# SUPREME COURT OF QUEENSLAND

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| CITATION: | *UI International P/L v Interworks Architects P/L & Ors* [2007] QCA 402 |
| PARTIES: | **UI INTERNATIONAL PTY LTD** ACN 070 639 422<br>(plaintiff/appellant)<br>**v**<br>**INTERWORKS ARCHITECTS PTY LTD**<br>ACN 087 985 402<br>(first defendant/first respondent)<br>**PAUL THOMAS SHEPHERD**<br>(second defendant/second respondent)<br>**MOSTIA CONSTRUCTIONS PTY LTD** ACN 010 608 009<br>(third defendant/third respondent)<br>**GROGAN RICHARDS PTY LTD** ACN 006 346 087<br>(fourth defendant/fourth respondent)<br>**MOSTIA PROJECT MANAGEMENT PTY LTD**<br>ACN 099 777 223<br>(fifth defendant/not party to appeal)<br>**ROHAN LEIGH WOODFORTH**<br>(sixth defendant/not party to appeal)<br>**REDLANDS SHIRE COUNCIL**<br>(seventh defendant/fifth respondent) |
| FILE NO/S: | Appeal No 4571 of 2007<br>SC No 10390 of 2004 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 16 November 2007 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 30 October 2007 |
| JUDGES: | Williams, Keane and Holmes JJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDER: | **1. Appeal dismissed**<br>**2. Appellant to pay respondents' costs of the appeal on the standard basis** |
| CATCHWORDS: | PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – where plaintiff developed land through construction of buildings – where |

construction provided, supervised and approved by defendants – where property subdivided and sold to third parties – where plaintiff claims defendants' breach of contractual duties or negligence caused structural defects – where plaintiff claims damages for demolition and reconstruction – where plaintiff pleads rectification measure of damages necessary to achieve development objective – where plaintiff pleads it is entitled to rectification damages for benefit of third parties – where plaintiff pleads all owners or the District Court would agree to demolition and rebuilding – where plaintiff claims in alternative diminished value of development – whether learned primary judge correct in striking out these parts of statement of claim

*Body Corporate and Community Management Act 1997* (Qld), s 71, s 72

*Bellgrove v Eldridge* (1954) 90 CLR 613, considered
*De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28, distinguished
*Director of War Service Homes v Harris* [1968] 1 Qd R 275, considered
*Ruxley Electronics and Constructions Ltd v Forsyth* [1996] AC 344, discussed
*Scott Carver v SAS Trustee Corporation* [2005] NSWCA 462, distinguished
*St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd* [1994] 1 AC 85, distinguished
*Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253, applied

COUNSEL: R N Wensley QC, with C C Heyworth-Smith and L D Bowden, for the appellant
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[1] **WILLIAMS JA:** This is an appeal from an order striking out a number of paragraphs in the appellant's statement of claim. The relevant pleadings and background facts are fully set out in the reasons for judgment of Keane JA.

[2] It can be assumed for present purposes that the remaining paragraphs in the statement of claim sufficiently plead that the first, second, third and fourth defendants breached their contracts with the appellant with respect to the construction of the development defined in the statement of claim. It should also be

assumed for present purposes that the seventh defendant was negligent in its supervision of the construction of that development. The extant parts of the statement of claim particularise some losses which, if proved, would result in at least some judgment against some of the defendants.

[3] The paragraphs of the statement of claim which have been struck out allege three bases (identified by Keane JA in his reasons) on which the appellant claims to be entitled to the cost of reinstatement of the development (in this case the cost of demolition and rebuilding) in the approximate sum of $34M against each of the respondents to the appeal. At first instance those paragraphs said to establish the first basis were struck out on the ground that the appellant could not demonstrate that in the circumstances it was in a position to demolish and rebuild the development. Because of that it was held that the paragraphs pleading those matters were embarrassing and prejudicial to the fair trial of the bases of recovery otherwise raised by the pleading. It is that aspect of the judgment at first instance that I deal with in these reasons.

[4] The principal contention of senior counsel for the appellant is that the claim for damages calculated as the cost of demolition and reinstatement is supported by the reasoning of the High Court in *Bellgrove v Eldridge* (1954) 90 CLR 613. Counsel referred to the passage in the judgment of Dixon CJ, Webb and Taylor JJ at 617 where it was said:

> "In the present case, the respondent was entitled to have a building erected *upon her land* in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her. This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract."

[5] That, according to the submission of senior counsel for the appellant provided in absolute terms the measure of damages where a builder breached his obligation under a building contract.

[6] In my view that submission cannot be sustained. In the first place, as was acknowledged in the quoted passage, that measure is only "prima facie" the measure of damages in such circumstances. A little later on the same page those judges said that the building owner "is entitled to the reasonable cost of rectifying the departure or defect so far as that is possible." That introduces two qualifications to the cost of reinstatement being the prima facie measure of the damages suffered; that cost must be "reasonable" and the reinstatement must be "possible".

[7] Their Honours expanded on the first of those qualifications at 618-9 of the judgment where they said:

> "The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt. No one would doubt that where pursuant to a building contract calling for the

> erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks. In such circumstances the work of demolition and re-erection would be quite unreasonable … Many examples may, of course, be given of remedial work, which though necessary to produce conformity would not constitute a reasonable method of dealing with the situation and in such cases the true measure of the building owner's loss will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials."

[8] Much was also made by senior counsel for the appellant of the final paragraph in the reasoning of their Honours at 620 where they said:

> "It was suggested during the course of argument that if the respondent retains her present judgment and it is satisfied, she may or may not demolish the existing house and re-erect another. If she does not, it is said, she will still have a house together with the cost of erecting another one. To our mind this circumstance is quite immaterial and is but one variation of a feature which so often presents itself in the assessment of damages in cases where they must be assessed once and for all."

[9] What to my mind is significant is that the judgment does not expand at all on the significance of the expression "so far as that is possible" in the passage quoted from page 617 of the judgment. Given the facts in *Bellgrove* it was not necessary for the Court to consider that particular aspect further. The fact that the words "upon her land" were emphasised in the first passage quoted from the judgment highlights that the contract was for the building of a home for the owner of the land. That remained the position at the time damages came to be assessed. As the reasoning in the judgment indicated, the only effective way of remedying the defects was to demolish and re-build. It would ordinarily follow in those circumstances that there would be a significant diminution in value of the house and land because of the defective workmanship and materials. If the building owner in that case did not demolish and re-build, but either retained the house in its present condition or sold it, the value of her asset would be significantly less than it should have been. In those circumstances there is nothing unjust in saying that it is irrelevant to the assessment of damages on a demolition and reinstatement basis that the building owner may not do that.

[10] There is nothing, in my view, in the decision in *Bellgrove* which supports the proposition that, if the building owner cannot for some reason demolish and re-build, nevertheless the cost of demolishing and re-building is the measure of damages for the breach of contract by the builder. Surely if for some reason demolition and re-building cannot be carried out there is a basis for saying that in the circumstances that is not a "reasonable course to adopt". But even if one rejected that approach one is still faced with the qualification that demolition and re-building must be "possible".

[11] Counsel for the appellant submitted that the judgment of the Full Court in *Director of War Service Homes v Harris* [1968] Qd R 275 established the proposition that

sale of the building by the original owner did not prevent that owner from recovering from the negligent builder the cost of demolition and reinstatement. The judgment in question was that of Gibbs J, and it deserves careful consideration. There was a building contract between the Director and the builder for the erection of 10 dwelling houses in accordance with contractual specifications. The buildings were completed and delivered to the Director in 1952; by 1954 all of the houses had been sold and were occupied by purchasers who complained of defective workmanship. The builder refused, at the request of the Director, to carry out rectification work with respect to the defects and the Director then employed others to do that work at his cost. The Director sought to recover that amount from the builder but he was unsuccessful at first instance because it was held that the cost of remedial work was a consequence of a purely voluntary act by the Director. The Full Court allowed the appeal and held the Director was entitled to recover money expended on rectifying the defects.

[12] Gibbs J at 278 referred to statements in *Bellgrove* at pages 617 and 618, defined the measure of damages in the terms used by the High Court, and noted the qualification that reinstatement "must be a reasonable course to adopt". He then went on to say:

> "It is true that *Bellgrove v Eldridge* was not a case in which the building owner had sold the building before bringing the action but I am unable to see any reason why there should be a different measure of damages in such a case and nothing is said in *Bellgrove v Eldridge* to support any such distinction. When the builder, in breach of his contract, delivered to the building owner a building that did not conform to the specifications, the owner became entitled to recover damages according to the measure approved in *Bellgrove v Eldridge.* If the owner subsequently sold the building, or gave it away, to a third person, that would not affect his accrued right against the builder to damages according to the same measure."

[13] Significantly at 279 Gibbs J went on to say:

> "The owner of a defective building may decide to remedy the defects before he sells it so that he may obtain the highest possible price on the sale; he may sell subject to a condition that he will remedy the defects; or he may resolve to put the building in order after it has been sold because he feels morally, although he is not legally, bound to do so. These matters are nothing to do with the builder, whose liability to pay damages has already accrued."

[14] In my view they were the scenarios which Gibbs J had in mind in writing his reasons. He did not say that having sold the building without loss on account of the defects, an owner could recover as damages the cost of reinstatement though he had no intention or capacity to reinstate the building. In my view the reasoning of the Full Court should be restricted to three situations referred to in the judgment.

[15] Ultimately the ratio decidendi of *Harris* is stated at 280:

> "In the present case it seems to me to be impossible to say that the repair of the houses was not a reasonable course for the appellant to have adopted, having regard to the fact that the nature of the defects disclosed in the evidence was such as to give the occupiers legitimate ground for complaint, and to the comparatively small cost of

> effecting the repairs. The appellant was therefore entitled to recover from the respondent the cost of making the work conform to the contract…"

[16] The question has most recently been considered by the New South Wales Court of Appeal in *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253. Giles JA (with whom McColl and Campbell JJA agreed) after reviewing a number of decisions commencing with *Bellgrove* concluded that "if supervening events mean that the rectification work cannot be carried out, it can hardly be found that the rectification work is reasonable in order to achieve the contractual objective: achievement of the contractual objective is no longer relevant."[61] In my view Giles JA correctly stated that the rationale behind the test approved in *Bellgrove* is that in a "contract for the performance of building work, the plaintiff can recover the cost of rectifying defective or incomplete work because, by receipt of the money in substitution for the performance, it is given the means of putting itself in the position it would have been in had the contract been performed."[43] His Honour also, correctly in my view, after referring to *Harris* and other cases concluded that: "Sale of the property by the plaintiff does not of itself displace the entitlement to damages according to the rectification measure".[49]

[17] It is not necessary to set out the facts of the *Chocolate Factory* case here; they were in some ways analogous to the facts of the present case. What, in my view, is significant is that the original building owner, the party to the building contract, had sold all the units in the building to unit holders who were not asking that rectification work be carried out. There was no evidence there had been any diminution in the sale price of the units and no evidence that the purchaser of any unit was seeking to have the alleged defects remedied or was consenting to the obvious inconvenience of having such work done. The original building owner did not propose to carry out the rectification work; the evidence was that it would return the recovered cost of reinstatement to its shareholders.

[18] The question the Court of Appeal asked was whether or not the rectification work was necessary and reasonable, which it described as a question of fact. In that regard Giles JA went on to say at [54]:

> "Ordinarily the court is not concerned with the use to which a plaintiff puts its damages, and if the likelihood of the plaintiff carrying out the rectification work were a consideration in the award of damages there would be the potential for expensive and time-consuming factual enquiries. On the other hand, adherence to the compensatory nature of damages suggests that, if the plaintiff will not put itself in a position it would have been in had the contract been performed, the plaintiff should not be given the means of doing so."

[19] Later he then said at [60]:

> "But the plaintiff's intention to carry out the rectification work, it seems to me, is not of significance in itself. The plaintiff may intend to carry out rectification work which is not necessary and reasonable, or may intend not to carry out rectification work which is necessary and reasonable. The significance will lie in why the plaintiff intends

> or does not intend to carry out the rectification work, for the light it sheds on whether the rectification is necessary and reasonable."

[20] That decision establishes the proposition that if the rectification work necessary to achieve the contractual objective cannot be carried out then it does not provide the test for the measurement of the building owner's loss. As follows from what was said in *Bellgrove*, in such circumstances the measure of the building owner's loss would be the diminution in value. If a sale of the building demonstrated that there was no difference between the sale price and the value of the building if constructed in accordance with the contractual obligations, the building owner would only be entitled to nominal damages.

[21] In his judgment Giles JA referred to *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28, *Scott Carver Pty Ltd v SAS Trustee Corporation* [2005] NSWCA 462, *Central Coast Leagues Club v Gosford City Council* (unreported, Giles J, Supreme Court of New South Wales, 55406/94 & 55011/96, 9 June 1998) and *Hyder Consulting (Aust) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd & Anor* [2001] NSWCA 313. It is now necessary to say something about each of those cases.

[22] The latter two cases can be dealt with briefly. In *Central Coast Leagues Club* the rectification work would not be carried out because other more extensive work had to be carried out in order to comply with later court orders. Giles J there said [pages 216-217] that the fact "that the work would not be undertaken [gave] occasion to conclude that it was not a reasonable course to adopt" the cost of reinstatement as the appropriate measure of damages. In *Hyder* the rectification work in question could not be carried out because other more extensive work had already been carried out. In consequence Giles J held that as the rectification work would never be carried out no damages should be awarded. In commenting on those decisions in the *Chocolate Factory* case Giles JA said at [62]:

> "In these cases the rectification work could not be carried out because of supervening events, and established that the plaintiff had not been deprived of the benefit of performance of the contract and thus had not suffered a compensable loss. In other cases, depending on their facts, whether rectification work would be carried out could come under consideration, but not because an intention to carry out the rectification work itself precluded the award of damages."

[23] There was a divergence of opinion between Hodgson JA on the one hand and Ipp and Bryson JJA on the other, though they all agreed that the critical appeal by Scott Carver should be dismissed. Two companies, SAS and P were the owners of an office development comprising two towers. A decision was made to join the two towers by means of a glazed pavilion and Scott Carver was appointed architect with respect to that work. It was established that there were significant defects in the construction work and at least some responsibility for that rested with Scott Carver. Subsequently P transferred its interest in the complex to SAS who in turn subsequently sold the whole building complex to a Trust. That was not an arms length sale and SAS held a 50 per cent interest in the Trust. In the sale to the Trust the parties agreed to certain deductions in the sum of "$2,232,752.00 for rectification of the pavilion" from the sale price determined by a valuation of the property. As was pointed out in the judgment: "No funds were expended by SAS on rectification before or after the sale, and there was no obligation under the contract of sale for SAS to undertake any rectification works."[15]

[24] The claim by SAS for cost of rectification was initially heard and determined by a Referee. The Referee rejected a submission that SAS should not recover damages because it had not performed rectification work, because the defects did not result in any diminution in value of property and because SAS had sold the property. He held SAS was entitled to damages in accordance with *Bellgrove*. The matter then went before a Master on an application for adoption of the Referee's report. For present purposes it is sufficient to say that the Master adopted the Referee's report; in essence he held that SAS was entitled to the cost of rectification of the defects because rectification would be reasonable, and it did not matter that the defects did not reduce the value of the property or that the property had been sold.

[25] Before the Court of Appeal counsel for the builder relied on statements in *Central Coast Leagues Limited* and *Hyder* to the effect that, if it is found that the rectification work will not be carried out, the cost of rectification work should not be included in the damages.

[26] Hodgson JA said at [38]:

> "I accept that *Bellgrove* does not require that damages for breach of contract by reason of defective building work must in all cases include the cost of rectification, so long as rectification would be a reasonable course to adopt. If by reason of subsequent events, the owner has suffered a different loss or no loss, then the underlying principle expressed by Deane J in *Amann* at 116 does mean that the damages must be assessed by the loss actually suffered."

[27] The passage from *Amann* referred to was that where Deane J said:

> "The general principle governing the assessment of compensatory damages in both contract and tort is that the plaintiff should receive the monetary sum which, so far as money can, represents fair and adequate compensation for the loss or injury sustained by reason of the defendant's wrongful conduct."

[28] In support of the proposition quoted above, Hodgson JA relied on *Central Coast Leagues Club* and *Hyder*. He then referred to *De Cesare* and said the decision therein was to be "explained on the basis that the circumstances were not sufficient to displace the cost of rectification as the measure of damages. It was found reasonable to undertake the rectification work, and it was appropriate to infer that the defects depreciated the value of the property; and there was nothing to suggest that the price obtained on sale was not affected by that depreciated value."[42] Critically Hodgson JA concluded that the cost of reinstatement would be displaced "only if there are supervening circumstances that show with substantial certainty that this will not happen".[44] Finally reference should be made to the observations by Hodgson JA at [47]:

> "The sale of the property of itself does not displace the *Bellgrove* measure, as illustrated by *De Cesare* and *Harris*. If it were shown that the price received on a sale was unaffected by the defects, or that it was reduced by an amount less than the cost of rectification, this could displace the *Bellgrove* measure. But this was not shown in this case. On the contrary, the price was reduced by an amount in excess of the cost of rectification, by reason of the defects."

[29] Ipp JA referred to *Bellgrove* and *Harris*, and in particular said that in the former the High Court effectively held "that if it were reasonable to do the work, it would not be material, in assessing damages to which the proprietor would be entitled, whether the proprietor had made a profit or loss on the sale of the building. The rationale expressed was, 'the builder has no concern with the details of any contract that the owner might make with a third party'."[119] He went on to say that any contract of sale was "collateral to the issue of the proprietor's loss" and that if that were not to be so "the builder in breach of contract would obtain a windfall, depending on coincidence (the proprietor's whim in selling), that would not be deserved."[121] and [122].

[30] Bryson JA said at [131] that "the transaction spoken of as the sale of the building does not constitute a reason of any kind for concluding that SAS did not suffer a loss." He went on to say: "The situation is quite unlike situations in which a building becomes useless or repairs would achieve nothing because of some supervening change in planning law or some administrative decision."

[31] Scott Carver sought special leave to appeal to the High Court but it was refused: [2006] HCA Trans 325. Counsel for Scott Carver endeavoured to argue that the asserted reduction in the sale price was a voluntary submission to loss with a view to preserving a right against a third party. It was said that the court would in those circumstances not regard the sale as being for a price less than market value if the contract had been performed. But in refusing special leave Kirby J indicated that the "adjusted on-sale price" meant that the case was not a proper vehicle in which to consider the consequences of an on-sale of property on the principle enunciated in *Bellgrove*.

[32] *De Cesare* raised the question in unusual circumstances. A sub-contractor claimed a lien, and such a lien could only be enforced if there was money owed by the original building owner to the builder. The building work had not been completed in accordance with the contract and the building in its unfinished state had been on-sold. There was no finding at first instance as to the effect on the sale price of the fact that the building was incomplete. Doyle CJ concluded, in my view clearly correctly, that the price paid by the buyer for the incomplete building was less than what would have been paid for a building in its completed state. It was not in dispute that at the time the builder ceased work on the project a considerable amount of money needed to be expended in order to complete the building to the contractual standard. Doyle CJ at 29-30 posed the question for determination in the following terms:

> "The question which arises is this. If building work performed under a contract with a building owner is not complete, and if to complete it the building owner has to carry out further building work, and has to rectify work which has been done defectively, is the building owner able to recover damages measured by the cost of that further work, even though the building owner has sold the building, does not intend to carry out the further work and has not established by evidence that the price for which the building was sold was less than it would have been if the building work had been completed in accordance with the contract?"

[33] His Honour, following *Bellgrove*, stated that the usual remedy for incomplete and defective building work will be the cost of completing the building works in

accordance with the building contract. He then correctly observed: "The award of such amount is not conditional upon the building owner having first done the necessary work, upon the building owner undertaking to the court to do so or upon the building owner proving that the building owner will do so."[page 30] But he also observed at page 31 that there may be "cases in which completion of the work in accordance with the contract will not be a reasonable course to adopt." That is because the governing principle stated in *Bellgrove* is "subject to a controlling factor of reasonableness".

[34] Further, his Honour recognised that the building owner need not carry out the rectification work. As he said at page 32:

> "What is awarded is the cost of bringing the building works into a state of compliance with the contract, not an amount which the plaintiff has in fact expended to do so or proves will be spent. In principle, the owner who chooses to make do with defective contractual performance is entitled still to an appropriate award of damages because that is the measure of what the plaintiff has lost."

[35] But significantly for present purposes he went on to say:

> "But does the fact that the owner of the defective building has disposed of the property, and does not intend to carry out the remedial work, mean that to undertake the remedial work is not a reasonable course to adopt, and therefore that all the owner can recover is the difference between what the owner received for the building and the amount which the owner would have received had it been completed in accordance with the contract?"

[36] Doyle CJ then referred to a passage, which was also referred to in some of the New South Wales decisions, from the judgment of Megarry VC in *Tito v Waddell (No. 2)* [1977] Ch 106 at 332 where relevantly it was said:

> "… if the plaintiff has suffered little or no monetary loss in the reduction of value of his land, and he has no intention of applying any damages towards carrying out the work contracted for, or its equivalent, I cannot see why he should recover the cost of doing work which will never be done. It would be a mere pretence to say that this cost was a loss and so should be recoverable as damages."

[37] There was then reference to *Harris*. In my view Doyle CJ was correct in saying that the submission by the claimant sub-contractor placed a construction on the reasoning of Gibbs J which was "too absolute".

[38] At the end of the day Doyle CJ concluded that whether money was owing by the original building owner to the builder was to be determined by the fact that the cost of reinstatement work did not cease to be reasonable because the building had been sold, particularly in circumstances where the sale price was less than it would have been but for the need for the remedial work.

[39] Nyland J (with whom Bollen J agreed) agreed in the result but for different reasons. With respect I find it difficult to discern a clear ratio. Clearly the judgment did not accept that the inference could be drawn that the price paid on the on-sale was less than it would have been if the building contract had been completed. But the judgment was also premised on the fact that what was sold was an incomplete

building, not a building completed in accordance with the contract. In those circumstances it was relevant that the original owner had a claim against the builder for the cost of completing it in accordance with the contract.

[40] Senior counsel for the appellant in the present case submitted that the reasoning of Gibbs J in *Harris*, of Bollen and Nyland JJ in *De Cesare* and of Ipp and Bryson JJA in *Scott Carver* supported or established the proposition that where there has been breach of a building contract the owner can recover the cost of reinstatement (even where that is the cost of demolition and rebuilding) where it is not legally possible for the reinstatement work to be carried out and where the building in question has been on-sold at a price not less than it would have been if the building had been constructed in accordance with the contract. What is clear is that not one of those five judges said that in express terms. There is nothing to suggest that any of those five judges had that particular situation in mind in making the statements relied upon as supporting the inference that such is the law. If that be the law which is to be applied in this particular contractual situation then it amounts to an exception to the general principle stated by Deane J in *Amann*. Because of that it would be reasonable to expect that one or more of those five judges would have endeavoured to justify the exception to that over-arching principle if that be the case.

[41] In my view the approach of the Court of Appeal in the *Chocolate Factory* case was correct. The cost of reinstatement is prima facie the measure of damages where a builder has breached his contractual obligations in delivering a building which did not conform with contractual expectations. But that test as to the measure of damages is subject to it being "reasonable" and "possible", to adopt qualifications derived from *Bellgrove*. Where there has been a supervening event which makes reinstatement impossible then the measure of the building owner's loss is the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials – again to use language taken from *Bellgrove*.

[42] It follows that the learned judge at first instance was correct in striking out the paragraphs in question. The appellant is bound to fail on the material presently available with respect to the claim for the cost of demolition and re-building and there is no reasonable possibility of evidence becoming available to provide a basis for possible success on that claim.

[43] On all other issues I agree with what Keane JA has written.

[44] The appeal should be dismissed with costs.

[45] **KEANE JA:** In 2001 and 2002, the appellant (to whom I will refer as "the plaintiff") developed land owned by it at Cleveland by the construction of buildings for residential, retail and office purposes.[1] In this action, the plaintiff seeks to agitate a number of claims against the respondents (to whom I will refer as "the defendants") in relation to alleged defects in the construction of the development. The defendants, other than the seventh defendant, were engaged by the plaintiff in relation to the design and construction of the development. The seventh defendant was the local authority within whose jurisdiction the development occurred.

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1 *U.I. International P/L v Interworks Architects P/L & Ors* [2006] QCA 434 at [2].

[46] After the construction was complete, the plaintiff caused the property to be subdivided by several community title schemes. It sold most of the lots in the schemes, and, although it retained a number of lots, the management of the development is now regulated under the *Body Corporate and Community Management Act 1997* (Qld). In consequence, the plaintiff is not able unilaterally to carry out any rectification work on the buildings in the development, any decision in that regard being a matter for persons who are not parties to the plaintiff's action.

[47] This is the second time in this action that a contest about the pleadings has come before this Court. On the first occasion,[2] this Court dismissed the plaintiff's appeal from the learned primary judge against orders striking out parts of its statement of claim and requiring other parts to be supported by the pleading of further allegations of fact. Subsequently, the plaintiff repleaded its case only to be confronted with further objections by the defendants. The defendants' challenge to the sufficiency of parts of the new pleading was upheld by the learned primary judge. The present appeal concerns the striking out of parts of what is now the third amended statement of claim ("the statement of claim").

[48] The parts of the statement of claim which were successfully challenged by the defendants on this occasion relate broadly to two claims, the first being to recover the cost of demolition and reconstruction of defective buildings; and the second being to recover the diminished value of the development.

[49] Before discussing the arguments agitated by the parties on the appeal, I will set out the contentious parts of the statement of claim and the reasons given by the learned primary judge for upholding the defendants' challenges to the statement of claim.

**The contentious parts of the statement of claim**

[50] The claim for demolition and reconstruction costs is put by the plaintiff on three bases. I shall describe them in turn.

**The claim for demolition and reconstruction costs: the first basis**

[51] Paragraphs 73A to 76 and 79 to 82 inclusive of the statement of claim advance the plaintiff's claim to recover the cost of reconstruction to achieve what is described in the pleading as the "development objective". That term is defined in paragraph 73A to refer, both to the plaintiff's contractual entitlement as against the first, second, fourth, fifth and sixth defendants "to have a development erected on the land which was reasonably fit for its intended purpose, namely, a good quality marketable mixed purpose commercial, retail and residential complex", and to the plaintiff's contractual entitlement as against the third defendant "to receive the benefit of the exercise of reasonable care in achieving the development objective".

[52] Paragraphs 73B and 73C of the statement of claim allege that the development as constructed departs substantially from the development objective by reason of breaches of contract or negligence on the part of the defendants except the seventh defendant. So far as that defendant is concerned paragraph 73D relies upon that defendant's negligence in relation to the approval and inspection of the development works.

[53] Paragraph 73E alleges that "the demolition and reconstruction of the development is a necessary, a reasonable and is the only practicable method of achieving the

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2 [2006] QCA 434.

development objective". Paragraph 73F alleges that, by 30 June 2005, the estimated reasonable cost of demolition and rebuilding the development to achieve the development was $31,099,490.

[54] One may pause here to note the distinctly unusual way in which this claim is pleaded. Importantly, for reasons which will become apparent, the plaintiff alleges its loss is to be measured by reference to the achievement of the development objective. It may also be noted that it is no part of this first claim that the plaintiff has not received full market value for the lots which it has sold or that the lots which it retains are worth less in the market by reason of the defects than if the defects were not present. It is also no part of the plaintiff's case in relation to this first claim that the plaintiff has paid or will pay for the rectification works to be done, or even that it can reconstruct the buildings comprised in the development. In truth, by reason of the transfer of the land and buildings into the community titles scheme, it cannot carry out the rectification works of its own volition. It is important to appreciate in relation to this first claim that the plaintiff seeks thereby to recover the costs of rectification even though it cannot rectify the alleged defects in construction.

[55] The plaintiff supports this part of its pleading by reference to the decision of the High Court in *Bellgrove v Eldridge*.[3] The plaintiff also relies on more recent decisions such as *Director of War Service Homes v Harris*,[4] *De Cesare v Deluxe Motors Pty Ltd*[5] and *Scott Carver Pty Ltd v SAS Trustee Corporation*,[6] which affirm the proposition that the sale of real property on which a defective structure has been built by the defendant does not preclude the recovery of damages measured by the cost of rectification of the defects.

[56] It is convenient to note here that the decision of the High Court in *Bellgrove v Eldridge* was that the measure of damages recoverable by an owner of land for defective work in constructing a building on the owner's land "can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of …".[7] In a passage which, though lengthy, is of such significance to the plaintiff's claim that it should be cited in full, the High Court said:

> "In particular, it was said, the building as it stood was saleable, at least, to some builders who were prepared to attempt the rectification of the existing defects by methods less drastic than demolition and rebuilding. This being so, it was contended, the proper measure of damages was the difference between the value of the house–and presumably the land upon which it stands–ascertained by reference to the amount which could be obtained for it on such a sale and the value which it would have borne if erected in accordance with the plans and specifications. To support this contention counsel for the respondent referred to the general proposition that damages when awarded should be of such an amount as will put an injured party in the same position as he would have been if he had not sustained the injury for which damages are claimed. Accordingly, it was said, damages should have been assessed by reference to the value of the

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3 (1954) 90 CLR 613.
4 [1968] Qd R 275.
5 (1996) 67 SASR 28.
6 [2005] NSWCA 462.
7 (1954) 90 CLR 613 at 617.

building as it stands and the value it would have borne if erected in accordance with the plans and specifications since this was the true measure of the respondent's financial loss. Whilst we readily agree with the general proposition submitted to us and with the remarks of Lord *Blackburn* in *Livingstone v Rawyards Coal Co* ((1880) 5 App Cas 25 at 39) which were cited to us, we emphatically disagree with the submission that the application of that proposition or the general principle expounded by his Lordship produces the result contended for in this case. **It is true that a difference in the values indicated may, in one sense, represent the respondent's financial loss. But it is not in any real sense so represented. In assessing damages in cases which are concerned with the sale of goods the measure, prima facie, to be applied where defective goods have been tendered and *accepted*, is the difference between the value of the goods at the time of delivery and the value they would have had if they had conformed to the contract. But in such cases the plaintiff sues for damages for a breach of warranty with respect to marketable commodities and this is in no real sense the position in cases such as the present. In the present case, the respondent was entitled to have a building erected *upon her land* in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her. This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract.** One or two illustrations are sufficient to show that the prima facie rule for assessing damages for a breach of warranty upon the sale of goods has no application to the present case. Departures from the plans and specifications forming part of a contract for the erection of a building may result in the completion of a building which, whilst differing in some particulars from that contracted for, is no less valuable. For instance, particular rooms in such a building may be finished in one colour instead of quite a different colour as specified. Is the owner in these circumstances without a remedy? In our opinion he is not; he is entitled to the reasonable cost of rectifying the departure or defect so far as that is possible. Subject to a qualification to which we shall refer presently the rule is, we think, correctly stated in *Hudson* on *Building Contracts*, 7th ed (1946), p 343. 'The measure of the damages recoverable by the building owner for the breach of a building contract is, it is submitted, the difference between the contract price of the work or building contracted for and the cost of making the work or building conform to the contract, with the addition, in most cases, of the amount of profits or earnings lost by the breach'. Ample support for this proposition is to be found in *Thornton v Place* ((1832) 1 M & Rob 218 [174 ER 74]); *Chapel v Hickes* ((1833) 2 C & M 214 [149 ER 738]) and *H Dakin & Co Ltd v Lee* ([1916]

> 1 KB 566). (See also *Pearson-Burleigh Ltd v Pioneer Grain Co* ((1933) 1 DLR 714) and cf *Forrest v Scottish County Investment Co Ltd* ((1915) SC 115) and *Hardwick v Lincoln* ([1946] NZLR 309). But the work necessary to remedy defects in a building and so produce conformity with the plans and specifications may, and frequently will, require the removal or demolition of some part of the structure. And it is obvious that the necessary remedial work may call for the removal or demolition of a more or less substantial part of the building. Indeed–and such was held to be the position in the present case–there may well be cases where the only practicable method of producing conformity with plans and specifications is by demolishing the whole of the building and erecting another in its place. In none of these cases is anything more done than that work which is required to achieve conformity and the cost of the work, whether it be necessary to replace only a small part, or a substantial part, or, indeed, the whole of the building is, subject to the qualification which we have already mentioned and to which we shall refer, together with any appropriate consequential damages, the extent of the building owner's loss.
>
> **The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt.**
>
> …
>
> **Many examples may, of course, be given of remedial work, which though necessary to produce conformity would not constitute a reasonable method of dealing with the situation and in such cases the true measure of the building owner's loss will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials.**"[8] (emphasis added)

**The claim for demolition and reconstruction costs: the second basis**

[57] In paragraph 73H, the plaintiff pleads a second basis for the demolition and reconstruction claim. It alleges that the defendants ought reasonably to have known that ownership of the development might be transferred by the plaintiff in whole or in part to third parties so that damage caused by a breach of contract with the plaintiff would cause loss to such third parties as well as the plaintiff while the plaintiff was the only party who may sue on the contracts or enforce a duty of care.

[58] The plaintiff seeks to support this aspect of its pleading by reference to the decision of the House of Lords in *St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd*.[9] In that case, the first plaintiffs assigned their interest in a development property and a contract with the defendant for the development of the property to the second plaintiffs. The development contract prohibited the assignment of the contract without the defendant's consent which was not obtained. Some years after the purported assignment, part of the development work was found to be defective. The House of Lords held that the development was, to the knowledge of the parties to the contract, likely to be occupied or purchased by third

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8 (1954) 90 CLR 613 at 616 – 619.

9 [1994] 1 AC 85.

parties, damage to such a third party was foreseeable, and because of the contractual prohibition on assignment of rights under the contract, the parties could be regarded as having contracted on the basis that the first plaintiffs would be entitled to enforce against the defendant contractual rights on behalf of those third parties who would suffer from defective performance of the contract but have no rights under it. Accordingly, the first plaintiffs were held to be entitled to recover as damages the cost of rectification of the defective work by the defendant. Lord Browne-Wilkinson, with whom Lords Keith of Kinkel, Bridge of Harwich and Lord Ackner agreed, said:

> "In my judgment the present case falls within the rationale of the exceptions to the general rule that a plaintiff can only recover damages for his own loss. The contract was for a large development of property which, to the knowledge of both Corporation and McAlpine, was going to be occupied, and possibly purchased, by third parties and not by Corporation itself. Therefore it could be foreseen that damage caused by a breach would cause loss to a later owner and not merely to the original contracting party, Corporation. As in contracts for the carriage of goods by land, there would be no automatic vesting in the occupier or owners of the property for the time being who sustained the loss of any right of suit against McAlpine. On the contrary, McAlpine had specifically contracted that the rights of action under the building contract *could* not without McAlpine's consent be transferred to third parties who became owners or occupiers and might suffer loss. **In such a case, it seems to me proper, as in the case of the carriage of goods by land, to treat the parties as having entered into the contract on the footing that Corporation would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who, under the terms of the contract, could not acquire any right to hold McAlpine liable for breach. It is truly a case in which the rule provides 'a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it.'**"[10] (emphasis added)

[59] I pause here to note that the statement of claim does not allege that the third parties have suffered loss which they are entitled to recover from the defendants by reason of their acquisition of lots in the community titles schemes.

**The claim for demolition and reconstruction costs: the third basis**

[60] In relation to the third basis for the plaintiff's claim to recover the costs of demolition and reconstruction, paragraph 74B of the statement of claim pleads:

> "In order to facilitate the matters referred to in paragraph 74C below, the Plaintiff has taken the following steps:
>
> (a) in November 2004 provided the Statement of Claim to the Body Corporate for the Raby Bay Harbour Community Titles Scheme 30942; and
>
> (b) in November 2004 provided the report of Dr Trevor Johnson, Consultant Engineer, of Cardno MBK, dated

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10 [1994] 1 AC 85 at 114 – 115.

> November 2004 to the Body Corporate for the Raby Bay Harbour Community Titles Scheme 30942."

[61] Paragraph 74C of the statement of claim alleges that, to facilitate the demolition and rebuilding of the development, the plaintiff intends to take such steps as are necessary, inter alia, to "seek the resolution without dissent of the bodies corporate for the community titles schemes … for the approval of a process for reinstating the development in whole, as provided for in section 74 of the *Body Corporate and Community Management Act* 1997" or "in the absence of such resolution without dissent, apply to the District Court of Queensland for an order pursuant to section 72 of the *Body Corporate and Community Management Act* 1997 for approval of a process of reinstating the development in whole". Paragraph 74C also pleads an intention, if necessary, to pursue other means of facilitating the demolition and rebuilding of the development.

[62] Paragraph 74D of the statement of claim pleads that the plaintiff will be successful in taking these steps because:

> "at the time that they will be undertaken (assuming a successful conclusion to the proceeding), the Plaintiff will have secured a successful conclusion to this proceeding that will have provided it with the funds necessary to undertake such demolition and rebuilding."

[63] Paragraph 82 of the statement of claim pleads:

> "Arising out of the rebuilding of the development as contemplated by paragraphs 74, 75 and 76 above, and assuming that any compensation arrangement with current third party unit owners and original third party purchasers does not entail the non-cash return of a properly completed residential property unit, a benefit may accrue to the Plaintiff in respect of:
>
> (a) the extent to which the achieved net sale proceeds upon a unit sale post-rebuilding of the development exceeds the actual net sale proceeds achieved for that unit pre-demolition; and/or
>
> (b) the extent to which the achieved net sale proceeds upon a sale of commercial or retain premises exceeds the actual net sale proceeds achieved for that commercial or retain premises pre-demolition.
>
> which gains would need to be set-off against the Plaintiff's claim for damages.
>
> **Particulars**
>
> The Plaintiff is unable to provide particulars of this reduction (if any) at this time. It will do so when the same become available to it."

**The diminished market value claim**

[64] In the alternative to the claim to recover the cost of demolition and construction, the plaintiff pleads in paragraphs 85 to 89 inclusive that, by reason of the defendants' failure to meet their obligations in relation to the achievement of the development objective:

> "the current market value of the land and the development is substantially less than the market value that the land and the

development would have borne had the Defendants not: (i) breached the development contracts … (ii) been negligent …"

[65] In paragraph 86, the plaintiff claims:

"the difference between the current market value of the land and the development and that market value had the development not been affected by:

(i) the Defendants' breaches of the development contracts …;

(ii) the Defendants' negligence …"

It should be noted here that the plaintiff acknowledged in its written submissions in this Court that the reference to the "current market value of the land" is erroneous.

[66] In paragraph 87, a claim is made to recover the difference between the current market value of the lots retained by the plaintiff and the market value those lots would have had but for the defendants' breaches of contract or negligence.

[67] Paragraph 88 of the statement of claim pleaded that the plaintiff remains exposed to the risk of being called upon by purchasers of lots in the development to pay damages:

"calculated as the difference between the current market value of the relevant Lots in the development and that market value had the development not been affected by:

(a) the Defendants' breach of contract …;

(b) the Defendants' negligence …"

[68] In paragraph 89, the plaintiff asserts an entitlement to damages by way of compensation for that risk. It should be noted that the plaintiff does not allege a basis on which it might be liable to third parties who acquired lots from it.

**The decision at first instance**

[69] In relation to the first basis for the demolition and reconstruction claim in paragraphs 73A to 76 and 79 to 82, apart from paragraph 73H, the learned primary judge referred to his thorough review of the authorities on the previous occasion the matter came before him[11] and concluded:

"Ultimately then, the plaintiff cited no authority which directly supports this first basis for the demolition/rebuilding claim, by exemplifying the recovery of the cost of rebuilding at the suit of an employer who has assigned the property for apparently full value, and who is neither obliged nor able to rebuild (In *Scott Carver Pty Ltd v SAS Trustee Corporation*, the plaintiff's on-sale price was apparently affected by the defects, as was noted in the High Court's refusal of special leave: [2006] HCA Tran 325 see the remarks of Hodgson JA quoted by me at [2006] QSC 079 at [21]. *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28 was not a claim by the owner for damages but by a subcontractor for a statutory lien, and Doyle CJ decided the case upon the basis that a loss from an effect on resale had not been excluded). I remain of the view expressed in last year's judgment, which is that recovery of the cost of demolition and rebuilding should not be allowed if there are supervening

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11 [2006] QSC 079 at [14] – [31].

> circumstances showing that the plaintiff will not demolish and rebuild."[12]

[70] In relation to the second basis for the demolition and reconstruction claim raised by paragraph 73H, the learned primary judge said:

> "This plea is based upon *St Martins Property Corporation* where, as already discussed, the first plaintiff as the former owner recovered the costs of rectification upon the basis that it had contracted for the benefit of subsequent owners on whose behalf damages should be recovered. The builder's argument there was that because the former owner had disposed of its interest in the property on which the building works were carried out before the date of any breach of contract, the former owner had suffered no loss. There had been no diminution in the value of the property when owned by it. The subsequent owners could not sue because they had no contract with the builder and the building contract had expressly precluded an assignment of its benefit. The former owner nevertheless succeeded because of what was held to be an exception to the general rule that a plaintiff can only recover damages for its own loss.
>
> …
>
> There were at least two critical features of *St Martins Property Corporation* which are not present here. The first is that the breach of contract occurred after the property was sold. The second is that because the building contract expressly precluded an assignment of its benefit, subsequent owners could be given no remedy for the loss that they would suffer. These two features meant that the first plaintiff, the original owner, had a cause of action but had suffered no loss whereas the subsequent owners had suffered a loss but had no cause of action, so that but for the recognition and operation of the exception, 'the claimed damages would disappear … into some legal black hole, so that the wrongdoer escaped scot-free.' ([1994] 1 AC 85, 109 per Lord Browne-Wilkinson quoting Lord Keith of Kinkel in *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd*, 1982 SLT 533, 538) Without those features in the present case, the basis for this exception as explained by Lord Browne-Wilkinson is not apparent. Further, the original owner there had rectified the loss, initially at its cost, before being indemnified by the new owners.
>
> This second ground is pleaded also against the Council, which is not sued upon a contract but in negligence. But on no view of *St Martins Property Corporation* could it support that case. The basis for that decision was the [effect] given to the *contract* between the (first) plaintiff and the defendant.
>
> If successful on this second basis, the plaintiff would hold any damages recovered 'for the benefit of those who suffered from defective performance.' ([1994] 1 AC 85, 115) There is some qualified acceptance of that in paragraph 74A of the pleading, where it is said that the 'plaintiff anticipates that, if it is successful in this proceeding, it may be legally obliged to [rebuild], such obligation arising by virtue of the sale of lots in the development to third

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[12] *UI International Pty Ltd v Interworks Architects Pty Ltd & Ors* [2007] QSC 096 at [16] (citation footnoted in original).

> parties.' Counsel for the plaintiff made it clear that such a legal obligation could come only from success upon their *St Martins Property Corporation* argument. Although it would follow from *St Martins Property Corporation* that the damages would be held for the benefit of others, the claim for the cost of demolition and rebuilding, upon this second ground, is not expressly pleaded as a claim for the benefit of others. Nor are these others indemnified by name or by category: for example, are the damages to be held on behalf of the initial purchasers or the owners at the date of a judgment in this case?
>
> In my conclusion the principle from *St Martins Property Corporation* cannot assist this case. It is distinguishable for the reasons I have given, and a trial could not affect that position."[13]

[71] In relation to the third basis for the demolition and reconstruction claim raised by allegations in paragraphs 74C and 74D and associated paragraphs, the learned primary judge said:

> "… the plaintiff's case is that all owners or the District Court would agree to a demolition and rebuilding although the buildings would have some years of useful life remaining. On merely the facts pleaded by the plaintiff, that seems to be unlikely. Many owners who live in their apartments might prefer to live there for another ten years rather than having to find somewhere else. But at present it cannot be summarily concluded that owners or the District Court would refuse the plaintiff's proposal. More would have to be known about that proposal. The difficulty for the defendants is that they do not know what that proposal is likely to be. They do not know, for example, what price or compensation is proposed to be paid to owners for the purchase or acquisition of their properties. In another part of this pleading the plaintiff makes a claim upon a diminution in value basis. Unfortunately it is yet to provide any particulars of that claim, including particulars of what it says are the present values of lots within these schemes or even simply those lots which it still owns. In preparing to meet this case the defendants could have their own valuations undertaken. But they have been told nothing of the plaintiff's case as to what price or compensation would be offered to owners, so as to be able to assess, by reference to the value of the lots and other circumstances, the likelihood that owners or the District Court would agree to it. All that they are told in this respect is what is pleaded within paragraph 82 …:
>
> …
>
> … [which] reveals that the plaintiff has it in mind to become the owner of the lots, having seen off the present owners by some 'compensation arrangement'. This seems inconsistent with the claim based on *St Martins Property Corporation*. For some reason the plaintiff acknowledges within this paragraph a need to set-off against its claim the difference between its net sale proceeds of the rebuilt development and its net sale proceeds of the existing development. Whether that is a relevant figure in the assessment of damages need not be determined at the moment. What matters from paragraph 82 is

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13 [2007] QSC 096 at [19] – [23] (citations footnoted in original).

> that it shows that the plaintiff's case will inevitably involve more than what is presently pleaded. Ultimately, in order to discharge even an evidentiary burden of proof that the plaintiff is likely to rebuild, the plaintiff's case will have to descend to the detail of what will be offered to owners, in the light of what their properties are worth and what they would be worth if rebuilt, to persuade them that they should give up those properties. At present, all that is pleaded is that when owners read a judgment in these proceedings, which makes findings that their buildings have a relatively short life span, each and every one of them is likely to agree to leave, regardless of what 'compensation arrangement' is offered. Moreover the pleading fails to plead any facts to address the particular circumstances of the 24 owners of residential lots within the building which is not affected by these structural defects.
>
> The plaintiff could not be seriously intending to spend more than $35,000,000 upon a redevelopment without having some intention as to what it should pay the owners of some 57 properties to re-acquire the development site. Whilst these matters are not pleaded, the defendants cannot prepare to meet this case. They cannot investigate the likelihood of owners agreeing to the plaintiff's proposal until they know what that is or will be.
>
> In my conclusion this most recent statement of claim fails to meet the requirements of my previous judgment and that of the Court of Appeal. It fails to 'address, as part of the case made by it, the means by which it says that the obstacle to demolition and rebuilding, apparent on the face of its own pleading, will be overcome.' (*UI International Pty Ltd v Interworks Architects Pty Ltd & Ors* [2006] QCA 434 at [22] per Keane JA)."[14]

[72] The learned primary judge summarised his conclusions in relation to three bases for the claim for the cost of demolition and reconstruction in the following terms:

> "In summary my conclusions on the demolition and rebuilding claim are that the first and second bases for the claim are wrong in law and the third basis is flawed, not because it is bad in law or (with the pleading of more facts) necessarily hopeless in fact, but because it fails to plead facts which would have to be part of the plaintiff's case and which the defendants would need to have pleaded in order to prepare their answer to it. Had the plaintiff properly pleaded that third basis, it would be appropriate to allow the pleading of the first and second bases to stand because they would involve no further facts and the ultimate determination of the legal questions they raise could be left to the trial. It is possible that the plaintiff will be able to rectify what I have described as the flaws in its pleading of the third basis. But given the history of this case, and the judgments last year, the paragraphs pleading that basis should be struck out. The paragraphs pleading the other bases (paragraphs 73A through 73H) should also be struck out. It should appear from these reasons then that the striking out of the demolition and rebuilding claim should not preclude the pleading of a further statement of claim which properly pleads what I have described as the third basis and in that

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14 [2007] QSC 096 at [36] – [39] (citation footnoted in original).

> event, the plaintiff could replead the alternative legal bases within the present paragraphs 73A through 73H."[15]

[73] It is convenient to note here that the learned primary judge noted that these claims against the seventh defendant were "especially weak" because the Council "is not sued upon a contract".[16]

[74] The learned primary judge also noted, but rejected, an argument which is the subject of a notice of contention pled by some of the defendants. In relation to this argument, the learned primary judge said:

> "The first and second defendants argue that the rebuilding plea is circular and thereby embarrassing, because the claim is that a loss will be suffered in the event of a rebuilding but that that will only occur if the claim succeeds. It was characterised as a case where there is no loss suffered by the plaintiff unless it succeeds in its action. I would not accept that submission because it misdescribes the loss which is claimed. It is not a future loss but rather one which has accrued and is not dependent upon the plaintiff's success in the proceedings (assuming of course, that that loss has not been displaced by facts and circumstances which have put paid to any prospect that the plaintiff will rebuild). Upon the premise that the building was constructed with these defects, the plaintiff suffered a loss for which the appropriate measure might have been the cost of demolition and rebuilding. On the face of things that loss has been displaced by the plaintiff's sale, unless there are other facts which make that uncertain. In seeking to discharge its evidentiary burden, the plaintiff points to the prospects of rebuilding being enhanced by the recovery of the cost of rebuilding within these proceedings. But a successful recovery would not be the event which gives rise to a loss. Accordingly there is not the circularity suggested by this argument."[17]

[75] Having regard to the conclusions which I have reached on the plaintiff's arguments in the appeal, it is unnecessary to resolve the issue raised by the notice of contention.

[76] In relation to the diminished market value claim advanced in paragraphs 85 to 89 inclusive of the statement of claim, the learned primary judge said:

> "… the claim in paragraph 86 is untenable and ought to be struck out because it complains of a diminished present value of the entirety of the land and development, although the plaintiff has for some years now not been the owner of it. It is unambiguously a claim for a diminished *current* market value. As already mentioned there is no claim that the plaintiff obtained less for the lots because of the matters complained of in these proceedings. Just how the plaintiff has suffered a loss because the present value of property which it does not own is less than it should be does not at all appear. In my view paragraph 86 should be struck out as disclosing no reasonable basis for the claim.

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15 [2007] QSC 096 at [40].
16 [2007] QSC 096 at [48].
17 [2007] QSC 096 at [42].

> Paragraph 87 is limited to property which is still owned by the plaintiff. It is doubtful nevertheless that the claim is properly made by its reference to a current market value as distinct from the value of the lots at the time of completion of construction. But that particular point was not taken by the defendants and I would not be inclined to strike it out upon that basis, at least at the moment. However the pleading should not stand whilst the relevant particulars have not been provided. Paragraph 87 should be struck out unless those particulars are provided within fourteen days. Those particulars had been promised by 5 March last and this litigation was commenced in 2004. There is no good reason for why the claim cannot be now particularised.
>
> The remaining question is the future of paragraphs 88 and 89. Paragraph 88 pleads that as a result of the various breaches of contract and negligence, 'the plaintiff remains exposed to the risk of being called upon by new owners of lots in the development who purchased lots in the development from the plaintiff to pay damages calculated as the difference between the current market value of the relevant lots in the development and that market value had the development not been affected by [the relevant defects].' Again those particulars were to have been provided by 5 March last. Paragraph 89 alleges that the plaintiff is entitled to damages 'as the court thinks fit to compensate the plaintiff for' that risk of being liable to the plaintiff's purchasers.
>
> The first problem with this particular claim is that there is no identified basis for the plaintiff to be liable to its purchasers. The second is that the quantification of a purchaser's claim is put at the difference between the current market value and the market value had the lot not been affected by the alleged defects. It is doubtful that that would be the basis of a purchaser's claim. For example, if a purchaser was able to claim that it had been misled, in contravention of s 52 of the *Trade Practices Act* 1974 (Cth), to think that the buildings were in all respects well-built and free of defects, the appropriate measure of damages would be the difference between the price paid and the real value of the lot at the time of its acquisition by that purchaser (*HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640).
>
> Because paragraph 88 does not indicate the basis of the plaintiff's potential liability to purchasers, it puts the present defendants in a particularly disadvantaged position in responding to this allegation. At least for that reason paragraphs 88 and 89 are embarrassing and should be struck out."[18]

**The plaintiff's arguments on appeal**

[77] The plaintiff's arguments in this Court in relation to the demolition and reconstruction measure of damages begin with a reminder that an application to strike out part of a pleading should succeed only where there is the requisite "high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."[19] A court invited to strike out a cause of action

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18 [2007] QSC 096 at [52] – [56] (citation footnoted in original).

19 *Agar v Hyde* (2000) 201 CLR 552 at 576.

should not risk "stifling the development of the law by summarily rejecting a claim where there is a reasonable possibility that, as the law develops, it will be found that a cause of action will lie".[20] As was said by Gleeson CJ, Gummow, Hayne and Heydon JJ in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*:[21] "The dangers of developing common law principle against an artificially constricted body of fact are self-evident."

[78] It may readily be accepted that the power summarily to terminate a claim should be exercised with great caution to ensure that a claim with a reasonable prospect of success is not allowed to be considered in its best light. In this case, the learned primary judge was fully alive to these constraints. These constraints did not, however, oblige the learned primary judge to approach the determination of the defendants' applications on the footing that some unpleaded facts might emerge unheralded at trial as a *deus ex machina* to breathe life into a moribund claim. It is difficult to see how, having regard to the plaintiff's many attempts at pleading its case, the facts on which the plaintiff relies for those claims struck out as bad in law are either "artificially constricted" or may possibly appear in a better light after a trial.

[79] Nor was his Honour obliged to act upon a counsel of despair that the capacity of the common law for development is so unruly, and the possible course of that development so capricious, that a plainly overreaching claim cannot be terminated as futile without the delay, expense and inconvenience of a trial. The question which must be addressed in relation to the first two bases of the claimed demolition and reconstruction measure of damages is whether "the case of the plaintiff is so clearly untenable that it cannot possibly succeed."[22] In that regard, it is clear that an award of damages cannot put a claimant in a better position than he or she would have been had the contract been performed.[23] The law does not currently sanction the injustice of double recovery by a claimant;[24] and there is no reason to think the law will develop so as to promote, or acquiesce, in that injustice. It would, I think, be to surrender unnecessarily to the counsel of despair if a court could not say with confidence that a claim by a party, who has realised or can realise an asset for its full market value, to recover the cost of repairs to the asset which it is neither liable for nor able to effect, is so clearly untenable that it cannot possibly succeed.

[80] On the appeal, the principal focus of the arguments of the parties was upon the first basis for the claim to recover the costs of demolition and reconstruction. To a consideration of the arguments in relation to that basis for the claim I now turn.

**The demolition and reconstruction claim: the first basis**

[81] In my respectful opinion, the first basis for the demolition and reconstruction claim cannot be sustained on the basis that *Bellgrove v Eldridge* requires, or even points the way to, the acceptance of the plaintiff's contentions. There are, broadly speaking, two reasons why I have come to that view. The first is that, because of the unusual way in which the plaintiff's case is pleaded in paragraphs 73A to 76 and 79 to 82 of the statement of claim, it is not correct to say that the *Bellgrove v*

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20 *Edwards Karwacki Smith & Co Pty Ltd v Jacka Nominees Pty Ltd (In Liq)* (1994) 15 ACSR 502 at 507 – 508.

21 (2004) 216 CLR 515 at 525 [7].

22 *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125 at 130.

23 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 82, 116, 136.

24 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 82, 116, 136.

*Eldridge* measure of damages is even prima facie applicable to this case. Secondly, even if the *Bellgrove v Eldridge* measure were, prima facie, applicable, it has been displaced as the learned primary judge held.

***Bellgrove v Eldridge* does not apply**

[82] The plaintiff argues that the learned primary judge erroneously failed to follow *Bellgrove v Eldridge* and the other cases to which I have referred. In the plaintiff's written submissions, it was said:

> "*Bellgrove* and *Harris* were and remain binding on the learned judge at first instance. It is, at least, arguable that they remain correct. Applying the reasons of Gibbs J in *Harris*, the [plaintiff] became entitled to recover damages against the [defendants] when they, in breach of contract and/or tortious duty, delivered to the appellant the development. The only issue remaining is the assessment of damages. For that assessment, matters that are accidental between the [plaintiff] and the [defendants], like the subsequent sale of part of the development for value, are not taken into account. Thus the learned primary judge erred when striking out paragraphs 73A to 73G of the … statement of claim because that pleading does disclose a reasonable cause of action."

[83] One must, of course, readily accept that the decisions in *Bellgrove v Eldridge* and *Harris* are binding on the learned primary judge and on this Court. The problem for the plaintiff is that, where, as in the statement of claim in this case, the defendants' obligations are defined by reference to the marketability of the development, the plaintiff cannot hope to argue successfully that the sale of lots in the development was "accidental as between the plaintiff and the defendants". The plaintiff used the concepts of "accidental sale" and "expectation interest" or "performance interest"[25] in making its arguments on this point. It is convenient to use these concepts in discussing the plaintiff's argument on this point.

[84] Discussion may usefully begin with reference to *Ruxley Electronics and Constructions Ltd v Forsyth*[26] where Lord Mustill explained:

> "There are not two alternative measures of damage, at opposite poles, but only one; namely, the loss truly suffered by the promisee. **In some cases the loss cannot be fairly measured except by reference to the full cost of repairing the deficiency in performance. In others, and in particular those where the contract is designed to fulfil a purely commercial purpose, the loss will very often consist only of the monetary detriment brought about by the breach of contract.**" (emphasis added)

[85] Lord Mustill's statement echoes the statement of principle in the passage from *Bellgrove v Eldridge* cited above. The point made in the passage from *Bellgrove v Eldridge* is that, where an owner of land contracts for the construction of a building **on its own land**, the expectation interest[27] of the owner in the performance of the contract may be measured, prima facie, **only** by the cost of rectification of defects.

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25 Cf *Alfred McAlpine Construction Pty Ltd v Panatown Ltd* [2001] 1 AC 518 at 546.

26 [1996] 1 AC 344 at 360.

27 Cf *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 at 546.

[86] In such a case, the owner's entitlement to be put into the position it would have enjoyed had the contract been fully performed can only be vindicated by the rectification measure of damages. In the language of expectation interest employed by the plaintiff, *Bellgrove v Eldridge* was a case where the plaintiff's interest was in the achievement of an improvement to her property for its enjoyment as such. A contract breaker cannot require the damage to that interest to be assessed as if the owner's interest in the builder's performance of the contract was only in selling the land and buildings to realise their value in the market. The owner's interest in the due performance of the contract may not be reflected in the market's valuation of the property: the market may not distinguish between the value of the property as it is, and the value it might have had if the contract had been duly performed. One may take the example of the contract for the construction of a house with blue bricks where the builder uses yellow bricks.[28] In such cases, the valuation, in money terms, attributed by the market to the loss suffered by the owner as a result of the defective construction will not vindicate the expectation interest of the owner under the contract. Even in cases where an owner intends to develop a property for commercial purposes, that private intention will often not be reflected in the builder's contractual obligations and the owner's expectation interest protected by the contract. In such cases, the builder's obligation is usually to construct a building in accordance with given plans and specifications. If the builder fails to do so, the prima facie measure of the owner's loss will be the cost of achieving a structure conforming to those plans and specifications.

[87] The fundamental principle in this field of discourse is, of course, that the plaintiff is entitled to be put in the same position, so far as an award of money can do it, that it would have been in had the contract been performed.[29] It is this principle which controls the measure of damages applicable to any particular case. In cases like *Bellgrove v Eldridge*, where the owner's expectation interest protected by the contract is not defined in terms of the construction of an asset to be sold in the market, the rectification cost measure of damages is the appropriate measure of damages to give effect to the fundamental principle. But where the terms of the bargain between claimant and defendant define the defendant's obligation and the claimant's expectation under the contract in terms of the marketability of that which is to be delivered to the plaintiff by the defendant, the cost of rectification is not, in the language of *Bellgrove v Eldridge*, "prima facie, the only measure" of the adverse impact of the defendant's breach upon the plaintiff's expectation interest.

[88] *Bellgrove v Eldridge* stands in marked contrast with cases where the plaintiff's expectation interest under the contract is in the marketability of the development. In such cases, the plaintiff's expectation interest can be fully vindicated by an award of damages which reflects the diminished value of the asset as an article of commerce in comparison with the article which should have been produced. When the asset imperfectly produced or improved by the defendant for the plaintiff is sold by the plaintiff as the parties by their agreement intended, the diminution in market value is, prima facie, the measure of loss which will put the claimant in the position it should have been had the contract been performed.

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28 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] 1 AC 344 at 358.

29 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 82, 116, 136; *Rentokil Pty Ltd v Channon* (1990) 19 NSWLR 417 at 432; *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28 at 42.

[89] In the present case, when one applies the fundamental principle as to the measure of damages for breach of contract by asking what amount of money is necessary to put the plaintiff in the position it would have been had the product been marketable as promised, the answer is: that amount of money which reflects the difference between actual realisable value in the market and the realisable value the product should have had. The measure of damages which gives effect to the fundamental principle is the difference in market value.

[90] To revert to the language of the plaintiff's argument, the crucial difference between the present case and *Bellgrove v Eldridge* is that the sale of the development into the community title schemes was not "accidental", in the sense in which that term is used in the plaintiff's submissions because, on the plaintiff's pleaded case, the consequence of what the plaintiff alleges was the parties' "development objective".

[91] In the statement of claim, the plaintiff claims that the defendants' breaches of contract have denied its contractually assured expectation of a "development erected on the land … [being] a good quality marketable mixed purpose … complex." The defendants' obligations are framed by the plaintiff on the basis that what was to be produced by the defendants was to be "marketable" by the plaintiff. In the result, as expected, the development was transferred into the community title schemes and many lots have been sold.

[92] It may readily be accepted that the law does not permit a defendant builder to gain a windfall by the sale of a defective building by the owner, which as between the plaintiff and the defendant is "accidental", in the sense that the contract between the parties is for the construction of a building on the owner's land rather than the production of a marketable commodity. In such a case, the law does not confine the owner to the measure of damages resulting from a comparison of the market value of the land and buildings as a saleable commodity with the market value it would have had if the building contract had been duly performed. But the question which arises on the statement of claim in respect of this aspect of the plaintiff's case is whether the law permits an owner to realise the market value of an asset produced for commercial realisation, and then to recover the cost of repairing defects in the asset which have not affected the owner's return from the realisation of the asset, and where the buyer has neither required nor consented to the rectification work.[30]

[93] The unusual form of the statement of claim in this case means that this case is not at all like *Bellgrove v Eldridge* where the plaintiff had, as the High Court emphasised, contracted for the construction of a house on her land. It is also not to the point here for the plaintiff to seek to support its statement of claim by citing from *Director of War Service Homes v Harris*.[31] Gibbs J, with whom the other members of the Full Court of the Supreme Court of Queensland agreed, said:

> "… **If the owner subsequently sold the building, or gave it away, to a third person, that would not affect his accrued right against the builder to damages according to the same measure**. The fact that the building had been sold might be one of the circumstances that would have to be considered in relation to the question whether it would be reasonable to effect the remedial work, but assuming that it would be reasonable to do the work the owner would still be

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30 *Radford v De Froberville* [1977] 1 WLR 1262 at 1270.

31 [1968] Qd R 275 at 278.

> entitled to recover as damages the cost of remedying the defects or deviations from the contract (assuming of course that the contract price had been paid). **In assessing those damages it would not be relevant whether the owner was under a legal liability to remedy the defects, or whether he had made a profit or a loss on the sale of the building, for the builder has no concern with the details of any contract that the owner might make with a third party.**" (emphasis added)

[94] It is to be noted that, in the last sentence in this passage, Gibbs J does not include as "irrelevant" the fact that the owner has sold the building for full value and **cannot** effect repairs to it. *Director of War Service Homes v Harris* was a case where the builder's obligation was to build a structure on the owner's land in accordance with a contractually agreed standard. The fact that the property as developed was subsequently sold by its owner to third parties had nothing to do with the contractual expectations generated by the arrangements between the owner and the builder. That was nonetheless the case even if, as may well have been the case, it was always the owner's private intention so to dispose of the houses. The private intentions of one party must not be confused with the contractual intentions of the parties enshrined in the contract. The point is that there was nothing in that case to suggest that the owner's private intention became a term of the bargain reflecting the owner's expectation interest protected by the contract. In such a case, the sale of the homes was truly "accidental", so far as the contract between the owner and builder was concerned, even though the owner may have intended to on-sell the homes to veterans of war service. In the present case, however, the contractual expectation which the plaintiff claims to vindicate is expressly defined by the statement of claim as an expectation of a marketable commodity. The measure of what is required to vindicate that commercial expectation can readily proceed by a consideration of whether and the extent to which, in the events which have happened, the market has devalued the marketable commodity by reason of the defendants' breaches of contract. The plaintiff's claim for demolition and reconstruction costs cannot be supported as "prima facie, the only measure" of the plaintiff's loss.

[95] In summary, the plaintiff's case, as pleaded by this part of the statement of claim, is one that the authorities on which the plaintiff relies simply do not support. There was nothing "accidental" about the plaintiff's commercial realisation of this development, and any damage to its expectation under the contract is susceptible of commercial measurement.

**Supervening events**

[96] The plaintiff argues that the learned primary judge erred resolving adversely to the plaintiff what was essentially a question of fact as to whether the rectification measure of damages was displaced because it would be unreasonable to apply that measure in the events which have happened.

[97] The plaintiff relies upon cases such as *Director of War Service Homes v Harris*, *De Cesare v Deluxe Motors Pty Ltd* and *Scott Carver Pty Ltd v SAS Trustee Corporation*. These cases certainly affirm the proposition that the mere fact that an asset, which is in need of rectification by reason of the defendants' breach of contract, is sold by the owner does not preclude the recovery of the costs of rectification. But the learned primary judge has not disputed that proposition. Rather, his Honour's decision reflects an appreciation that those cases do not

establish that, in a case of the kind pleaded in the statement of claim, the rectification measure of damages reasonably reflected the fundamental principle in relation to the measure of damages.

[98] The decisions in *De Cesare v Deluxe Motors Pty Ltd* and *Scott Carver Pty Ltd v SAS Trustee Corporation* are clearly distinguishable for the reasons given by the learned primary judge. Further, neither of these cases involved a claim that the builder's breach of contract consisted of a failure to construct a product for realisation in the market.

[99] In *De Cesare v Deluxe Motors Pty Ltd*, the issue was as to the proper measure of damages due by a builder to joint venturers who had engaged the builder to construct a development of residential units. The issue was not framed in terms of a loss in the marketability of the development or the units. The focus of attention was upon whether the sale of the units built on the joint venturer's land made it unreasonable to apply the rectification measure of damages. The rectification measure of damages was applied by the Full Court of the Supreme Court of South Australia. It is clear, however, from a perusal of the reasons given by Doyle CJ and Nyland J, with whom Bollen J agreed, that the construction of the building had not been completed,[32] so that, as Doyle CJ observed, "it is reasonable to assume the price paid by the buyer of the building was less than it otherwise would have been."[33]

[100] In *Scott Carver Pty Ltd v SAS Trustee Corporation*, the contracts relating to the building work concerned the joining of two office towers by means of a glazed pavilion. By a complex rearrangement of the trusts on which the development was held, the beneficial ownership of the development changed after the completion of the construction work. As Bryson JA observed, however, the transaction which effected the change of ownership was not "a test of the market".[34] There is no suggestion in the reasons for judgment that the obligation of the builders was to construct a product for the market. And, more importantly for present purposes, the sale price which was agreed was reduced by an amount in excess of the rectification costs. Hodgson JA said:

> "The sale of the property of itself does not displace the *Bellgrove* measure, as illustrated by *De Cesare* and *Harris*. If it were shown that the price received on a sale was unaffected by the defects, or that it was reduced by an amount less than the cost of rectification, this could displace the *Bellgrove* measure. But this was not shown in this case. On the contrary, the price was reduced by an amount in excess of the cost of rectification, by reason of the defects. The Referee found that this was done, in a sale not at arm's length, to preserve the value of the cause of action; but while I accept that such a consensual reduction could not give rise to damages claimable by SAS, I see no reason why it cannot prevent the sale from displacing the *Bellgrove* measure of damages."[35]

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32 (1996) 67 SASR 28 at 30 and 37 – 38.

33 (1996) 67 SASR 28 at 30.

34 [2005] NSWCA 462 at [130].

35 [2005] NSWCA 462 at [47]. See also *Ace Ceramics Pty Ltd & Ors v SAS Trustee Corporation & Ors* [2006] HCATrans 325 esp at 9 – 10.

[101] In the same case, Ipp JA referred to the reasons of Gibbs J in *Director of War Service Homes v Harris*, and said:

> "Gibbs J emphasised that a subsequent sale by the owner of a defective building before remedying the defects is 'nothing to do with the builder, whose liability to pay damages has already accrued' (at 279).
>
> In my respectful view Gibbs J accurately stated the legal principles applicable.
>
> It is true that in *Bellgrove v Eldridge* the High Court observed that the fact that the building had been sold might be one of the circumstances that would have to be considered in relation to the question whether it would be reasonable to carry out the remedial work. But the High Court said that, if it were reasonable to do the work, it would not be material, in assessing damages to which the proprietor would be entitled, whether the proprietor had made a profit or a loss on the sale of the building. The rationale expressed was, 'the builder has no concern with the details of any contract that the owner might make with a third party'.
>
> In my view, the qualification expressed in *Bellgrove v Eldridge* at 618 (namely, that the rectification work must be a reasonable course to adopt), is aimed at determining whether the cost of remedying the defect is out of proportion to the achievement of the contractual objective. As Lord Jauncey said in *Ruxley Electronics Ltd v Forsyth* (1996) AC 344 (at 358):
>
> > '[I]n taking reasonableness into account in determining the extent of loss, it is reasonableness in relation to the particular contract and not at large.'
>
> In my view (and with respect to those who have expressed contrary views), the details of any contract that the proprietor might make for the sale of the building defectively constructed is collateral to the issue of the proprietor's loss, or, as it used to be described, *res inter alios acta*.
>
> Were this not to be the rule, the builder in breach of contract would obtain a windfall, depending on coincidence (the proprietor's whim in selling), that would not be deserved.
>
> More extreme situations, consistent with Scott Carver's argument that a subsequent sale by the proprietor is relevant to loss, illustrate the possible consequences of such an approach. Assume that a building is constructed otherwise than in accordance with the contract and for that reason is defective. Assume that the proprietor sues the builder for damages based on the cost of rectifying the defect. Assume then, before judgment in the proprietor's case is delivered, the building burns down (through nobody's fault), is totally destroyed, and the proprietor constructs a new but entirely different building on the site. In these circumstances, on Scott Carver's argument (as Mr Donaldson SC rightly accepted), the proprietor would fail (even if – prior to the fire and its decision to re-build – it would have succeeded). In my view, that postulated result would be anomalous and contrary to *Bellgrove v Eldridge*."[36]

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[36] [2005] NSWCA 462 at [117] – [123].

[102] One may pause to note that the example given by Ipp JA in the last paragraph of the passage cited above recognises the right of a claimant to recover damages for repair work which has not been done; but it says nothing about a case where the asset has been sold by a claimant for full value and work is neither required nor permitted by the purchaser. The point to be made here is that neither *De Cesare v Deluxe Motors Pty Ltd* nor *Scott Carver Pty Ltd v SAS Trustee Corporation* is authority for the proposition that the rectification measure is appropriate where an asset has been sold for full market value and rectification work by the vendor claimant is neither required nor permitted by the purchaser.

[103] At this point, it is necessary to refer to a further passage from the reasons of Gibbs J in *Director of War Service Homes v Harris*. His Honour said:

> "There is a principle that in actions for non-delivery or breach of warranty under a contract for the sale of goods 'the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods' (*Rodocanachi v Milburn* (1886) 18 QBD 67 at 77; *Williams Brothers v Ed T Agius Ltd* [1914] AC 510; *Slater v Hoyle* [1920] 2 KB 11) and this principle (which has been applied to a contract for the sale of a lease, plant, buildings and stock, treated as realty–*Brading v F McNeill & Company Limited* [1946] 1 Ch 145) should in my view be similarly applied to the case of a building contract. **The owner of a defective building may decide to remedy the defects before he sells it so that he may obtain the highest possible price on the sale; he may sell subject to a condition that he will remedy the defects; or he may resolve to put the building in order after it has been sold because he feels morally, although he is not legally, bound to do so. These matters are nothing to do with the builder, whose liability to pay damages has already accrued.**"[37]

[104] Once again, it is to be noted that the last two sentences of the passage cited in the preceding paragraph do not refer to the case where the building is sold for a value unaffected by the defects and the rectification work cannot be done. The present is not a case of the kind contemplated by Gibbs J in *Director of War Service Homes v Harris* or by Ipp JA in *Scott Carver Pty Ltd v SAS Trustee Corporation*. It is not merely that the work of rectification has not been done and will not be done. On the factual basis on which the first basis of claim for rectification costs is advanced, ie that it is not suggested that the new owners of the development require or permit the rectification work to be done, the rectification work **cannot** be done.

[105] As was recently said by Sir Guenter Treitel:

> "… it is indeed generally (*Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 at 571) no concern of the court's what the claimant intends to do with the damages; but the rationale of this rule does not necessarily apply in a three-party case. That rationale in a two-party case is that the defendant has, by reason of the breach, inflicted injury, loss or damage on the person or property **of the claimant** (or has failed to improve, or to transfer, an asset

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[37] [1968] Qd R 275 at 278 – 279.

> belonging to, or to be vested in, the claimant) who should therefore be able to deal in whatever way he pleases with the damages awarded to him in substitution of the interest **of his own** of which he has been deprived by the breach. For example, in the case of a contract to repair the claimant's own house, he could, but for the breach, have sold the house at a price reflecting the value of the repairs, had they been properly carried out, and then have disposed of the proceeds of sale in any way he pleased; and so he should be able to dispose in the same way of the damages due to him for failure to carry out the repairs." (emphasis in the original)[38]

[106] Where, by reason of the ownership of a property by a third party, the repairs **cannot** be carried out by the claimant, the claimant cannot claim the cost of repairs. In such a case, it is not a matter of the claimant being entitled to do what he or she pleases with his or her property or the damages due to him or her; rather, it is simply that the damage to the claimant's interest in the performance of his or her contract with the builder cannot reasonably be measured by the cost of repair which cannot occur.

[107] In such a case, there is no reason to doubt the application of the observations of Giles JA, with whom McColl JA and Campbell JA agreed, in *Westpoint Management Ltd v Chocolate Factory Apartments Ltd*:

> "**So if supervening events mean that the rectification work can not be carried out, it can hardly be found that the rectification work is reasonable in order to achieve the contractual objective: achievement of the contractual objective is no longer relevant. If sale of the property to a contented purchaser means that the plaintiff did not think and the purchaser does not think the rectification work needs to be carried out, it may well be found to be unreasonable to carry out, the rectification work.** An intention not to carry out the rectification work will not of itself make carrying out the work unreasonable, but it may be evidentiary of unreasonableness; if the reason for the intention is that the property is perfectly functional and aesthetically pleasing despite the non-complying work, for example, it may well be found that rectification is out of all proportion to achievement of the contractual objective or to the benefit to be thereby obtained."[39] (emphasis added)

[108] This statement of principle by Giles JA, with which McColl and Campbell JJA agreed, was made in the context of a comprehensive review of the authorities to which I have referred. It is a statement of principle with which, for the reasons I have given, I respectfully agree. This authoritative statement of principle is decisively against this aspect of the plaintiff's claim.

[109] For these reasons, I agree with the conclusions of the learned primary judge that the first basis of the claim for demolition and reconstruction costs is unsustainable.

**The demolition and reconstruction claim: the second basis**

[110] As to the second basis pleaded by the plaintiff to support the demolition and reconstruction claim, the learned primary judge correctly distinguished this case

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38 Treitel, G, *The Law of Contract* (11th ed, 2003), p 602.

39 [2007] NSWCA 253 at [61].

from *St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd* on the basis that, in this case, there was no basis for reading the contract between the plaintiff and the defendants with whom it contracted as impliedly authorising an action by the plaintiff to recover loss suffered by others. More importantly, this is not a case where it is possible to regard the plaintiff as suing to recover loss sustained by those who purchased lots in the development from the plaintiff because any loss resulting from the defendants' breaches of contract with the plaintiff was suffered by the plaintiff before lots in the community titles scheme were acquired by third parties.

[111] The learned primary judge was correct to regard this case as distinguishable from *St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd*. There the loss held to be compensable was that suffered by the purchasers in consequence of a breach of a contract held to have been made for their benefit. In this case, the plaintiff does not seek, either to recover that loss, or to suggest that its contracts with the defendants were made for the benefit of any person other than itself.

**The demolition and reconstruction claim: the third basis**

[112] As to the third basis pleaded by the plaintiff to support its rectification claim, the learned primary judge's decision on this aspect of the statement of claim does not suggest that this aspect is bound to fail as a matter of law. Rather, his Honour proceeded on the basis that the claim that the plaintiff can, and will, procure the demolition and reconstruction work to occur is confronted by legal and practical obstacles which, though they may be overcome, cannot be ignored.

[113] In its written submissions, the plaintiff argued that its pleading is sufficient to avoid embarrassment to the defendants in that it is open to the defendants to investigate the alleged defects in the development, and make their own enquiries to determine whether owners of lots in the development will consent to demolition and reconstruction and the terms on which they would be willing to do so. This approach assumes that the plaintiff need plead no more than a theoretical basis whereby demolition and reconstruction might be achieved, and that it is for a defendant to investigate the feasibility of proposals to overcome obstacles to a claim when the existence of the obstacles is apparent on the face of the plaintiff's statement of claim. These assumptions are incorrect.

[114] If the plaintiff is to plead a reasonable cause of action which is not apt to embarrass the fair trial of the action, the statement of claim must show how these obstacles may actually be surmounted. It must describe steps which will actually occur as facts, otherwise the second basis for the recovery of the costs of demolition and reconstruction is no more than pie in the sky.

[115] It is also quite wrong for the plaintiff to attempt to reverse the onus of proof on these complex issues by requiring the defendants to identify every possible basis on which demolition and reconstruction might possibly be achieved and demonstrate that every such possibility is not feasible.

[116] In oral argument, the plaintiff emphasised the unfairness involved in requiring it to formulate proposals apt to achieve demolition and reconstruction because of the possibility that other lot owners might use the opportunity afforded by such negotiations to press for a financial advantage against the plaintiff. But this acknowledgment by the plaintiff of its reluctance to address the difficult practicalities of demolition and reconstruction serves to confirm that the defendants

are justified in their contention that the statement of claim does not plead a real basis for concluding that demolition and reconstruction will occur.

**The diminished market value claim**

[117] As to the plaintiff's claim to recover damages measured by reference to the difference in value between "what was contracted for and what was supplied", the plaintiff does not dispute that paragraph 86 of the statement of claim erroneously referred to the difference between the current value of the development (and not the value of the development as it ought to have been when completed) and the value of the development as it was when completed.

[118] As to paragraphs 88 and 89, the plaintiff cannot dispute that the learned primary judge was correct in concluding that the absence of any particulars to support the assertion that the plaintiff is at risk of a claim by purchasers of lots in the development meant that these paragraphs were embarrassing.

**Conclusion and orders**

[119] The appeal should be dismissed.

[120] The plaintiff should pay the defendants' costs of the appeal on the standard basis.

[121] **HOLMES JA:** I agree, for the reasons given by Keane JA, that the appeal should be dismissed.