Court of Appeal
Supreme Court

New South Wales

Case Name:	Rialto Sports Pty Limited v Cancer Care Associates Pty Limited; CCA Estates Pty Limited; Davjul Holdings Pty Limited; Armmam Pty Limited
Medium Neutral Citation:	[2022] NSWCA 146
Hearing Date(s):	1 June 2022
Date of Orders:	10 August 2022
Decision Date:	10 August 2022
Before:	Bell CJ at [1] Macfarlan JA at [3] Gleeson JA at [4]
Decision:	CA2022/3420, 3426, 3432, 3439 (1) Appeal allowed in part. (2) Set aside orders 1 and 2 made by Curtis ADCJ on 9 December 2021 in each proceeding in the District Court: 2018/114952, 2018/115009, 2018/115043, 2019/91017. (3) In lieu, pursuant to Uniform Civil Procedure Rules 2005 (NSW), r 20.14, refer to a referee as agreed by the parties within 21 days or, failing agreement, to a referee as determined by the Court for enquiry and report the matter in the Schedule below. (4) Direct that (without affecting the powers of the Court as to costs) the parties be jointly liable to the referee for the fees payable to him/her in the first instance. (5) Direct that the parties deliver to the referee

forthwith a copy of this order together with a copy of Division 3 of Part 20 of the UCPR.

(6) Direct that:

(a) subject to subpars (b) and (c) below, the provisions of Pt 20, r 20 shall apply to the conduct of proceedings under the reference;

(b) the reference will commence on 1 September 2022 unless otherwise ordered by the referee;

(c) the referee consider and implement such manner of conducting proceedings under the reference as will, without undue formality or delay, enable a just determination to be made including, if the referee thinks fit:

(i) the making of inquiries by telephone;
(ii) site inspection;
(iii) inspection of plant and equipment; and
(iv) communication with experts retained on behalf of the party;

(d) the evidence before the referee is to be the evidence received by the District Court, and the parties are bound by the rulings made at trial by Curtis DCJ and by any ruling made by the Court of Appeal concerning the admissibility of Mr Madden's evidence on quantum;

(e) for the avoidance of doubt, there is to be no cross-examination of any expert, irrespective of whether the expert was cross-examined at the trial before Curtis DCJ;

(f) the referee submit the report to the Court in accordance with Pt 20 r 23 addressed to the Court of Appeal Registrar on or before 20 October 2022.

(7) Amendments to the Schedule, whether by agreement or on a contested basis, are to be the subject of an order made by the Court.

(8) If for any reason the referee is unable to comply with the Order for delivery of the report to the Court by the date in this Usual Order for Reference, the referee is to provide to the Court of Appeal Registrar an Interim Report setting out the reasons for such inability and an application to extend the time within which to deliver the report to the Court to a date when the referee will be able to provide the report.

(9) Grant liberty to the referee or any party to seek directions with respect to any matter arising in proceedings under the reference upon application made on 24 hours' notice or such less notice ordered by the Court.

(10) Reserve costs of the proceedings in this Court and the District Court for further consideration.

(11) Stand the proceedings over before the Registrar for further directions on 31 October 2022.

Catchwords:

CONTRACTS – construction – whether vendor's covenant to construct building in a proper and workmanlike manner was only a "best endeavours" obligation – whether vendor is liable under covenant for incomplete or defective work by builder – where covenant did not merely require compliance with physical description of the building according to approved plans

CONTRACTS – construction – whether good workmanship covenant merged on completion – absence of express statement that the covenant survived completion – primary obligation to convey title merged upon completion – nature of subject matter of secondary obligation as to good workmanship – where performance of covenant could not be investigated prior to completion – where occupation certificate is not determinative of performance

CONTRACTS – damages – whether lot owners can claim damages in respect of proportionate share of cost to rectify common property – where damage to

common property is infringement of lot owner's proprietary interest in common property as equitable tenant in common – whether lot owners can recover costs of rectification where works have not been undertaken

CONTRACTS – assignment – whether assignment of chose in action was effective – whether assignee had genuine, substantial pre-existing commercial interest in the suit – whether claim is time barred where plaintiff substituted – where effect of substitution order under UCPR, r 6.32 placed substituted plaintiff in same position as party replaced

APPEAL – orders on appeal – building case – whether appropriate relief is remitter for retrial or reference out to referee – where reference out is the most efficient and timely option

Legislation Cited:

Environmental Planning and Assessment Act 1979 (NSW), s 109C
Strata Schemes (Freehold Development) Act 1973 (NSW)
Strata Schemes Management Act 1996 (NSW)
Strata Schemes Development Act 2015 (NSW), s 28
Strata Schemes Management Act 2015 (NSW), ss 20, 74, 106
Rules of the Supreme Court 1971 (WA), rr 6, 7
Uniform Civil Procedure Rules 2005 (NSW), rr 6.20, 6.24, 6.28, 6.30, 6.32, 20.14

Cases Cited:

APT Finance Pty Limited v Bajada [2008] WASCA 73
Australian Conference Association v Carter [1988] ANZ ConvR 516; (1988) NSW ConvR 55-435; BC8700959
Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99; [1973] HCA 36
Beale v Government Insurance Office of New South Wales (1997) 48 NSWLR 430
Bellgrove v Eldridge (1954) 90 CLR 613; [1954] HCA 36
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185; [2014] HCA 36
Carre v Owners' Corporation Strata Plan 53020 (2003)

58 NSWLR 302; [2003] NSWSC 397
Cavanagh v Manning Valley Race Club Ltd [2022] NSWCA 36
Central Coast Council v Norcross Pictorial Calendars Pty Ltd (2021) 391 ALR 157; [2021] NSWCA 75
Chorlton v Dickie (1879) 13 Ch D 160
Churnin v Pilot Developments Pty Ltd [2003] NSWCA 391; (2003) 11 BPR 21,603
Dean v Gibson [1958] VR 563
Eastmark Holdings Pty Ltd v Kabraji [2013] NSWSC 1763; (2013) 97 ACSR 161
Ellis v Torrington [1920] 1 KB 399
Equuscorp Pty Limited v Haxton (2012) 246 CLR 498; [2012] HCA 7
Foss v Harbottle (1843) 2 Hare 461, 67 ER 189
Fu v Bucasia [2014] NSWSC 325; (2014) 17 BPR 32,885
Hadley v Baxendale (1854) 9 ExCh 341
Hazard Systems Pty Limited v Car-Tech Services Pty Limited (in liq) [2013] NSWCA 314
Houghton v Immer (No 55) Pty Ltd (1997) 44 NSWLR 46
Lawrence v Cassel [1930] 2 KB 83
National Mutual Property Services (Australia) Pty Limited v Citibank Savings Limited (1995) 132 ALR 514
Marex Financial Ltd v Savilleja [2021] AC 39
Pollard v RRR Corporation Pty Limited [2009] NSWCA 110
Prudential Assurance Co Ltd v Newman Industries (No 2) [1982] Ch 204
Rickard Constructions Pty Limited v Rickard Hails Moretti Pty Limited (2004) 188 FLR 278; [2004] NSWSC 1041
Simply Irresistible Pty Ltd v Samuel B Couper [2010] VSC 601
Soulenazis v Dudley (Holdings) Pty Limited (1987) 10 NSWLR 247
Svanosio v McNamara (1956) 96 CLR 186; [1956] HCA 55
Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272; [2009] HCA 8
Trendtex Trading Corporation v Credit Suisse [1982] AC 679

	Trentelman v The Owners – Strata Plan No 76700 (2021) 106 NSWLR 227; [2021] NSWCA 242 Woodings v Stevenson [2001] WASC 174 Woolcock Street Investments v CDG Pty Limited (2004) 216 CLR 515; [2004] HCA 16 Zaccardi v Caunt [2008] NSWCA 202; (2008) 15 BPR 28,403
Texts Cited:	Prof Peter Butt, The Standard Contract for Sale of Land in New South Wales (2nd ed, 1998, LBC Information Services)
Category:	Principal judgment
Parties:	2022/3420 Rialto Sports Pty Limited (Appellant) Cancer Care Associates Pty Limited (Respondent) 2022/3426 Rialto Sports Pty Limited (Appellant) CCA Estates Pty Ltd (Respondent) 2022/3432 Rialto Sports Pty Limited (Appellant) Davjul Holdings Pty Limited (Respondent) 2022/3439 Rialto Sports Pty Limited (Appellant) Armmam Pty Limited (Respondent)
Representation:	Counsel: G A Sirtes SC / J W Pokoney (Appellant) D S Weinberger / R A McEwen (Respondents) Solicitors: Brown Ward King Pty Limited (Appellant) Grace Lawyers Pty Limited (Respondents)
File Number(s):	2022/3420, 3426, 3432, 3439
Decision under appeal:	
Court or Tribunal:	District Court of New South Wales
Jurisdiction:	Civil

Date of Decision:	9 December 2021
Before:	Curtis ADCJ
File Number(s):	2018/114952, 2018/115009, 2018/115043, 2019/91017

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

Rialto Sports Pty Ltd owned and developed a four-storey commercial strata building consisting of 27 lots at the Kingsway, Miranda. In early to mid-2014, prior to completion of the building, Rialto entered into “off the plan” contracts of sale for four lots with SRProp Investments No 1 Pty Ltd (lot 1), Cancer Care Associates Pty Ltd (lots 12, 25) and Davjul Holdings Pty Ltd (lot 18). The strata plan was registered on 25 June 2014, and the building completed in October 2014, with a final occupation certificate granted on 2 October 2014. In September 2015, Rialto entered into contracts for the sale of lots 7 to 10 with Armmam Pty Ltd. Rialto engaged SX Projects as the builder, who went into liquidation in January 2016.

In April 2018, the four lot owners commenced separate proceedings against Rialto in the District Court seeking damages for the costs of rectifying alleged defects to the common property, principally relating to the use of combustible aluminium cladding on the northern and southern facades, and defective waterproofing on the southern façade. Armmam also sought damages for specific defects to its individual lots. The claims against Rialto were exclusively in contract, relying upon breaches of special conditions in the respective “off the plan” contracts, where each contract contained a covenant that the building will be constructed in a proper workmanlike manner. Armmam relied upon a separate special condition in its contract.

In May 2020, SRProp sold lot 1 to CCA Estates Pty Ltd which sale completed on 1 July 2020. SRProp and CCA Estates entered into a deed of assignment on 1 July 2020 by which SRProp assigned "choses in action" to CCA Estates, including causes of action in proceedings against Rialto. On 14 December 2020, orders were made in the District Court removing SRProp as a plaintiff and substituting CCA Estates as plaintiff.

The main issues on appeal were:

(1) Whether the judge failed to give sufficient reasons for his decision, including failed to address Rialto's key arguments.

(2) Whether Rialto's covenant that the building shall be constructed in a proper and workmanlike manner was only a "best endeavours" obligation.

(3) Whether the good workmanship obligations merged on completion of the respective contracts for sale.

(4) Whether lot owners have standing to sue Rialto and whether they have suffered loss.

(5) Whether the assignment to CCA Estates was effective, and if so, whether CCA Estates' claim was time barred.

(6) The appropriate form of relief.

Held (per Gleeson JA, Bell CJ and Macfarlan JA agreeing), allowing appeal in part:

As to issue 1:

The lot owners properly conceded that the appeal should be allowed in part because the trial judge's reasons were inadequate and failed to address several key issues: [57], [59]-[62].

Pollard v RRR Corporation Pty Limited [2009] NSWCA 110; *Cavanagh v Manning Valley Race Club Ltd* [2022] NSWCA 36 applied.

Soulenazis v Dudley (Holdings) Pty Limited (1987) 10 NSWLR 247; *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430 referred to.

As to issue 2:

Rialto's construction of the special conditions as only a "best endeavours" obligation cannot be accepted: [70]. Although the contracts for sale did not require Rialto to undertake the building work itself, Rialto remained liable under its warranty of good workmanship for work done by the builder to whom it sub-contracted the work: [72]. In circumstances where Rialto did not owe any contractual obligations to the owners' corporation, it was commercially sensible for the purchasers to obtain a warranty from Rialto as to good workmanship of the building as a whole: [79].

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99 at 109 (Gibbs J); [1973] HCA 36 applied.

Churnin v Pilot Developments Pty Ltd [2003] NSWCA 391; (2003) 11 BPR 21,603 distinguished.

As to issue 3:

The absence of an express statement that the special conditions as to good workmanship survive completion is not determinative of the intentions of the parties: [84].

The CCA, SRProp and Davjul contracts dealt with two obligations. The primary obligation, the promise by Rialto as vendor to convey title in the identified lot in the unregistered strata plan to the purchaser, necessarily merged in the transfer of title: [97]. The secondary obligation, the promise by Rialto as vendor that it would construct the building in in a proper and workmanlike manner, was intended to survive completion: [98]. The performance of this obligation is not something the purchaser could investigate prior to completion: [98].

Svanosio v McNamara (1956) 96 CLR 186; [1956] HCA 55; *Zaccardi v Caunt* [2008] NSWCA 202; (2008) 15 BPR 28,403; *Fu v Bucasia* [2014] NSWSC 325; (2014) 17 BPR 32,885; S*imply Irresistible Pty Ltd v Couper* [2010] VSC 601; *Lawrence v Cassel* [1930] 2 KB 83; *Dean v Gibson* [1958] VR 563; *Australian Conference Association v Carter* [1988] ANZ ConvR 516; (1988) NSW ConvR 55-435 referred to.

As to issue 4:

The interest of an individual lot owner in the common property is an equitable interest as tenant in common with the other lot owners: [106]. Damage to common property is an infringement of the lot owner's proprietary interest, the consequence of which is a diminution in the value of the lot owner's interest in the common property. The lot owners have standing to claim damage for their proportionate share of the cost of rectifying damage to the common property: [110].

Lot owners can recover the cost of rectification irrespective of whether the remedial works have not yet been undertaken by the owners corporation or the lot owners could never undertake the works themselves: [111]. The lot owner's claim is not a case of reflective loss by analogy with such corporations cases: [116].

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185; [2014] HCA 36; Trentelman v The Owners – Strata Plan No 76700 (2021) 106 NSWLR 227; [2021] NSWCA 242; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; [2009] HCA 8 applied.

Houghton v Immer (No 55) Pty Ltd (1997) 44 NSWLR 46; *Bellgrove v Eldridge* (1954) 90 CLR 613; [1954] HCA 36; *Central Coast Council v Norcross Pictorial Calendars Pty Ltd* (2021) 391 ALR 157; [2021] NSWCA 75 referred to.

Carre v Owners' Corporation Strata Plan 53020 (2003) 58 NSWLR 302; [2003] NSWSC 397; *Prudential Assurance Co Ltd v Newman Industries (No 2)* [1982] Ch 204; *Marex Financial Ltd v Savilleja* [2021] AC 39 distinguished.

As to issue 5:

The assignment was effective. At the date of the deed of assignment, CCA Estates had a sufficient interest in the suit brought by SRProp against Rialto, having completed the purchase of lot 1 from SRProp that day, and also had a genuine and substantial pre-existing commercial interest in the suit, having entered into the contract for sale with SRProp on 20 May 2020: [129].

Substitution of CCA Estates for SRProp as plaintiff placed CCA Estates in the same position as SRProp and did not raise any limitation defence: [138]-[139], [141].

Equuscorp Pty Limited v Haxton (2012) 246 CLR 498; [2012] HCA 7; *Woolcock Street Investments* v *CDG Pty Limited* (2004) 216 CLR 515; [2004] HCA 16; Ellis v Torrington [1920] 1 KB 399; *APT Finance Pty Limited v Bajada* [2008] WASCA 73; *Chorlton v Dickie* (1879) 13 Ch D 160 applied.

Hazard Systems Pty Limited v Car-Tech Services Pty Limited (in liq) [2013] NSWCA 314 referred to.

National Mutual Property Services (Australia) Pty Limited v Citibank Savings Limited (No 1) (1995) 132 ALR 514 distinguished.

As to issue 6:

The appropriate relief is an order for a reference out to a referee for inquiry and report under UCPR r 20.14, rather than remitter of the undetermined issues to the District Court for a retrial, given the subject matter of the issues for determination and the likely delay in finalisation of the proceedings in the event of a remitter: [144].

JUDGMENT

1 **BELL CJ:** I agree with the reasons for judgment and orders proposed by Gleeson JA.

2 **MACFARLAN JA:** I agree with Gleeson JA.

3 **GLEESON JA:** In disputes between four lot owners and a landowner/developer of a strata development, the lot owners alleged breach of the special conditions of their respective contracts for sale of land with respect to the construction of the building in a proper and workmanlike manner. The lot owners commenced separate proceedings against the landowner/developer, Rialto Sports Pty Ltd (Rialto), in the District Court which were heard together. Rialto was found liable for damages in the amount of each lot owners proportionate share of the costs to rectify defects in the common property. Judgments were entered in favour of the lot owners in the following amounts:

- Cancer Care Associates Pty Limited (CCA) - $624,126;
- Davjul Holdings Pty Limited (Davjul) - $74,531.53;
- Armmam Pty Limited (Armmam) - $114,351; and

- CCA Estates Pty Limited (CCA Estates) - $581,709.
- (CCA Estates is the assignee of the original lot owner, SRProp Investments No 1 Pty Ltd (SRProp).)

4 By its appeals, Rialto contends that the primary judge erred in awarding damages and should have dismissed all claims against it. Insofar as Rialto contends that asserted errors by the primary judge should have led to the dismissal of the respondents' claims, I have concluded that those grounds of appeal have not been made out.

5 Insofar as Rialto contends that the primary judge failed to give adequate reasons for his decision, including failed to consider Rialto's submissions on several key issues relating to the alleged breaches of contract and the extent of any required rectification works, the respondents properly conceded that this ground was made out in each appeal.

6 The appeals should be allowed, in part, and the judgments and costs orders below set aside. Rather than remit the proceedings to the District Court for a retrial of the undetermined issues, it is preferable in the circumstances of this case for these issues to be referred to a referee for inquiry and report under Uniform Civil Procedure Rules 2005 (NSW) (UCPR), r 20.14. The terms of the proposed order for reference are addressed below.

Background

7 Rialto owed and developed land at the Kingsway, Miranda on which was constructed a four-storey commercial strata building consisting of 27 lots. Rialto engaged SX Projects Pty Ltd as the builder. The strata plan for the building was registered on 25 June 2014 as SP 89831. The building was completed in around October 2014, with a final occupation certificate granted on 2 October 2014. The builder went into liquidation in January 2016.

8 Prior to completion of the building, Rialto entered into contracts for sale in respect of four of the 27 lots within the building, relevantly: SRProp dated 4 February 2014 (lot 1), CCA dated 27 June 2014 (lots 12 and 25); and Davjul undated in 2014 (lot 18).

9 It is common ground that each of these contracts was "off the plan" in the sense that the contracts were entered into before construction of the building

was completed. Each of the contracts contained special conditions as to (a) the date for completion, (b) the construction and completion of the building in a proper and workmanlike manner in accordance with the plans and specifications approved by Sutherland Shire Council (the Council), and (c) the defects liability period. These special conditions are referred to in more detail below at [22]ff.

10 The terms of the development consent approved by the Council relevantly included a prescribed condition that the development must be carried out in accordance with the provisions of the Building Code of Australia (General Conditions, cl 2).

11 The sales of lot 1 to SR Prop and lot 18 to Davjul both completed on 18 July 2014. The sale of lots 12 and 25 to CCA completed on 21 July 2014. In each case, completion occurred prior to the issue of an occupation certificate in respect of those lots; that did not occur until 2 October 2014.

12 After completion of the building, Rialto entered into a contract for the sale of lots 7-10 with Armmam dated 3 September 2015. This contract was completed on 16 November 2016.

13 The four lot owners – SRProp, CCA, Davjul and Armmam – collectively owned eight of the 27 lots within the building, representing 49.01 per cent of the total unit entitlements. In April 2018, these lot owners commenced separate proceedings against Rialto in the District Court seeking damages for the costs of rectifying alleged defects to the common property, principally relating to the use of combustible aluminium cladding on the northern and southern facades, and defective waterproofing on the southern façade. Armmam also sought damages for specific defects to its individual lots.

14 The pleaded claims against Rialto were exclusively in contract, relying upon breach of the special conditions in the contracts for sale. A claim in negligence was abandoned. Neither the owners' corporation, nor the remaining lot owners, were joined as either a plaintiff or a defendant to the four proceedings.

15 After the commencement of its proceedings, SRProp entered into a contract for the sale of lot 1 to CCA Estates on 20 May 2020, which was completed on

1 July 2020. Also on 1 July 2020, SRProp entered into a deed of assignment with CCA Estates by which it assigned to CCA Estates certain “choses in action” which were widely defined to include the causes of action in the proceedings brought by SRProp against Rialto. On 14 December 2020, orders were made in the District Court removing SRProp as a plaintiff and adding CCA Estates as plaintiff in substitution for SRProp. The orders were in the following terms:

> 1 That SRProp investments No 1 Pty Limited be removed as plaintiff in these proceedings.
>
> 2 That CCA Estates Pty Limited be added as a plaintiff n these proceedings in substitution for SRProp investments No 1 Pty Limited.

16 Earlier, on 16 September 2019 the Council issued a notice to SRProp, copied to the strata manager, stating that it was investigating the fire cladding of the building, following the building product use ban issued by the Commissioner for Fair Trading on 10 August 2018, and requesting that a report be prepared by a fire safety engineer in respect of the cladding.

17 Following an inspection of the building by a fire engineer in December 2019, the owners’ corporation received a report from Cladding Compliance Australia on 7 February 2020 indicating that the cladding contained a polyurethane content of 87 per cent and recommended removal and replacement of the cladding in its entirety.

18 On 10 August 2020, the owners’ corporation imposed a special levy of $660,000 for the costs to fund the removal and replacement of the cladding. On 17 September 2020, the Council issued a notice of intention to give a fire safety order, having determined that the building was in need of upgrade works for the purposes of ensuring or promoting adequate for safety.

19 On 20 October 2020, the owners corporation entered into a contract with Structural Building Maintenance Pty Ltd for the removal and replacement of the cladding. The four lot owners (which by that time included CCA Estates in place of SRProp) paid to the owners corporation their proportionate share of the special levy: CCA - $149,556 (lots 12 and 25); Davjul - $17,850.60 (lot 18); CCA Estates - $139,392 (lot 1); and Armmam - $49,005 (lots 7-10).

20 At trial, the lot owners' claims against Rialto for damages for defects in the common property were quantified as $1,353,304. Armmam's claim also included an amount of $11,058 for defects attributable to its individual lots. It is common ground that the judge failed to deal with this latter claim by Armmam.

21 Before referring to the judge's reasons it is necessary to identify the special conditions of the contracts.

Relevant terms of the contracts

CCA contract – lots 12 and 25

22 Special Conditions 1 and 7 of the CCA contract relevantly provided:

> 1. The building in which the said unit is situated is in the course of construction and shall be constructed by the vendor in a proper workmanlike manner in accordance with the plans and specifications approved by the Sutherland Council. …
>
> …
>
> 7. The Vendor must:
>
> > (a) subject to a special condition (c) hereof, cause Lot 25 on level 3 of the plan of subdivision, to be delivered up to the Purchaser as a "raw concrete shell" comprised [sic] of concrete walls, floors, ceilings with ducting from the building air conditioning unit to that lot; and for the common property to be finished as specified in the Schedule of Finishes annexed hereto and marked "D"; and
> >
> > (b) subject to special condition (d) hereof cause to be installed in Lot 25 on level 3 of the plan of subdivision and the common proper [sic] the items (if any) specified in the Schedule of Finishes;
> >
> > (c) The Vendor reserves the right without being required to give any notice to the Purchaser to alter any finish specified in the Schedule of Finishes to another finish of equivalent quality.
> >
> > (d) The Vendor reserves the right without being required to give any notice to the Purchaser to alter any item to be installed in the property or the common property as specified in the Schedule of Finishes to another item of equivalent quality. …

23 Special Condition 11 dealt with completion. The due date for completion of the contract was the later of (a) 28 days from the date of the contract, or (b) 21 days from the date the vendor despatched a notice in writing to the purchaser informing him that the plan of subdivision has been registered, or (c) 21 days after receipt by the purchaser of a copy of the occupation certificate issued in relation to the development.

24 Special Condition 17 dealt with the defects liability period and provided that if the purchaser notifies the vendor in writing of any Defects within a period of six months after completion of this contract (and no later), the vendor shall at its costs make good those Defects within a reasonable period of time after the expiration of that period. Special Condition 17(c) required the purchaser on reasonable notice to provide the vendor with access to the property to make good any defects. Special Condition 17(d) provided a dispute resolution mechanism. Special Condition 17(e) provided that this clause shall not merge on completion.

25 "Defects" was defined in Special Condition 17(f) to mean "any defects or faults in the property due to faulty materials or faulty workmanship, excluding normal maintenance, fair wear and tear, minor shrinkage or minor settlement cracks" (**Blue 2/687R**). Rialto correctly accepted in argument that the reference to "property" in the definition of "Defects" in Special Condition 17(f) was to be read as referring to the "property" as that term is defined in cl 1 of the general conditions of the contract ("the land, the improvements, all fixtures and the inclusions, but not exclusions") and did not include common property.

SRProp (lot 1) and Davjul (lot 18) contracts

26 The contracts for sale with SRProp and Davjul were essentially in the same terms.

27 Special Condition 33 dealt with completion and provided:

> **33. Completion**
>
> The completion date of this contract is the later of:
>
> (a) 28 days from the contract date;
>
> (b) 21 days after the day on which the vendor serves notice of the registration of the Strata Plan; and
>
> (c) 14 days after the day on which the vendor serves notice of the Occupation Certificate.

28 Special Condition 34.1 provided that completion is subject to and conditional on the registration of the strata plan and the issue of an Occupation Certificate. "Occupation Certificate" was defined to mean "an interim or final occupation certificate under s 109C of the *Environmental Planning and Assessment Act 1979* (NSW) for the Property". The term "occupation certificate" is described in

s 109C(1)(c) as a certificate that authorises: "(i) the occupation and use of a new building, or (ii) a change of building use for an existing building".

29 Special Condition 30 (Definitions) provided that the term "Property" had the meaning given to it in the standard form contract for sale, where "property" was defined as "the land, the improvements, all fixtures and the inclusions, but not exclusions".

30 Special Conditions 36.1 and 37.1 relevantly provided:

> 36.1 Before Completion the vendor must cause the construction and completion of the Building in a proper and workmanlike manner in accordance with the Development Consent.
>
> …
>
> 37.1 The vendor must use all reasonable endeavours before Completion:
>
> (a) subject to 37.2(a), cause the Property to be finished as specified in the Schedule of Finishes and Fixtures; and
>
> (b) subject to clause 37.2(b), cause to be installed in the Property the items as specified in the Schedule of Finishes and Fixtures.

31 Special Condition 30 contained definitions, including:

- "Building" means that part of the improvements on the Development Site constructed or be constructed, which is the subject of the Strata Plan.
- "Development Site" means identified lots making up the property the subject of the strata development.
- "Development" means the development to be constructed on the Development Site by the vendor, including the Building.
- "Development Consent" means the development consent DA10/1292, as modified by development consent DA12/00119 and development consent DA12/1163 granted by Council in accordance for the Development (as amended from time to time), including any consent the subject of a s 96 Application.

32 The effect of these definitions was that the "Building" as defined in the contracts included the common property of the building.

33 Special Condition 37.3 provided a dispute mechanism in the event of any disagreement in connection with cl 37.2, dealing with changes by the vendor to the Schedule of Finishes and Fixings.

34 Special Condition 38 provided:

> **38. Vendor's obligations to repair**

> 38.1 Before Completion the purchaser may not serve notice of any Defects in the Property other than a Special Fault.
>
> 38.2 The purchaser must serve notice of any Special Fault immediately after the purchaser becomes aware of that defect or fault. The vendor must before Completion repair in a proper and workmanlike manner, at the vendor's expense, any Special Fault of which notice has been served by the purchaser before the Completion Date.
>
> 38.3 The vendor must repair in a proper and workmanlike manner, at the vendor's expense, within a reasonable time after the expiry of the Defects Period, any Defects in the Property (including Special Faults) of which notice is served by the purchaser on the vendor before the expiry of the Defects Period. The purchaser may serve notice of Defects in the Property on no more than two occasions.
>
> 38.4 If there is any disagreement with clause 38.3 either the vendor or the purchaser may refer the disagreement to an Expert Determinator (see clause 70).

35 "Special Fault" was defined in Special Condition 30 to mean:

> **Special Fault** means a structural fault or defect in the Property, which because of its nature requires urgent attention, or may cause danger to persons in the Property or which makes the Property uninhabitable.

36 "Defects" was defined in Special Condition 30. It was given the same meaning as that expression had in the CCA contract: see [25] above. The "Defects Period" was defined to mean the period commencing on Completion and ending on the date three months after Completion: Special Condition 30. Given the definition of "Property" in the Special Conditions (see [29] above), the reference to "Property" the subject of the vendor's obligation to repair "Defects" is to be read as referring to the "property" as defined in cl 1 of the general conditions of the contract for sale and did not include common property

Armmam contract

37 Special Condition 15 of the Armmam contract provided for ten specific items of work to be undertaken to the lots by Rialto and its builder prior to completion:

> 15. The Vendor and the Builder will, in a proper and workmanlike manner and at is own expense, carry out the following work prior to completion:
>
> (a) Replace stained ceiling tiles;
>
> (b) Re-paint stained wall and windowsill linings;
>
> (c) Re-seal joints and flashings where required;
>
> (d) Repair and re-paint cracking to windowsill in third office at eastern end;

(e) Re-fit power points to ducting in 4th office;

(f) Re-paint window infill panels in 4th office;

(g) Re-paint water stains to window mullions;

(h) Replace or repair wall lining where stained;

(i) Rectify water entry to south window sills and repaint;

(j) Ensure re-levelling of floor is sound and will not crack.

The primary judge's reasons

38 The reasons of the primary judge were extremely brief, comprising only eleven pages. Although the contractual provisions upon which each lot owner relied were not identical, the judge only considered the claim by CCA and then adopted the same reasoning when upholding the claims by Davjul, Armmam and CCA Estates, without considering the specific terms of the other contracts for sale.

39 The judge rejected the six defences relied upon by Rialto in answer to CCA's claim for damages measured as its share of the liability to contribute to the cost of repairs to the common property (20.6 per cent): (a) lack of standing to bring an action for a wrong done to the owners' corporation; (b) merger; (c) construction of the special condition; (d) loss or damage is too remote; (e) extent of necessary rectification work; and (f) the failure to join all parties jointly entitled to the same relief as required by UCPR, r 6.20.

40 *Standing*: The judge held at [12] that since CCA has a cause of action in contract, it was unnecessary for CCA to seek relief as an exception to the proper plaintiff rule by analogy to *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189, distinguishing at [10] the decision of Barrett J in *Carre v Owners' Corporation Strata Plan 53020* (2003) 58 NSWLR 302; [2003] NSWSC 397, which held that the proper plaintiff to bring any claim for damage to common property is the owners' corporation itself and not one of the lot owners.

41 *Merger*: The judge found at [18] that the parties cannot have intended that the Special Conditions, including Special Condition 1 (that the building shall be constructed in a proper and workmanlike manner) would merge on completion before the certifier confirmed that the building complied with the development approval in circumstances where the contract for sale was entered on 27 June 2014, and completed on 21 July 2014, which was prior to the date the final

occupation certificate was issued on 2 October 2014. The judge said that such a construction would leave a purchaser without a remedy in respect of breaches of contract causing defects identified by the certifier before certification, patent defects overlooked by the certifier, and latent defects.

42 *Construction of Special Condition 1*: The judge gave three reasons for rejecting Rialto's argument that Special Condition 1 was no more than a promise by Rialto to use its "best endeavours" to achieve the result that the building was constructed in a proper workmanlike manner in accordance with the plans and specifications approved by the Council:

(1) Rialto had the power to appoint a building manager to oversee the work and prescribe elements of its performance and also had contractual rights against the builder not possessed by CCA: at [20];

(2) Special Condition 1 operates to allocate, as between the parties, the risk that the building may prove to be defective: at [21]; and

(3) if the operation of Special Condition 1 was intended to mean "best endeavours" those words would have been used, noting that such language had been used in Special Condition 33: at [23].

43 *"No loss" issue*: The judge gave three reasons for rejecting Rialto's contention that CCA had suffered no loss, if the common property was defective:

(1) CCA had suffered diminution in the value of its property, and a prospective purchaser on notice of the defects and possible levies to repair them will pay less for the property. The judge found that "this is a financial loss proportionate to the unit entitlement which may be expressed as the cost of repairs": at [27];

(2) in the usual course of things, an owners corporation will incur costs to repair defects caused by the vendor's breach of contract and impose levies for this purpose: at [28]; and

(3) it is not to the point that the owners' corporation may never undertake the repairs as CCA has already suffered loss in the diminution of the value in its lots and the proportionate cost to repairs is merely a measure of that loss: at [29].

44 *Southern façade:* Addressing the competing expert evidence concerning damage to the southern façade as a consequence of water ingress, the judge rejected the opinion of Mr Tim Womack, an architectural engineer retained by Rialto, that work undertaken by the builder in September 2015 had sufficiently resolved the problem, and that the minor leaks detected since that time do not represent significant and widespread water ingress: at [31].

45 As to the scope of remedial works, the judge accepted the view of Mr Peter Karsai, a structural engineer retained by the plaintiffs, that the only possible remedy is to address the integrity of the whole façade (at [32]), noting that localised repairs by the builder had not solved the problem: at [37]. The judge concluded that the only reasonable solution was that recommended by Mr Karsai and costed by Mr Madden: at [40].

46 *Joinder of parties:* The judge found that Rialto had not proved that other lot owners are jointly entitled to the same relief as CCA, as their contracts for sale were not in evidence and, in any event, the claims of other lot owners are now time barred and accordingly they are no longer persons jointly entitled to the same relief and may no longer be joined, and it was appropriate to dispense with UCPR, r 6.20: at [42]-[43].

47 *Defences to CCA Estates' claim*: Addressing the separate issues raised by Rialto's separate defences to the claims by CCA Estates, as assignee of the rights of SRProp, the judge found that the assignment of the choses in action was valid since at the time of assignment, CCA Estates had agreed to purchase lot 1 from SRProp and accordingly, CCA Estates had a very real commercial interest in the cause of action adding value to that lot or reducing its liabilities to levies by the owners' corporation: at [55].

48 As to the limitation defence, the judge found that the claim by CCA Estates was not time barred because the order of the Court in December 2020 granting leave to substitute CCA Estates as plaintiff did not add or substitute a new cause of action; rather, the cause of action for breach of contract remained the same: at [58]. Moreover, the effect of UCPR, r 6.32(2) is that CCA Estates stands in the shoes of SRProp, which had commenced its claim within time: at [59].

Overview of the appeals

49 Except where indicated, the issues raised on appeal are common to all appeals.

50 First, there are two issues of contractual construction. One is whether Rialto's covenant in the Special Conditions that the building shall be constructed in a proper and workmanlike manner was only a "best endeavours" obligation, as

Rialto contended. The other is whether these Special Condition merged on completion of the respective contracts for sale. The merger issue does not arise in relation to the Armmam contract.

51 Second, there are issues concerning the lot owners' "standing" to sue Rialto as the vendor and whether the lot owners suffered "no loss".

52 Third, there are issues concerning alleged breaches of contract by Rialto relating to (a) water ingress on the southern façade, (b) defective fire cladding, and (c) the extent of any required rectification works. There are also separate issues concerning alleged defects in the individual lots sold to Armmam in 2015.

53 Fourth, there is an issue concerning the admissibility of the expert reports of Mr David Madden on quantum, relied upon by the lot owners.

54 Fifth, there are discrete issues raised in the CCA Estates appeal concerning the validity of the assignment of the cause of action, and if the assignment is effective, there is an issue whether the claim by CCA Estates was time barred when CCA Estates was joined or substituted as plaintiff in the place of SRProp in December 2020.

55 Sixth, there is an issue whether the judge failed to give sufficient reasons for his decision, including failed to address Rialto's key arguments on the alleged breaches of contract and any required rectification works.

56 It is appropriate first to address the last issue.

Inadequate reasons and failure to address arguments

57 Given the concession by the respondents that the appeals should be allowed in part on these grounds, only brief reasons are required to explain why this concession was properly made.

58 The obligation to give adequate reasons is well-established. The need for transparency in decision-making and what is required in any particular case is discussed in numerous authorities, including: *Pollard v RRR Corporation Pty Limited* [2009] NSWCA 110 at [56], citing *Soulenazis v Dudley (Holdings) Pty Limited* (1987) 10 NSWLR 247 at 260 and *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430 at 444.

59 In the present case, the insufficiency of the judge's reasons is patent. Reference to the following matters will suffice to make the point.

60 First, the judge's unqualified adoption of his reasoning with respect to the CCA contract for the claim by Armmam was inappropriate. No reasons were given for the acceptance of Armmam's claim in relation to defects in its individual lots where Special Condition 15 of the Armmam contract was in a materially different form to the special conditions in the other contracts, and Rialto had raised specific defences to the effect that there was no breach of its much narrower remediation obligations in the Armmam contract.

61 Second, in addressing the scope of the required rectification works for water ingress to the southern façade, the judge rejected the views of Mr Womack and expressed his preference for the views of Mr Karsai without exposing any reasoning for that preference. This Court is left to speculate why the judge did so: *Pollard* at [56].

62 Third, in addressing the claim that the fire cladding was defective, the judge's reasons simply failed to refer to this claim or any evidence adduced on this issue at trial.

63 As observed by Leeming JA (Simpson AJA and N Adams J agreeing) in *Cavanagh v Manning Valley Race Club Ltd* [2022] NSWCA 36 at [24] "[c]oncision in judgments is desirable, but not if it comes at the expense of failing to give adequate reasons". In *Cavanagh*, the reasons were described as "strikingly short", four-and-a-half pages, with respect to a trial worth more than $1 million. Similarly, the reasons of the judge in this case are also strikingly short; 11 pages for a claim worth more than $1.3 million involving a trial of three days with cross-examination of competing experts.

64 Unfortunately, the judge manifestly failed in his judicial task by failing to consider material arguments and relevant evidence on substantial issues, including the fire cladding issue, the southern façade issue and the different terms of the Armmam contract. As Rialto correctly submitted, many of the claims were determined with bald conclusions without appropriate accompanying analysis, including why evidence of one expert had been accepted or rejected.

65 It is common ground that if the appeals fail on the other grounds, then the issues requiring determination are the appropriate rectification approach to the water ingress on the southern facade, the fire cladding issue, the claims by Armmam in relation to defects in individual property lots 7, 8, 9 and 10 and the cost of rectification or replacement of defects. Before considering whether there should be a remitter of the proceedings or a reference out to a referee for an inquiry and report, it is necessary to address the other grounds of appeal which Rialto says provide a complete answer to the respondents' claims.

Construction issues

66 The covenants by Rialto in Special Condition 1 of the CCA contract and Special Condition 36.1 of the SRProp and Davjul contracts are in similar terms. They require the construction of the building by Rialto in a "proper workmanlike manner in accordance with the plans and specifications approved by the Sutherland Council" (Special Condition 1) and in a "proper and workmanlike manner in accordance with the Development Consent" (Special Condition 36.1).

67 Rialto says that its obligation under these special conditions to cause the building to be constructed in a proper and workmanlike manner was as a "best endeavours" obligation only and that obligation merged on completion. This argument was not relied upon by Rialto in relation to the Armmam contract, which as indicated, was entered into after the building work had been completed.

68 It is convenient first to address the nature of Rialto's obligations before turning to the question of merger.

Nature of Rialto's obligation as vendor

69 In support of the narrow characterisation of the Rialto's obligations under the special conditions, Rialto relied essentially upon the following propositions:

(1) the special conditions required Rialto to ensure that the building was constructed prior to completion, but did not require Rialto to undertake the construction itself;

(2) since the building was never to be constructed by Rialto, the obligation on the part of Rialto was to utilise its best endeavours to achieve the stated result, not an absolute obligation to achieve a defect-free

construction of the building by third parties. Reference was made by analogy to *Churnin v Pilot Developments Pty Ltd* [2003] NSWCA 391; (2003) 11 BPR 21,603;

(3) this interpretation is supported by Special Condition 38 of the SRProp and Davjul contracts which provided purchasers with a "narrow" mechanism for rectification of "Special Faults" limited up to the expiration of the "Defects Period";

(4) since the contracts for sale did not convey to the purchasers any part of the common property of the building, it would have been commercially nonsensical for Rialto to provide a warranty or guarantee as to the condition of the common property in favour of each purchaser; and

(5) assuming that Rialto's warranty as to good workmanship was only a "best endeavours" obligation, the mere presence of defects in the building years later did not suffice to establish a breach of this obligation.

70 For the following reasons, Rialto's construction of the special conditions as only a "best endeavours" obligation cannot be accepted.

71 It can be accepted that the contracts for sale did not require Rialto to undertake the building work itself. That follows from the language of the special conditions of the SRProp and Davjul contracts ("the vendor must cause the construction and completion of the Building …") which expressly contemplated that Rialto might not undertake the building work itself, and the absence in the CCA contract of any prohibition on sub-contracting of the building work. However, it does not follow that Rialto's good workmanship obligations with respect to the construction of the building, should be read down in the manner suggested by Rialto.

72 That Rialto is liable under its warranty of good workmanship for work done by the builder which Rialto engaged to perform its own obligation to construct or cause the building to be constructed, is not a consequence which appears to be capricious, unreasonable, inconvenient or unjust, so as to make it necessary to read down Rialto's obligations to the purchasers to avoid such consequences: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 (Gibbs J); [1973] HCA 36.

73 Rialto's argument that the nature of its good workmanship obligation was merely to utilise its best endeavours to achieve the stated result, being compliance with a physical description of the building in which the purchaser

was buying a lot, cannot be accepted. It would require a significant rewriting of the special conditions of the contracts for sale to read down Rialto's obligation of good workmanship as if it only required, as Rialto submitted, that the building "replicate substantially or fully replicate the plan, … so that what is in fact registered resembles very closely, if not exactly, what it is that they understand they are purchasing".

74 As the contracts for sale were otherwise silent as to the choice of materials and working methods, other than the special conditions concerning finishes and fixtures within the lots (Special Condition 7, CCA contract, and Special Condition 37, SRProp and Davjul contracts), the good "workmanship obligation" left the choice of materials and working methods to construct the building to Rialto. That Rialto sub-contracted this work to a builder does not excuse Rialto from its good workmanship obligations to the purchasers.

75 Rialto's reliance upon *Churnin v Pilot Developments* is misplaced. *Churnin* concerned the obligation of a vendor to complete a subdivision to a designated standard. This Court (Santow JA, Handley JA and Foster AJA agreeing) rejected the purchaser's argument that the obligation was an absolute one, "even though the breach was not the fault of the respondent, but of the builder" (at [30]) and preferred a construction of the obligation that it required "the vendor to do what it can do", without imposing an "absolute obligation" to have the result achieved (at [57]).

76 Rialto says that the same construction applies to the special conditions in the CCA, SRProp and Davjul contracts. That cannot be accepted. The contracts for sale are distinguishable from the contract in *Churnin* where the provisions of the contract relevantly required the vendor to "proceed with all due expedition to complete the subdivision" (cl 10.7) and each party had a right of rescission in the event that the subdivision plan had not been registered within 24 months of the date of the contract (or within a further agreed period) (cl 10.8). The Court found that cl 10.8 did not make compliance with cl 10.7 an express condition precedent to the right of rescission in cl 10.8. The reasoning in *Churnin* was to the effect that a clause such as cl 10.7 requiring a vendor to do something with

"all due expedition" requires a vendor to do what it can do, although "not beyond the bounds of reason, and not to the point of ruin": *Churnin* at [57]-[58].

77 There are two points of distinction with *Churnin*. One is that there is no analogy between cl 10.7 in *Churnin* and the nature of Rialto's obligations under the special conditions of the contracts for sale in the present case. The other is that unlike cl 10.8 in *Churnin*, here the good workmanship obligations expressly provided a time for compliance with the obligation, being before Completion as defined in the contracts.

78 Rialto's submission that its narrow interpretation of the good workmanship obligations is supported by Special Condition 38 of the SRProp and Davjul contracts proceeds on an incorrect premise. As acknowledged by Rialto in oral argument, the subject matter of the vendor's obligations in Special Condition 38 to repair defects in the "property" concerned the individual lots the subject of the contracts for sale, not the common property: see [36] above. The same reasoning applies to Special Condition 17 (Defects Liability Period) of the CCA contract: see [25] above.

79 Further, and contrary to Rialto's submission, it was not commercially non-sensical for Rialto to provide a warranty as to the condition of the common property in favour of each purchaser. In circumstances where Rialto did not owe any contractual obligations to the owners' corporation, and does not suggest that it owed an obligation in the tort of negligence to the owners corporation with respect to defects in the construction of the building, clearly enough, it was commercially sensible for the purchasers to obtain a warranty from Rialto as to good workmanship of the building as a whole.

Merger

80 Rialto's argument that the special conditions as to good workmanship merged on completion relied upon the following essential propositions:

(1) the contracts themselves identified which clauses did not merge upon completion and the special conditions relied upon by each of CCA, CCA Estates (as assignee of SRPProp) and Davjul were not among those identified clauses;

(2) the special conditions relied upon by CCA, CCA Estates and Davjul did not deal with obligations collateral to the main duties of proving title,

conveyance and payment so as to suggest their survival post-completion; and

(3) in the case of the CCA contract, the express preservation of Special Condition 17 (Defects Liability Period) against any merger, tends against the conclusion that Special Conditions 1 and 7 were also intended to survive given the absence of any corresponding express preservation.

81 The doctrine of merger was stated by McTiernan, Williams and Webb JJ in *Svanosio v McNamara* (1956) 96 CLR 186 at 206-207; [1956] HCA 55 as follows:

> Upon the completion of a contract for the sale of land, the contract is merged in the conveyance with the consequence of extinguishing the rights and obligations of the parties under the contract, except insofar as the contract expressly or impliedly provides that the merger shall not take place. The rationale of the doctrine is that contracts for sale of land are in a special category of contracts because of the opportunity given to the purchaser of investigating the title and the purchaser's right of election to either terminate the contract if the vendor fails to show good title or choose to accept such title as the vendor has, and complete the contract either with or without compensation.

82 In *Zaccardi v Caunt* [2008] NSWCA 202; (2008) 15 BPR 28,403 at [35] Campbell JA (Allsop P and Barr J agreeing) said of merger of provisions of a contract of sale of land:

> There is a well-established principle whereby all the provisions of a contract for the sale of land which parties intend should be performed by the transfer are merged in the transfer, and all the rights of the purchaser in relation to those provisions are thereby satisfied: *Knight Sugar Co Ltd v Alberta Railway & Irrigation Co* [1938] 1 All ER 266 at 269. There are examples of contractual provisions concerning which the parties have made no express statement that the provision is not to merge on completion, but from the nature of the subject matter the court has been able to conclude that it was not intended that the clause should merge on completion: *Pallos v Munro* (1970) 92 WN (NSW) 797 (vendor's covenant to comply with council notices survives completion); *Palmer v Johnson* (1884) 13 QBD 351 (purchaser's right to compensation surviving transfer); *Gaut v Patterson* (1931) 31 SR (NSW) 612 (vendor's covenant to build house in workmanlike manner survives completion); *Hancock v BW Brazier (Anerley) Ltd* [1966] 1 WLR 1317 (same as *Gaut*); *Lawrence v Cassel* [1930] 2 KB 83 (same as *Gaut*); *Hissett v Reading Roofing Co Ltd* [1969] 1 WLR 1757 (vendor's covenant to give vacant possession survives completion). The notion of a purchaser's warranty not surviving completion is an unusual one, though not an impossible one — a purchaser's covenant to make certain adjustments to the price on completion might in some circumstances not survive completion.

83 Thus, whilst all the provisions of a contract for the sale of land which parties intend should be performed by the transfer are merged in the transfer, there is

no merger in respect of any rights and obligations which "as a matter of construction of the contract, the parties intended to endure beyond completion": *Fu v Bucasia* [2014] NSWSC 325; (2014) 17 BPR 32,885 at [54] citing Prof Peter Butt, *The Standard Contract for Sale of Land in New South Wales* (2nd ed, 1998, LBC Information Services) at [20.41]. That directs attention to the parties' intentions with respect to the good workmanship obligation surviving beyond completion.

Absence of express reference to provision surviving completion

84 Rialto points to the fact that the contracts for sale contain some clauses which were expressed to continue after completion, but there is no such statement that the special conditions as to good workmanship were to survive completion. That can be accepted but it is not determinative of the intentions of the parties as to the special conditions in issue in these proceedings.

85 The general terms of all of the contracts for sale contained cl 20.8 which states that rights under specified clauses, cll 11, 13, 14 and 17, "continue after completion whether or not other rights continue". This clause recognised that the parties may have intended that other rights survive completion, even though there was no express statement in the contract for sale to that effect.

86 Special Condition 17 (Defects Liability Period) of the CCA contract states that the clause shall not merge on completion: Special Condition 17(e)(e). Given that the subject matter of the condition is confined to the individual lot acquired by CCA (see [25] above) and the requirement that defects must be notified within six months after completion, this statement served a temporal purpose specific to the nature of that condition. It says nothing of the parties' intentions with respect to a different subject matter.

87 Similarly, in Special Condition 26 of the CCA contract, the inclusion of the statement that the clause will not merge on completion is in the context of the various acknowledgments and agreements by the purchaser, including the naming rights to the building and the permitted use of other lots in the strata plan, which were expressed to extend until the completion of the sale of *all* lots in the strata plan. Clearly enough, the parties understood that the sale of all other lots might not occur until after completion of the sale of lots 12 and 25 to

CCA and wished to avoid any ambiguity as to the temporal operation of this provision.

88 The SRProp and Davjul contracts contained two special conditions, which deal generally with merger and some special conditions which expressly state that they will not merge on completion.

89 Special Condition 31 (Interpretation) and Special Condition 68 (Certain provisions apply after completion) are in similar terms. Special Condition 31 states:

> The provisions of this contract, which are intended to have application after Completion, continue to apply from Completion.

90 Other than stating the obvious, the significance of these special conditions is that they state that there is an intention that "provisions of this contract" are intended to have application after completion. Importantly, the reference point of both clauses is the parties' intentions, not to whether or not provisions in the contract identify in express terms that they will not merge on completion.

91 Special Condition 56.3 (Selling and leasing activities) and Special Condition 62.7 (GST), both state that the clause will not merge on completion. In the case of selling and leasing activities, the clause continues in full force and effect until the vendor has completed the sale of all the lots which comprise the strata plan. In the case of GST, the clause continues to apply after expiration or termination of this contract. Both clauses serve a temporal purpose specific to the nature of those conditions.

92 Special Condition 58 (Purchaser's obligations about Designated Matters) states that the clause is limited in operation to 12 months from completion in relation to the strata scheme: Special Condition 58.5(b). This clause served a temporal purpose specific to the nature of those conditions. Special Condition 51.4 (Agent) states that it will not merge on completion. This clause is explicable by its subject matter to avoid ambiguity with respect to the purchaser's warranty of only having dealt with the agent nominated in the contract.

93 None of these special conditions are inconsistent with the parties intending the special conditions in relation to good workmanship to continue after completion.

Nature of the subject matter of the obligation

94 It is well established that the right to enforce a vendor's obligation to construct a building on the property in the manner set out in the contract, is a right "collateral" to the conveyance which does not merge on completion. This is because the nature of the subject matter of the right is one that the parties did not intend to merge in the transfer on completion: *Zaccardi v Cuant* at [35]. See also: S*imply Irresistible Pty Ltd v Couper* [2010] VSC 601 at [247] (Kyrou J), citing *Lawrence v Cassel* [1930] 2 KB 83 at 89 (vendor's covenant to complete house in accordance with plans of other houses in a building estate) and *Dean v Gibson* [1958] VR 563 at 572-573 (vendor's covenant to build house in conformity with the local government … regulations").

95 Rialto did not dispute these authorities. It sought to draw a distinction between a contract for the sale of land, containing an obligation to construct a building on the property, and a contract for sale "off the plan" of a strata lot. According to the submission, the parties to an "off the plan" contract must have intended that any good workmanship obligation with respect to the construction of the building would merge in the conveyance upon transfer of the lot in the registered strata plan because completion of the building containing the lot the subject of the contract must occur prior to registration of the strata plan.

96 This submission is unsound. It ignores that the CCA, SRProp and Davjul contracts dealt with two matters: first, and primarily, the promise by Rialto as vendor to convey to the purchaser title to the identified lot in an unregistered strata plan, which was part of the land the subject of identified lot(s) in a Deposited Plan, and second, the promise by Rialto as vendor that it would construct or cause to be constructed the building in which the identified lot was situated in a proper and workmanlike manner in accordance with the plans and specifications approved by the Council/ the Development Consent.

97 This duality about the contracts for sale is significant. The obligation on the part of Rialto to convey title to the identified lot in the unregistered strata plan could

not continue beyond completion, so that the obligations as to title undertaken by Rialto in the contracts of sale must be regarded as merging in the transfer, if not at the time of completion, then no later than the time of its being registered: *Australian Conference Association v Carter* [1988] ANZ ConvR 516; (1988) NSW ConvR 55-435; BC8700959 at 17 (Powell J).

98 The same, however, cannot be said of the secondary obligation undertaken. Whilst the parties made no express statement that the good workmanship obligations did not to merge on completion, the nature of the subject matter of the obligations is such that one can readily conclude that it was intended that these special conditions should survive completion. As the respondents correctly submitted, performance of Rialto's covenant as to good workmanship is not something which the purchaser could investigate prior to completion, like investigating the vendor's title.

99 It is no answer to say, as Rialto submitted, that performance of its secondary obligation under the respective contracts is a matter upon which the purchaser is to be taken to have been satisfied on completion because the latest date for completion of the contracts was a time after issue of the "Occupation Certificate" in respect of the strata development (see Special Condition 11(c), CCA contract and Special Condition 33, SRProp contract) or, a time after registration of the strata plan (Special Condition 33, Davjul contract) when the building had been constructed. The subject matter of the occupation certificate is the "occupation and use of a new building" (s 109C, *Environmental Planning and Assessment Act*), not Rialto's performance of its good workmanship obligations.

100 Since performance of Rialto's covenant as to good workmanship is not something which the purchaser could investigate prior to registration of the strata plan, and the subject matter of an occupation certificate is distinct from Rialto's good workmanship obligations, the parties are not to be taken to have intended that the purchaser accepted performance of the good workmanship obligations upon registration of the strata plan or issue of an occupation certificate.

101 The merger argument should be rejected.

Standing/no loss issues

102 Rialto submitted that the lots owners' claims were unsustainable because the injury for which damages are claimed concerns remedial works not yet undertaken or suggested to be done to property not owned by the lot owners, and which the lot owners could never undertake themselves.

103 Rialto's submissions essentially involved the following propositions:

(1) as the lot owners do not own the common property, the proper plaintiff to bring any claim for damage to common property is the owners corporation itself and not one of the lot owners. Reference was made to *Carre v Owners Corporation – SP 53020* at [25] (Barrett J) which was followed and applied by Darke J in *Eastmark Holdings Pty Ltd v Kabraji* [2013] NSWSC 1763; (2013) 97 ACSR 161 at [78];

(2) the claim by the lot owners circumvents the scheme of the *Strata Schemes Management Act 2015* (NSW), in particular, s 106, which confers responsibility upon the owners corporation to maintain and repair the common property, giving a statutory cause of action to lot owners against the owners corporation to compel it to adhere to that duty;

(3) the lot owners' proportionate share of the cost to rectify the common property, reflected in statutory levies imposed by the owners corporation under the *Strata Schemes Management Act*, is not a form of "damages" recoverable by the respondents in the sense understood by *Hadley v Baxendale* (1854) 9 ExCh 341; rather, it represents compliance of the lot owners with their statutory obligations; and

(4) lot owners may not recover a "reflected" form of loss, being their proportionate share of the loss suffered by the owners corporation for damage to common property, nor is a statutory levy a form of damages recoverable by lot owners. Reference was made to *Prudential Assurance Co Ltd v Newman Industries (No 2)* [1982] Ch 204; *Marex Financial Ltd v Savilleja* [2021] AC 39.

104 The first two propositions are directed to the "standing" issue. The third and fourth propositions are directed to the "no loss" issue.

Standing

105 Whilst the common property is vested in the owners corporation which holds common property as agent for the lot owner (*Strata Schemes Development Act 2015* (NSW), s 28), the concept of agency in this context takes its shape from the statutory scheme, which was analysed in some detail in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185; [2014] HCA 36 with respect to the predecessor legislation, *Strata Schemes*

(Freehold Development) Act 1973 (NSW); *Strata Schemes Management Act 1996* (NSW): at [9] (French CJ), [152] (Crennan, Bell and Keane JJ). See also *Trentelman v The Owners – Strata Plan No 76700* (2021) 106 NSWLR 227; [2021] NSWCA 242 at [182]-[195].

106 Importantly, the interest of an individual lot owner in the common property is an equitable interest as tenant in common with the other lot owners: *Brookfield* at [10] and the authorities referred to in fn 43, including *Houghton v Immer (No 55) Pty Ltd* (1997) 44 NSWLR 46 at 56 (Handley JA, Mason P and Beazley JA agreeing).

107 In *Carre*, Barrett J held that the proper plaintiff rule in *Foss v Harbottle* applied to an owners corporation governed by the former *Strata Schemes Management Act 1996* in respect of claims which a lot owner considered the owners corporation to have against (a) the developer for breach of a duty of care to the owners corporation in respect of construction of the building as a whole, (b) the builder for breach of a duty of care to the owners corporation in relation to the carrying out of the work involved in the construction of the building, and (c) a claim similar in concept against a third party in relation to the design and installation of the air conditioning system and the carrying out of subsequent remedial work (see at [12], [20]-[25]). Barrett J found that the interests of justice exception to the rule in *Foss v Harbottle* applied on the facts (at [34]-[40]), and granted leave to the lot owner to prosecute those claims on behalf of the owners corporation (at [49], [57]-[60]).

108 *Carre* is distinguishable from this case. Here, as the respondents correctly pointed out, there can be no doubt that the lot owners have standing to bring their own claims for breach of contract against Rialto. The real question is whether, assuming breach by Rialto, the lot owners have a claim for damages in respect of their proportionate share of the cost to rectify common property.

109 It is no answer for Rialto to say that the claim by the lot owners against Rialto for damages in relation to the defective common property circumvents the scheme of the *Strata Schemes Management Act 2015* (NSW). The statutory scheme conferring responsibility upon the owners corporation to maintain and repair the common property (s 106(1)) and giving a statutory cause of action to

lot owners against the owners corporation to compel it to adhere to that duty (s 106(5)), does not negate any personal rights a lot owner may have against a third party for breach of contract, even if that breach involves damage to the common property.

110 Damage to common property such as that alleged in this matter is an infringement of the lot owner's proprietary interest in the common property as an equitable tenant in common with the other lot owners. The consequence of any such damage is a diminution in the value of the lot owner's interest in the common property. It should be accepted that the lot owners have standing to claim damage for their proportionate share of the cost of rectifying damage to the common property. That lot owners do suffer loss if there are defects in common property is consistent with what was said in *Brookfield* by way of obiter: at [150] (Crennan, Bell and Keane JJ), [45] (Hayne and Kieffel JJ) and [173] (Gageler J).

111 The final argument raised by Rialto is that the lot owners cannot recover damage insofar as remedial works to the common property have not yet been undertaken and which the lot owners could never undertake themselves. This only relates to the southern facade as the cladding has already been replaced.

112 The short answer is that the lot owner can recover the costs of rectification of incomplete or defective building work in accordance with the contract: *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; [2009] HCA 8 at [13]-[15]. Provided the remedial work is necessary and reasonable (*Bellgrove v Eldridge* (1954) 90 CLR 613 at 919; [1954] HCA 36), it is not the point that the work may be never done by the owners corporation because either (a) Rialto has majority control of the owners corporation and may be opposed to rectification of the southern façade, or (b) the respondents are unwilling for whatever reason, such as costs, to commence proceedings against the owners corporation for breach of statutory duty in respect of failure of the owners corporation to discharge the obligation to maintain and keep in a state of good and serviceable repair the common property: s 106(1) of the *Strata Schemes Management Act*.

113 Moreover, how a lot owner deploys any damages recovered from the party in breach is a matter for the lot owner.

No loss

114 Rialto's submission that the claim for damages is not a form of damages compensable for breach of contract because it represents the cost of compliance of the lot owners with their statutory obligations to pay contributions levied by the owners corporation, mischaracterises the lot owners loss.

115 The lot owners did not contend that the amount of the statutory levy is the appropriate quantification of loss or that loss is only incurred when a levy is imposed. Among other reasons, an owners corporation holding a significant amount in a capital works fund under s 74(1) of the *Strata Schemes Management Act*, may not always levy contributions in the full amount of the cost of rectification of defective common property. The lot owners' loss is not dependent upon the owners corporation levying a contribution, nor is the loss only accrued when the levy is imposed.

116 Nor is the lot owner's claim a case of reflective loss by analogy with the prohibition of such claims in the case of corporations: *Prudential Assurance* and *Marex*. As explained in *Central Coast Council v Norcross Pictorial Calendars Pty Ltd* (2021) 391 ALR 157; [2021] NSWCA 75 at [103] (Bathurst CJ, Macfarlan and Gleeson JJA agreeing), the reflective loss principle articulated in *Prudential Assurance* is that where loss is suffered by a company as a result of wrongdoing in respect of which each of the company and the shareholder has a cause of action, a shareholder cannot sue to recover the diminution in the value of his or her shares (or loss of benefits associated with his or her shareholding) resulting from loss suffered by the company.

117 It is not necessary to explore the rationale for this principle, which has been described as the prevention of double recovery, or that the shareholder does not suffer a loss distinct from the company and the shareholder is barred from pursuing the claim by the principle in *Foss v Harbottle*. In the present case, the lot owners' claim for damages do not rely on a principle of reflective loss. The owners corporation has no cause of action against Rialto in contract, and it is not suggested that the owners corporation has any claim in negligence against

Rialto for breach of any duty of care with respect to construction of the building: cf *Brookfield*.

118 The "standing" and "no loss" grounds should be rejected.

Breach of contract issues

119 Given the concession by the respondents that the judge failed to give adequate reasons, including failing to consider Rialto's submissions on several issues concerning alleged breaches of contract, it is not necessary to the address the specific grounds directed to challenging the judge's findings, to the extent that any findings were made on the issue of breach of contract.

Admissibility of the Madden Reports

120 At trial, the initial and three supplementary reports of Mr David Madden, the respondents' quantum expert, were admitted over objection by Rialto. The basis of the objection was that one of the underlying factual assumptions adopted by Mr Madden in approaching the task of quantification, namely, the existence of defects referred to in his reports, had not been proved.

121 Rialto submitted at trial and again on appeal that Mr Madden had proceeded to quantify the costs of rectification by reference to items identified as defects within the "SDDC" report. This was a report of Strata Diagnostic & Defect Consultants Pty Limited, which had initially been referred to in the respondents' pleadings but was not referred to in amended pleadings and was not tendered in evidence at trial. Rialto submitted that Mr Madden had assumed that the defects identified in the SDDC report were the defects to be costed by him. The judge rejected this submission. He was correct to do so.

122 On a fair reading of Mr Madden's reports, commencing with his initial report of 12 October 2018 and concluding with his third supplementary report of 6 November 2020, it is plain that Mr Madden provided his estimate of rectification costs of the defect items contained within the expert reports provided to him which were identified in his report. Those other experts reports were tendered in evidence, including the building defect report of Mr Bruce Hodsdon dated 5 September 2018.

123 Mr Hodsdon was an engineer/building consultant at RHM Consultants Pty Limited, a specialist engineering and building diagnostics consultancy. Having inspected the building on a number of occasions in June, July, August and September 2018, he provided a report identifying building defects within the commercial suites and common areas. Importantly, the defect schedule appended to his report as Annexure E assigned a specific item number to each of the defects he identified in individual lots and the common property. Where the defect identified by Mr Hodsdon had previously been reported in the report by SDDC, this was acknowledged by Mr Hodsdon in his report, who included a cross-reference in his report to the relevant item number in the SDDC report.

124 Rialto submitted that the inclusion in the Madden reports of the defect item number from Mr Hodsdon's report and, where applicable, the cross-reference to the earlier defect item number in the SDDC report, meant that it was unclear whether Mr Madden was costing the defects identified in the SDDC report or the Hodsdon report. That submission should be rejected. Mr Madden costed the defect items contained in the Hodsdon report. That some of the defect items included a cross-reference to the corresponding earlier items in the SDDC report was merely a matter of historical reference.

125 Rialto's submission that there was no evidential foundation for the assumption upon which Mr Madden's report was "at least partially based", namely defects in the building, is without merit. No error has been established in the judge's decision to admit the Madden reports.

Assignment and time bar issues - CCA Estates

126 The assignment and limitation issues are of narrow compass.

Whether the assignment was effective

127 Rialto submitted that the chose in action the subject of the deed of assignment between SRProp and CCA Estates dated 1 July 2020 could not be assigned because CCA Estates did not establish that it had a "substantial" pre-existing commercial interest in the suit by SRProp. Reference was made to *Equuscorp Pty Limited v Haxton* (2012) 246 CLR 498 at [79]; [2012] HCA 7. It followed, Rialto argued, that the judge erred in rejecting Rialto's submission that the assignment was ineffective.

128 In *Equuscorp* at [79], Gummow and Bell JJ observed that the objection to the assignment of "bare" rights of action is subject to an exception where the assignee has an interest in the suit, referring to *Ellis v Torrington* [1920] 1 KB 399 at 406, and has a genuine and substantial commercial interest, referring to *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 at 703; *Rickard Constructions Pty Limited v Rickard Hails Moretti Pty Limited* (2004) 188 FLR 278 at [42]-[61]; [2004] NSWSC 1041. The joint judgment of French CJ, Crennan and Kiefel JJ at [50]-[51] was to similar effect.

129 In the present case, at the date of the deed of assignment on 1 July 2020, CCA Estates had a sufficient interest in the suit brought by SRProp against Rialto, as CCA Estates was then the owner of lot 1 in the building, having completed the purchase of lot 1 from SRProp that day. Further, and contrary to the submissions of Rialto, CCA Estates also had a genuine and substantial pre-existing commercial interest in the suit brought by SRProp. First, CCA Estates had earlier entered into the contract for sale with SRProp on 20 May 2020 which completed on 1 July 2020. Second, the recitals to the deed of assignment recorded that the contract had completed prior to the deed of assignment also entered into on 1 July 2020 (Recital D). Rialto did not challenge the correctness of this recital, either at trial or in this Court.

130 Rialto's reliance on the decision of Lindgren J in *National Mutual Property Services (Australia) Pty Limited v Citibank Savings Limited (No 1)* (1995) 132 ALR 514 is misplaced. That case concerned claims in tort and under statute. Lindgren J concluded that the statutory claims were not assignable as a matter of construction of the statute (at 539) and that the tort claims were not assignable because the *Trendtex* exception was not satisfied (at 540):

> By reference to three matters, however, I do not think that the "genuine commercial interest" limb of the Trendtex test is satisfied. First, the genuine commercial interest referred to in Trendtex is not a nebulous notion of the general commercial advantage of the assignee but something more specific and limited. In particular, it does not embrace an interest arising from an arrangement voluntarily entered into by the assignee of which the impugned assignment is an essential part, like the arrangement in the present case. Rather, the expression refers to a commercial interest which exists already *or by reason of other matters*, and which receives ancillary support from the assignment. (Emphasis added.)

131 In contrast to the facts in *National Mutual v Citibank*, CCA Estates acquired proprietary rights when it purchased lot 1, that is, prior to the assignment by SRProp, as the vendor of lot 1, of its rights of action against Rialto. Those rights of action were incidental or subsidiary to the property rights which it had acquired from SRProp.

132 In that respect, the assignment to CCA Estates was on all fours with the position considered in *Ellis v Torrington*. That a vendor of property can assign to a purchaser rights it has against a third party in connection with the property is consistent with *Woolcock Street Investments* v *CDG Pty Limited* (2004) 216 CLR 515; [2004] HCA 16 at [31], where reference was made to an assignment by a vendor to a purchaser of any rights it may have against the builder.

Time bar

133 Following the deed of assignment dated 1 July 2020, orders were made by the District Court on 14 December 2020 that SRProp be removed as a plaintiff in its proceedings and that CCA Estates was "added as a plaintiff in these proceedings in substitution for SRProp …". The terms of the Court's order have been set out at [15] above.

134 The substitution of CCA Estates as the plaintiff in place of SRProp was permitted by UCPR, r 6.24 which relevantly provides:

> **6.24 Court may join party if joinder proper or necessary (cf SCR Part 8, rule 8(1); DCR Part 7, rule 8(1); LCR Part 6, rule 8(1))**
>
> (1) If the court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, the court may order that the person be joined as a party.
>
> …

135 As observed by the Western Australian Court of Appeal in *APT Finance Pty Limited v Bajada* [2008] WASCA 73 at [35], in relation to O18, r 6(2) of the Rules of the Supreme Court 1971 (WA) (a rule in similar terms to UCPR, r 6.28), this rule is not limited to the joinder of further parties to an action, but also applies to the substitution of a party in place of an existing party: see also *Woodings v Stevenson* [2001] WASC 174 at [12] (Owen J).

136 Although the rules of the Supreme Court of Western Australia make express provision under O18 r 7(2) for a change of parties by reason of death or bankruptcy, and also assignment or transmission, whereas UCPR, r 6.30 does not deal with assignment, the remarks of Pullin JA and Newnes AJA in *APT Finance Pty Limited v Bajada* at [38] in relation to substitution of a plaintiff under O18, r 6, the equivalent of UCPR, r 6.28, are apposite:

> … There is no reason that the latter rule [O18, r 6] cannot apply to the present circumstances where (assuming for the moment it is the case) there have been valid legal assignments of the debts during the currency of legal proceedings commenced in the name of the assignor to recover the debts. The result of the assignments is that the assignor has ceased to be a proper or necessary party to the action and the addition of the assignee, as the legal owner of the debts, as plaintiff is necessary for the proper determination of the proceedings. It is not therefore to the point that at the time the proceedings were commenced [the assignee] did not have a cause of action against the first respondent. It is sufficient that since the action was commenced [the assignee] has obtained the legal right to the debts by virtue of the assignments.

137 Rialto referred to UCPR, r 6.28, which provides that if the court orders that a person be joined as a party, "the date of commencement of the proceedings, in relation to that person, is taken to be the date on which the order is made or such later date as the Court may specify in the order". Rialto says that upon joinder of CCA Estates as plaintiff in substitution for SRProp, the proceedings by CCA Estates are taken to have been commenced on 14 December 2020, and therefore its claim is time barred. I do not agree. Rule 6.28 does not apply where a party is substituted for another, rather than added as a party.

138 In the case of substitution of a party, the person is placed in the same position as the party replaced. The relevant rule in the case of *substitution* is UCPR, r 6.32(2), which provides:

> **6.32 Orders as to the future conduct of proceedings (cf SCR Part 8, rule 11; DCR Part 7, rule 11; LCR Part 6, rule 11)**
>
> …
>
> (2) If the court orders the substitution of one party for another party or former party, all things previously done in the proceedings have the same effect in relation to the new party as they had in relation to the old, subject to any other order by the court.

139 The effect of UCPR, r 6.32(2) is that where a party is *substituted* for another rather than added as a party, the person is placed in the exact position as the

party replaced: *Chorlton v Dickie* (1879) 13 Ch D 160 at 161. As Basten JA (Meagher JA agreeing) said in *Hazard Systems Pty Limited v Car-Tech Services Pty Limited (in liq)* [2013] NSWCA 314 at [27], in the context of an equitable assignment of a cause of action after the commencement of proceedings by the assignor:

> … So long as the proceedings are properly commenced by the plaintiff then entitled to pursue the claims, the proceedings will not become unmaintainable because, after their commencement and after the expiration of a limitation period, there is an assignment of the plaintiff's rights to a third party.

140 The same reasoning applies where there is a legal assignment and the assignee is joined as a plaintiff in substitution of the assignor.

141 The effect of the orders made by the District Court on 14 December 2020 was the substitution of a new party who had succeeded to the interest of a former party to existing proceedings. The substitution of a new party was not a new cause of action or new claim against Rialto. Accordingly, the substitution was not capable of raising questions of limitation.

142 For the above reasons, the limitation defence relied upon by Rialto in answer to the claim by CCA Estates was properly rejected by the judge.

Relief: remitter or reference out?

143 As the appeals by Rialto have succeeded in part, as conceded by the respondents, determination of the appropriate orders involves a choice between a remitter of the undetermined issues to the District Court for a retrial or an order for a reference out to a referee for inquiry and report under UCPR, r 20.14.

144 In supplementary submissions received after the conclusion of the hearing, Rialto did not concede that a reference out was the most appropriate course. Nevertheless, given the subject matter of the issues which require determination and the likely delay in finalisation of the proceedings in the event of a remitter, a reference out is preferable. This can be expected to be the most efficient and timely way of finalising this matter.

145 At the hearing of the appeal, the parties were directed to provide a draft form of the order for any reference by 8 June 2012, if this form of relief was granted.

Only the respondents complied with this direction. Rialto did not provide its draft order with suggested responses/amendments to the respondents' draft until 16 June 2022. Whilst there was no agreement as to the identity of the proposed referee, there was a measure of agreement on the questions the subject of the proposed reference and the procedure to be adopted by the referee. Some minor drafting suggestions by Rialto should be incorporated into the order for the reference out.

146 There was no agreement as to three additional questions which Rialto proposed should be determined by the referee on the issue of loss, specifically:

> 7. are the amounts of such costs "damage" that has been suffered by the respondents, as pleaded and particularised in their respective statements of claim?
>
> 8. were such costs caused by a breach by the appellant of its obligations under the respective contracts with the respondents, or were they suffered by reason of different causative events?
>
> 9. are the damages sought by the respondents too remote?

147 None of those additional questions are appropriate for a reference. This is for several reasons. As acknowledged by Rialto, the experts agreed at trial that the southern façade had not been constructed fully in accordance with the relevant standard but disagreed as to the consequences which flowed from that non-compliance, specifically, the appropriate rectification method for water ingress to the southern façade. The agreed questions for the referee in relation to the southern facade (as well as the cladding) already include whether the installation or construction was in breach of Rialto's obligations under the contract, as pleaded by the respondents (see questions 2 and 3 in the Schedule to the proposed orders below).

148 Further, the agreed question for the referee in relation to the Armmam contract directs attention to the existence of alleged specific defects in the individual lot property for Lots 7, 8, 9 and 10, which if established, would amount to a breach of contract (see question 5 in the Schedule to the proposed orders below).

Costs

149 The question of costs of the appeal including the reference out, and the proceedings below, should be reserved until after the outcome of the referee's report is known.

Orders

150 I propose the following orders:

(1) Appeal allowed in part.

(2) Set aside orders 1 and 2 made by Curtis ADCJ on 9 December 2021 in each proceeding in the District Court: 2018/114952, 2018/115009, 2018/115043, 2019/91017.

(3) In lieu, pursuant to Uniform Civil Procedure Rules 2005 (NSW), r 20.14, refer to a referee as agreed by the parties within 21 days or, failing agreement, to a referee as determined by the Court for enquiry and report the matter in the Schedule below.

(4) Direct that (without affecting the powers of the Court as to costs) the parties be jointly liable to the referee for the fees payable to him/her in the first instance.

(5) Direct that the parties deliver to the referee forthwith a copy of this order together with a copy of Division 3 of Part 20 of the UCPR.

(6) Direct that:

(a) subject to subpars (b) and (c) below, the provisions of Pt 20, r 20 shall apply to the conduct of proceedings under the reference;

(b) the reference will commence on 1 September 2022 unless otherwise ordered by the referee;

(c) the referee consider and implement such manner of conducting proceedings under the reference as will, without undue formality or delay, enable a just determination to be made including, if the referee thinks fit:

(i) the making of inquiries by telephone;

(ii) site inspection;

(iii) inspection of plant and equipment; and

(iv) communication with experts retained on behalf of the party;

(d) the evidence before the referee is to be the evidence received by the District Court, and the parties are bound by the rulings made at trial by Curtis DCJ and by any ruling made by the Court of Appeal concerning the admissibility of Mr Madden's evidence on quantum;

(e) for the avoidance of doubt, there is to be no cross-examination of any expert, irrespective of whether the expert was cross-examined at the trial before Curtis DCJ;

(f) the referee submit the report to the Court in accordance with Pt 20, r 23 addressed to the Court of Appeal Registrar on or before 20 October 2022.

(7) Amendments to the Schedule, whether by agreement or on a contested basis, are to be the subject of an order made by the Court.

(8) If for any reason the referee is unable to comply with the Order for delivery of the report to the Court by the date in this Usual Order for Reference, the referee is to provide to the Court of Appeal Registrar an Interim Report setting out the reasons for such inability and an application to extend the time within which to deliver the report to the Court to a date when the referee will be able to provide the report.

(9) Grant liberty to the referee or any party to seek directions with respect to any matter arising in proceedings under the reference upon application made on 24 hours' notice or such less notice ordered by the Court.

(10) Reserve costs of the proceedings in this Court and the District Court for further consideration.

(11) Stand the proceedings over before the Registrar for further directions on 31 October 2022.

SCHEDULE

The following questions arising in the proceedings, namely:

Referred Questions on Liability

(12) what is the appropriate rectification method for water ingress to the southern façade of the Building at 531-533 Kingsway, Miranda?

(13) did the cladding installed on the Building comply with the Building Code of Australia at the time of its installation?

(14) if the answer to question 2 is “no”, was the installation of the cladding on the Building in breach of the appellant’s obligations under the contracts for the sale of land, as pleaded by the respondents?

(15) was the construction of the southern façade of the Building in breach of the appellant’s obligations under the contracts for the sale of land, as pleaded by the respondents?

(16) has Armmam Pty Ltd established the existence of defects in the individual lot property for Lots 7, 8, 9 and 10?

Referred Questions on Quantum

(17) what is the cost of:

(a) the rectification of water ingress to the southern façade of the Building?

(b) the replacement of the fire cladding on the Building?

(c) the rectification of any defects to the individual property in Lot 7, 8, 9 and/or 10?

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