements of the BCA. [Emphasis in original]

Item 7: Separation between common property windows

72. The vertical separation between the windows to the western elevation at the ends of the common corridors does not comply with the relevant deemed-to-satisfy provision. The experts were in agreement as to that non-compliance: Report at [196], [197].

73. Mr Whitton identified three methods of rectification. However he also considered that compliance with the Performance Requirements could be achieved by an alternative solution. Mr Grubits' opinion was that the vertical separation between the windows was such that the building still complied with Performance Requirement [CP 2] of the BCA. He accepted that there was a "negligible additional [fire] risk" in adopting the alternative solution, rather than a deemed-to-satisfy measure. But he considered that additional risk would only arise from the accumulation of combustible material near the window: Report at [201].

74. The Referee analysed this evidence at [203], [206] and [208] as follows:

> I note that the Grubits [Report] did not accept that there is a defect. What has been exposed in the Whitton Report is a non-compliance with the DTS requirements of the BCA. Grubits indicated that, in his opinion, because an Occupation Certificate had been issued by the certifying authority, the building had been assessed as meeting the Performance Requirements of the BCA prior to the discovery of this non-compliance with the DTS requirements.
>
> ...
>
> I note that the BCA provides for a non-compliance to be addressed by means of a building specific 'alternative solution' that meets the Performance Requirements of the BCA, but that the 'alternative solution' needs to be documented by a suitably qualified expert and included in the Fire Safety Schedule for the building. Documentation of that 'alternative solution' and approval by the certifying authority, then confirms that the building remains compliant.
>
> ...
>
> I note that discovery of a non-compliance with the DTS requirements of the BCA is not evidence of a defect. If the Performance Requirements of the BCA are met by an 'alternative solution', there is no defect. As noted previously, the present defect is that the 'alternative solution' has not been documented. This will only be a defect requiring rectification if the certifying authority does not accept that the documented 'alternative solution' meets the Performance Requirements of the BCA.

75. Relying on the evidence of Mr Grubits, the Referee concluded that the alternative solution proposed was the appropriate means of addressing the identified non-compliance: Report at [210]-[211].

76. In so concluding the Referee correctly identified the breach of contract as being that the building did not comply with the BCA because as built, it did not satisfy Performance Requirement [CP 2]. To make it comply, the alternative solution had to be formulated and assessed. The Referee also correctly concluded that the issue of the occupation certificate did not address or satisfy the assessment requirements in the BCA (see [A.09] at [17] above).

Item 9: Level 8 fire separation

77. In the roof-space above the units on level 8, the steel framing members passed through the internal or bounding walls to the units without any fire protection treatment of that steelwork where it penetrated the walls: Report at [221], [223]. The dispute between the experts was whether the deemed-to-satisfy provisions for Performance Requirement [CP 3] applied to that steelwork and required that it be treated. If not, the steelwork and bounding walls were otherwise in accordance with the deemed-to-satisfy provision.

78. Mr Grubits' opinion was that the provision did not apply because the steel members were not "combustible building elements" within cl 3.1(c)(iii) of Specification C1.1 of the BCA. It followed

that there could be crossings of that kind in those walls: Report at [233]-[239]. Mr Whitton maintained that fire-rating treatment of the steelwork penetrating the bounding walls was necessary to maintain the fire-rating of the wall: Report at [232].

79. The Referee concluded at [244]-[245]:

> I have considered the definitions and clauses which have been cited and the arguments regarding compliance and prefer the evidence of Grubits, who demonstrated his understanding of the applicable fire engineering behind the BCA provisions and the intent of the clauses. I find that the structural steelwork penetrations comply with the DTS requirements set out in the relevant clauses of the BCA.
>
> I find that, where these locations have been shown to occur, there is no requirement for any protection of the non-combustible steelwork where it crosses or penetrates the bounding walls of the units.

80. The plaintiff appears to take issue with the Referee's conclusion that the as-built steelwork penetrations of these walls complied with the deemed-to-satisfy provisions.

81. The Referee accepted Mr Grubits' evidence as to the interpretation and application of cl 3.1(c)(iii). The plaintiff's argument does not explain why he erred in doing so or in proceeding on the basis that the steelwork was not combustible. The Referee's conclusions with respect to item 9 should be adopted.

Items 10/11: Stairs from carpark

82. The stairs leading from the car park in Blocks 2A and 2B are said to be non-compliant because, as a path of exit, they are less than one metre wide. The Referee observed that the width of the enclosed stairwells exceeds one metre but that, because of the handrail attached to the wall, the unobstructed width of each is less than one metre: Report at [251]. The experts agreed that an alternative solution should be prepared addressing that reduced width: Report at [252]-[255].

83. The Referee found that the "Performance Requirement of the firestairs… is not impaired by the presence of the handrail": Report at [264]. The shortfall in width was small and a handrail could be helpful. He also observed that the damages claimed by the plaintiff (on the basis that the deemed-to-satisfy provision applied) were unreasonable and that in claiming them, the plaintiff was relying on a 'technical breach': Report at [267].

Item 16: Fire wall penetrations

84. The fire-rated shaft wall that separates the residential units from the common property service shafts is penetrated by conduits serving the air-conditioning equipment. The joint report recorded the experts' agreement that those penetrations would be covered by the proposed alternative solution for small gaps: Report at [283].

85. On the basis of that consensus, the Referee concluded at [286]:

> I note that, notwithstanding Whitton's stated preference for compliance with the DTS requirements, the experts agree that an 'alternative solution' is appropriate to achieve the Performance Requirements of the BCA and compliance.

86. Contrary to the plaintiff's submission, there was no "error of principle" in the Referee accepting that the agreed alternative solution should be adopted.

Item 23: Unit 704 bathroom mechanical ventilation shaft

87. Mr Grubits accepted that there is an opening of the shaft penetration of approximately 20cm, but considered it not to be significant: Report at [299].

88. In relation to this item, the Referee observed at [300]-[302]:

> The plaintiff submits that had consent been sought in respect of all the various 'alternative solutions' now proposed prior to the construction of the building they were unlikely to have been approved. I note that this submission is speculative and that there is no evidence before me that this is likely to be the case.
>
> The plaintiff concedes that even if that submission is correct, at the end of the day, the Owners bargained for a particular product not an 'alternative solution' and the defendants should not be permitted to circumvent their liability to the plaintiff in this way and in a manner which is theoretical and uncertain.
>
> I note that, inter alia, the Owners purchased buildings that were in accordance with the specifications, certified as fit for occupation with all the required documentation and warranties. If there is demonstrated non-compliance with the Performance Requirements of the BCA, the defendants are liable and the Owners will recover damages based on the evidence.

89. The plaintiff submits that this conclusion should not be adopted because it "does not make sense".

90. The Referee's further comments at [335] of his Report make clear his conclusion and reasoning with respect to this item. He considered the alternative solution for small gaps should apply. This accords with how the joint report also deals with the same item.

91. The defendants have been successful in relation to their arguments advanced for the adoption of the contested parts of the Report. They have not taken issue with the adoption of [332]-[337] of the Report or the award of the additional $22,000 by way of damages.

92. It follows that there should be judgment for the plaintiff against the first and second defendants in an amount which is the sum of $314,255.45 and interest on that amount, calculated from 22 August 2015 to the date of judgment in accordance with Practice Note SC Gen 16.

93. Accordingly, I make the following orders:

    1. Order that the Referee's Report dated 21 August 2015, with the exception of paragraph [357], be adopted, subject to the following:

        1. In support of the Referee's conclusions at [169], [212], [268] and [287], and that the damages for item 23 should be assessed by reference to the cost of pursuing the small gaps alternative solution, I make the additional finding in [59] of these reasons.

        2. The Referee's findings in [332]-[337] are adopted only to explain the way in which he reached the conclusions in those paragraphs, which are not otherwise challenged by the defendants.

    2. Dismiss the plaintiff's notice of motion filed 24 September 2015.

    3. Otherwise dismiss the defendants' notice of motion filed 25 September 2015.

    4. Direct the parties within 7 days to lodge with my Associate, Short Minutes of Order which provide for the entry of judgment for the plaintiff in accordance with these reasons and which address the costs of the proceedings, including those of the reference and the adoption proceedings. If the parties cannot agree on the form of these orders, each within a further 7 days should submit the form of orders for which it contends, together with written submissions (not exceeding 4 pages) supporting the orders contended for. The question of the appropriate orders will then be decided on the papers.

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Decision last updated: 02 May 2016