SUPREME COURT OF QUEENSLAND

CITATION:	*UI International Pty Ltd v Interworks Architects Pty Ltd & Ors* [2007] QSC 096
PARTIES:	**UI INTERNATIONAL PTY LTD** ACN 070 639 422 (plaintiff) **v** **INTERWORKS ARCHITECTS PTY LTD** ACN 087 985 402 (first defendant) **PAUL THOMAS SHEPPARD** (second defendant) **MOSTIA CONSTRUCTIONS PTY LTD** ACN 010 608 009 (third defendant) **GROGAN RICHARDS PTY LTD** ACN 006 346 087 (fourth defendant) **MOSTIA PROJECT MANAGEMENT PTY LTD** ACN 099 777 223 (fifth defendant) **ROHAN LEIGH WOODFORTH** (sixth defendant) **REDLAND SHIRE COUNCIL** (seventh defendant)
FILE NO/S:	BS10390 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	30 April 2007
DELIVERED AT:	Brisbane
HEARING DATE:	30 January 2007
JUDGE:	McMurdo J
ORDERS:	**1. Paragraphs 73A through 76 and 79 through 82 be struck out** **2. Paragraphs 86, 88 and 89 be struck out** **3. Unless particulars of paragraph 87 are provided within fourteen days of this judgment, paragraph 87 be struck out** **4. The plaintiff pay the costs of each of the applicant defendants of this application.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – where plaintiff developed land through construction of building – where construction provided, supervised and approved by defendants – where plaintiff claims defendants' breach of contractual duties or negligence caused structural defects – where plaintiff has on-sold properties – where plaintiff seeks damages for demolition and rebuilding – where earlier judgment had provided that plaintiff amend pleadings to address how it will demolish and rebuild properties – whether plaintiff must establish it will demolish and rebuild where circumstances indicate they will not do so in order to seek damages on that basis – whether plaintiff has sufficiently pleaded facts that indicate demolition and rebuilding will occur

Body Corporate and Community Management Act 1997 (Qld), s 72, s 74, s 78, s 85
Uniform Civil Procedure Rules 1999 (Qld), r 158, r 171(1)(a), r 171(1)(b)

Alfred McAlpine Construction Ltd v Panatown Ltd [2001] 1 AC 518, discussed
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] Qd R 275, considered
General Steel Industries Inc v Commissioner of Railways (NSW) (1964) 112 CLR 125, considered
Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; *St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd* [1994] 1 AC 85, discussed
Scott Carver v SAS Trustee Corporation [2005] NSWCA 462, applied
UI International Pty Ltd v Interworks Architects Pty Ltd & Ors [2006] QCA 434, discussed
UI International Pty Ltd v Interworks Architects Pty Ltd & Ors [2006] QSC 079, discussed

COUNSEL: RN Wensley QC, with C Heyworth-Smith and P Jennings, for the plaintiff
LF Kelly SC, with DP de Jersey, for the first and second defendants
RA Holt SC, with SM Burke, for the third defendant
P Applegarth SC, with SS Monks, for the fourth defendant
A Musgrave for the seventh defendant

SOLICITORS: Creswicks Lawyers for the plaintiff
Thynne & Macartney for the first and second defendants
James Byrne & Rudz for the third defendant
DLA Phillips Fox for the fourth defendant

Barry & Nilsson for the seventh defendant

[1] **McMURDO J:** Last year in this case I struck out parts of the statement of claim and required other parts to be supported by the pleading of further facts[1]. The plaintiff's appeal against those orders was dismissed[2]. The plaintiff filed an amended statement of claim and most of the defendants have applied to strike out parts of it, arguing that it does not cure the defects in its predecessor which were the subject of my judgment. Then shortly prior to the hearing of their application, the plaintiff filed a further amended statement of claim. The defendants have the same objections to that pleading and also object to certain parts of it which are new.

[2] Before going to the arguments, it is necessary to again summarise the plaintiff's claims. In 2001 and 2002 the plaintiff developed land at Cleveland by the construction of a number of buildings now used for residential, retail and office purposes. Upon completion of that construction it caused the land to be subdivided by a layered community title scheme, and it then sold most of the lots. It remains the owner of a relatively small number of them. There is a principal scheme and three schemes for different parts of the development. They are described in my previous judgment[3]. There are in all 54 residential apartments and three lots in the commercial centre which the plaintiff does not own. Twenty-four of these residential lots are within a separate scheme for the stand alone building described in the arguments as building 4. The plaintiff remains the owner of 19 of the commercial lots.

[3] The plaintiff has many complaints about the construction. It says that it was more costly than it should have been, the difference being $7,062,305. It claims to have performed rectification works costing just under $70,000. But its principal complaint is that the buildings (with one exception) have structural faults and other defects which are so serious that they need to be demolished and rebuilt. It continues to claim $2,285,000 as the estimated cost of demolition, $28,746,407 as the estimated cost of rebuilding and a further $3,612,860 as income which will be lost from not being able to rent the lots which it retained because of the necessary demolition and rebuilding.

[4] The plaintiff says that it engaged both the first defendant and its director the second defendant as the architects for this development. The third defendant was engaged by it to coordinate and supervise the construction. The fourth defendant was the consulting engineer. The fifth defendant and its director, the sixth defendant, who are not involved in the present application, are said to have been involved as project managers. The seventh defendant is Redland Shire Council, which the plaintiff says was negligent in allowing the construction of these defective buildings.

[5] Against the first, second, third, fifth and sixth defendants the plaintiff continues to claim $42,464,603 as damages for breach of contract or negligence. Against the fourth defendant, the engineers, it claims $35,402,298 as damages for breach of

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1 *UI International Pty Ltd v Interworks Architects Pty Ltd & Ors* [2006] QSC 079

2 *UI International Pty Ltd v Interworks Architects Pty Ltd & Ors* [2006] QCA 434

3 *UI International Pty Ltd v Interworks Architects Pty Ltd & Ors* [2006] QSC 079 at [12]

contract or negligence and claims the same sum against the seventh defendant, Redland Shire Council, in negligence. The difference in the amounts is because the plaintiff does not claim against the fourth and seventh defendants that they were responsible for the excessive cost of construction ($7,062,305).

[6] These components of the plaintiff's claim are then unchanged from the pleading the subject of last year's judgments. What has changed is that the plaintiff now pleads alternative bases for the recovery of the components for demolition and rebuilding costs and there is now also a claim for the diminished value of the entire development, or at least those lots which the plaintiff still owns, as alternatives to the claims for the costs of demolition and rebuilding. The principal attack is upon the claim for the demolition/rebuilding costs and the diminished value of the development.

[7] In the pleading the subject of last year's judgments, the demolition and rebuilding claim was put upon the basis that there will in fact be a demolition and rebuilding undertaken by the plaintiff. The problem with that pleading was that the plaintiff had not pleaded the facts which it would seek to prove in order to prove that this will occur. I held that the implicit allegation that the consent of owners would be obtained should be made explicit, by the plaintiff pleading whatever is its case as to whether it has obtained the consent of any owner and as to the likelihood of obtaining the consent of owners or the approval of the District Court, by reference to the facts, matters and circumstances from which that likelihood is alleged[4]. I will return to the question of whether the plaintiff has now pleaded those matters.

[8] As I then said, there is authority to the effect that the plaintiff need not establish that it will demolish and rebuild. According to what Gibbs J (as he then was) said in *Director of War Service Homes v Harris*[5], which was adopted by at least two members of the South Australian Full Court in *De Cesare v Deluxe Motors Pty Ltd* [6] and by Ipp JA in *Scott Carver Pty Ltd v SAS Trustee Corporation*[7], whether a plaintiff has rebuilt or intends to rebuild has nothing to do with the defendant, whose liability to pay damages accrues from the defective state of the building as long as it would be reasonable (for someone) to rebuild it[8].

[9] But there is a line of authority for a different view, which is that if "there are supervening circumstances that show with substantial certainty that [rebuilding] will not happen", the cost of rebuilding cannot be recovered[9]. I expressed my preference for that view. But because the plaintiff's then pleading accepted that it would have to address how and why the plaintiff would rebuild although the plaintiff no longer owned the buildings, it was unnecessary to consider whether a

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4 [2006] QSC 079 at [34]
5 [1968] Qd R 275
6 (1996) 67 SASR 28
7 [2005] NSWCA 462
8 *Director of War Service Homes v Harris* [1968] Qd R 275, 278-279
9 *Scott Carver v SAS Trustee Corporation* [2005] NSWCA 462 at [44] per Hodgson JA; *Central Coast Leagues Club Ltd v Gosford City Council & Ors*, unreported, Supreme Court of New South Wales, Giles CJ Comm D, 9 June 1998; *Hyder Consulting (Australia) Pty Ltd v Walh Wilhelmsen Agency Pty Ltd & Anor* [2001] NSWCA 313 per Giles JA, Sheller JA agreeing

claim pleaded without regard to whether the plaintiff would rebuild would be struck out.

[10] The Court of Appeal decided the matter in the same way. In the principal judgment which was given by Keane JA, his Honour said:[10]

> "[14] In this Court, the plaintiff contends that the learned primary judge erred in requiring the plaintiff to plead the facts which would show how it could and would obtain the agreement of lot owners or the order of the District Court to the demolition of the development. The plaintiff contends that these facts are not a necessary part of the plaintiff's cause of action against the defendants. In this regard, the plaintiff submits it is sufficient that demolition and reconstruction is a reasonable method of rectifying the defects in the construction work for which the defendants were responsible. Moreover, the plaintiff submits that the circumstance that demolition and reconstruction may, in fact, not occur because the plaintiff has sold the development, is immaterial to the plaintiff's claim for damages.
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> [15] In support of these contentions, the plaintiff advances arguments which seek to rely upon the principles according to which the cost of demolition and reconstruction of defective building work have been held to afford the proper measure of damages recoverable from those responsible for the defects. The decision of the High Court in *Bellgrove v Eldridge* is the leading authority on these principles.
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> [16] The defendants join issue with the plaintiff's arguments in relation to principle. More importantly for present purposes, the defendants also submit that the position taken by the plaintiff on this appeal involves an attempt to circumvent a difficulty which arises from the terms in which the plaintiff has chose to plead its case. On this view, it is unnecessary to resolve the issues of legal principle which the plaintiff seeks to agitate. There is much force in this submission.
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> …
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> [21] Whatever the possible theoretical bases for any cause of action which the plaintiff might seek to agitate against the defendants, it is undeniable, as Senior Counsel for the plaintiff conceded, that the plaintiff's amended statement of claim does advance a case in these paragraphs which involves an actual – as opposed to hypothetical or fictional – demolition and reconstruction, at the plaintiff's costs, of buildings which are part of the development.

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[10] [2006] QCA 434 at [14] – [16] and [21] – [22]

> [22] It is apparent from the terms of the plaintiff's own pleading that it is not in a position to demolish and rebuild the development. As a result, the plaintiff's case, as presently pleaded, is incoherent and self-contradictory. In the absence of a pleading of facts apt to explain how it is that demolition and rebuilding of buildings on land owned by others can be achieved, the plaintiff's case, as presently pleaded, is embarrassing. There is, therefore, no point in the plaintiff's contention that it should not be required 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."

[11] The latest statement of claim now pleads an alternative case for which the likelihood of an actual rebuilding is irrelevant. That case is pleaded within paragraphs 73A to 73G inclusive. It is pleaded against each of the defendants (apart from the seventh defendant) as a claim for damages for breach of contract and against each of the defendants as a claim for damages for negligence. For this case, the plaintiff relies upon the cases I discussed in last year's judgment, and now also the speeches of Lord Griffiths in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*; *St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd*[11] and of Lord Goff of Chieveley and Lord Millett in *Alfred McAlpine Construction Ltd v Panatown Ltd*[12].

[12] In *St Martins Property Corporation*, the first plaintiffs began to develop property pursuant to a contract it made with the defendant builder in 1974. That contract contained a term providing that the employer should not, without the written consent of the builder, assign the contract. In 1976, the first plaintiff assigned to the second plaintiff, for full value, all its interests in the property and purported to assign the benefit of the building contract. The defendant did not consent to the assignment of the contract. This occurred prior to the completion of the building work so that when the defendant breached the building contract, the first plaintiff was no longer the owner. The rectification work was undertaken and at the first plaintiff's cost, which was then indemnified by the second plaintiff. Both plaintiffs sued for the cost of rectifying the defective works. The second plaintiff, the purported assignee of the contract, failed because according to its express terms, the benefit of the contract could not be assigned. The question then was whether the first plaintiff could recover. The House of Lords held that they could, but for different reasons. Save for the speech of Lord Griffiths, the first plaintiff succeeded upon the basis that in the circumstances it had contracted for the benefit of subsequent owners and accordingly the first plaintiff was entitled to recover substantial damages on their behalf. It is upon the basis of that conclusion that the plaintiff in the present matter pleads an alternative basis for this claim, to which I will come. Lord Griffiths found for the first plaintiff upon a broader ground, which was that it was entitled to damages representing the cost of fulfilling its contractual expectation, which was for a building relevantly free of defects, and that it was not fatal to that entitlement that it had assigned the property.

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11 [1994] 1 AC 85

12 [2001] 1 AC 518

[13] In the subsequent case of *Alfred McAlpine Construction v Panatown*, Lord Goff of Chieveley and Lord Millett endorsed that view of Lord Griffiths, and in one respect relevant to the present case, took it a stage further. In that case, the employer was a member of a group of companies, and contracted for the construction of a building on a site owned by another member of the group. At the same time, the builder entered into a deed with the owner, by which the owner was given a direct remedy against the builder for any failure by it to exercise reasonable skill, care and attention under the building contract with the employer. That deed was assignable by the owner to any successor in title to the property. After certain defects were discovered, the employer sued for damages. The House of Lords, by a majority, held that the employer had suffered no financial loss, so that it was entitled to nothing more than nominal damages. The present plaintiff relies upon the dissenting speeches of Lord Goff of Chieveley and Lord Millett, who held that it was irrelevant that the plaintiff was not the owner of the site and that there was no basis for displacing the plaintiff's prima facie entitlement to damages quantified by the amount which would be required to remedy the works to the contractual standard.

[14] The speech of Lord Griffiths in *St Martins Property Corporation* offers little support for this plaintiff's case, in which the plaintiff says it need not plead or prove that rebuilding is likely. That is because Lord Griffiths said that the plaintiff would have to satisfy the court that "the repairs have been or are likely to be carried out"[13]. But in *Alfred McAlpine Construction*, Lord Goff and Lord Millett each said that whilst it was relevant to consider whether the plaintiff intended to remedy the works, the proof of that intention was not essential. Lord Goff said that it would be "appropriate to have regard to such a matter when the reasonableness of the plaintiff's claim to damages is under consideration."[14] Similarly, Lord Millett said that the plaintiff's intention to rectify the work, or lack of that intention, "may be evidence of the reasonableness or otherwise of the plaintiff's claim to damages, but it cannot be conclusive."[15] Accordingly, their conclusions do not support the proposition that in the present case, it is irrelevant to consider whether the plaintiff can and will incur the cost by which it says its damages should be measured.

[15] So in the view of Lord Griffiths, the case pleaded in paragraphs 73A through 73G would be insufficient, and on the view of Lord Goff and Lord Millett, the prospect of an actual rectification of the work would at least be a relevant matter in considering whether it was reasonable for the plaintiff to recover that cost of demolition. And of course, their views were expressed in a context where there was a group of companies, one of which was entitled to the performance of the building contract and another was and remained the building owner.

[16] 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[16]. I remain of

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13 [1994] 1 AC 85, 97

14 [2001] 1 AC 518, 556

15 [2001] 1 AC 518, 592

16 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*

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 circumstances showing that the plaintiff will not demolish and rebuild.

[17] It can be appropriate to summarily dismiss a claim, or a part of a claim, upon the basis that it is bad in law although that question of law can be decided only after extensive argument[17]. If paragraphs 73A through 73G were the only basis for the rebuilding claim, there would be a particular advantage in deciding that legal question now. However, there are three alternative bases upon which this plaintiff claims the cost of demolition and rebuilding, and if any of those bases is not to be struck out, there would be little utility of striking out paragraphs 73A to 73G. I turn then to the case in paragraphs 73H through 76.

[18] The second basis for the demolition/rebuilding claim is within paragraph 73H as follows:

> "73H. Further and in the alternative to paragraphs 73A, 73B, 73C, 73D, 73E, 73F and 73G above, the Plaintiff pleads that:
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> (a) the development contracts were each for the development of land which, to the knowledge of the Plaintiff and the Defendants, at least part of which was going to be occupied, and possibly purchased and owned by, third parties and not the Plaintiff;
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> (b) at all times material to this proceeding, the Plaintiff and the Defendants knew, or ought reasonably to have known, that the ownership of the development (in whole or in part) would or might in the ordinary course of the business of the Plaintiff (as pleaded in paragraph 1(b) above), be transferred by the Plaintiff to a third party or third parties during or after the currency of the development contracts;
>
> (c) the Defendants could, at all times material to this proceeding, foresee, and it was reasonably foreseeable, that damage caused by a breach of the development contracts or negligence by the Defendants (as pleaded above), would cause loss to the later owner or owners of the development and not only to the original contracting party, namely the Plaintiff;
>
> (d) the Plaintiff is the only party who may bring an action on the development contracts against, where appropriate, the First, Second, Third, Fourth, Fifth and Sixth Defendants;

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.

17 *General Steel Industries Inc v Commissioner of Railways (NSW)* (1964) 112 CLR 125, 130

> (e) the Plaintiff is the only party to whom the Defendants owed the relevant duties of care (as pleaded in paragraphs 43 to 49 above)."

[19] 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. The circumstances which brought the case within that exception were described by Lord Browne-Wilkinson as follows:[18]

> "… 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 be 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.'"

[20] 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

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18 [1994] 1 AC 85, 114-115

the recognition and operation of the exception, "the claimed damages would disappear … into some legal black hole, so that the wrongdoer escaped scot-free."[19] 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.

[21] 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 affect given to the *contract* between the (first) plaintiff and the defendant.

[22] If successful on this second basis, the plaintiff would hold any damages recovered "for the benefit of those who suffered from defective performance."[20] 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 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?

[23] 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.

[24] The third basis for the rebuilding claim is that which was originally pleaded and the subject of last year's judgments. As the defendants developed their arguments, it became clear that they were applying to strike out this part of the pleading on two bases: that it discloses no reasonable cause of action[21] and that it tends to prejudice or delay a fair trial[22].

[25] In essence this alternative case is that the plaintiff will rebuild and that it will suffer a loss from the cost of doing so. This alternative accepts a burden to prove that the plaintiff will rebuild. Strictly speaking, it may not be for the plaintiff to prove this, but for the defendants to prove that the plaintiff's prima facie loss has been displaced by supervening events and circumstances, as I said in my previous judgment[23]. In *Scott Carver Pty Ltd v SAS Trustee Corporation*, Hodgson JA said that the recovery of damages according to *Bellgrove v Eldridge* "will be displaced

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19 [1994] 1 AC 85, 109 per Lord Browne-Wilkinson quoting Lord Keith of Kinkel in *G.U.S. Property Management Ltd v Littlewoods Mail Order Stores Ltd*, 1982 S.L.T. 533, 538

20 [1994] 1 AC 85, 115

21 UCPR r 171(1)(a)

22 UCPR r 171(1)(b)

23 *UI International Pty Ltd v Interworks Architects Pty Ltd & Ors* [2006] QSC 079

only if there are supervening circumstances that show with substantial certainty that [rectification] will not happen."[24]

[26] Because the plaintiff no longer owns most of this property, then in the absence of any other evidence, it would sufficiently appear that a rebuilding by the plaintiff would not happen, and a recovery on the *Bellgrove* measure would be displaced. Accordingly there is some burden upon the plaintiff to demonstrate further facts although the overall burden of proof as to whether rebuilding will occur might remain upon the defendants. Within this part of the pleading, the plaintiff seeks to plead those further facts. The defendants argue that the facts which are pleaded disclose no serious prospect, as distinct from a merely theoretical one, that the plaintiff will rebuild. So they argue that the plaintiff's allegation that all owners will agree to a demolition and rebuilding has no serious prospect of being established, at least upon the facts now pleaded. Alternatively the defendants say that the pleading in its present form is embarrassing and would prejudice a fair trial. In effect the argument is that there must be other circumstances upon which the plaintiff's case would ultimately depend but they are not pleaded. For example, the plaintiff has not pleaded that any owner has indicated a willingness to give up his or her property to be demolished or even that any owner has been approached about that. Nor does the pleading indicate the terms which would be offered to owners.

[27] Paragraph 74A of the pleading is as follows:

> "The Plaintiff intends to demolish and rebuild the development upon the successful conclusion to this proceeding (that is, a conclusion which produces a judgment sum to the Plaintiff sufficient to pay for the demolition and rebuilding of the development), such intention arising because:
>
> (a) the directors of the Plaintiff, Mr Lin and Ms Lo, feel morally obliged to do so.
>
> (b) the Plaintiff anticipates that, if it is successful in this proceeding, it may be legally obliged to do so, such obligation arising by virtue of the sale of lots in the development to third parties.
>
> (c) the Plaintiff owns lots in the development, as pleaded in paragraph 6 above, and does not wish to own lots in a development which has the structural deficiencies pleaded in paragraphs 57(j), (k) and (l) above."

[28] As counsel for the plaintiff made clear in their oral argument, the legal obligation referred to in paragraph 74A(b) is one which would arise, if at all, from the plaintiff's succeeding upon the *St Martin's Property Trust Corporation* argument. If the plaintiff is not entitled to succeed on that basis, then it does not allege that it is legally obliged to demolish and rebuild. For present purposes then, its intention to rebuild comes from a combination of the alleged moral position of its directors and its interest as the owner of some lots.

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[24] *Scott Carver Pty Ltd v SAS Trustee Corporation* [2005] NSWCA 462 at [44]

[29] Paragraph 74B pleads what the plaintiff has done thus far towards a rebuilding. The plaintiff there pleads:

> "In order to facilitate the matters referred to in paragraph 74C below, the Plaintiff has taken the following steps:
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> (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 November 2004 to the Body Corporate for the Raby Bay Harbour Community Titles Scheme 30942."

[30] Notably the plaintiff does not plead that the body corporate or any owner of a lot has responded to the provision of that material, in a way which indicates some likelihood of an agreement to a demolition and rebuilding, or at all. And this was material provided in 2004.

[31] Paragraph 74C pleads what the plaintiff intends to do to "facilitate the said demolition and rebuilding". The paragraph identifies four alternative legal avenues by which the plaintiff might reach a position under which it could demolish and rebuild. The first is that the plaintiff would "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". The second is that the plaintiff would apply to the District Court for an order pursuant to s 72 of that Act "for approval of a process for reinstating the development in whole". The third is that the plaintiff would seek the consent of each and every lot owner to amalgamate the community title schemes, to terminate the basic community title scheme that would be thus created and to demolish the development and rebuild it. The fourth is that in the absence of such consent the plaintiff would apply to the District Court for orders under s 85(3) to amalgamate the schemes and under s 78(2) to terminate the scheme.

[32] The defendants challenge the first and second alternatives, those of "reinstatement", by an argument as to the construction of the *Body Corporate and Community Management Act* to the effect that this would not be reinstatement under that Act because the buildings are not "damaged". Section 71 provides that the reinstatement provisions apply only if "the building is damaged". The term "damaged" is defined within schedule 6 to the Act but only to include the destruction of property. Importantly, the plaintiff does not allege that the three buildings which have the alleged structural defects could fail at any time. Instead the case is that they have a shorter life span because of those defects, which is that they will last ten to fifteen years[25]. There is some force then in the defendants' argument that buildings which are defective in this way have not been "damaged" and that their demolition and rebuilding would not be in the nature of a "reinstatement", in the sense of restoring them to a previous condition: rather, they

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[25] Paragraph 57 of the pleading.

have always had the defects. Moreover, one of the buildings proposed to be demolished and rebuilt is the one referred to as building 4, containing 24 residential lots. The application of the reinstatement provisions of the Act to this building is not at all apparent.

[33] But if there is no prospect of the reinstatement provisions applying to this case, there is still, in theory at least, a basis for the third and fourth avenues, involving either the necessary consent of each and every lot owner within each of the schemes, or the approval of the District Court, to a termination of the schemes. As the defendants appear to accept, these are at least theoretical possibilities. But they say there is effectively no likelihood that either will occur.

[34] It is in paragraph 74D that the plaintiff pleads the facts and circumstances which are said to make it likely that the unanimous approval of owners or the District Court (whether for a purported reinstatement or simply for termination of the schemes) will be obtained. The plaintiff there pleads that these things are likely after the plaintiff secures "a successful conclusion to this proceeding", providing it with funds necessary to undertake the demolition and rebuilding and with findings to the effect that the development suffers from the relevant defects. It pleads that in those circumstances it is likely "that owners of lots in the development will not wish to own lots in a development possessed of the structural defects … due to the adverse effect such defects would have on their respective lots' value, amenity and safety." The adverse effect on value is alleged to be that the lots would be rendered "valueless or near-valueless (where any nominal value would derive solely from the potential rental income or residential value which may be achieved for the period pending the lots becoming unsafe to use or occupy or of such diminished amenity that they are rendered unable to be used or occupied)". The adverse effect on "amenity" is said to be likely to be "such as to render them unable to be used or occupied". And the adverse effect on safety "would be such as to render them unsafe for use or occupation due to the effect of the structural defects on the structural soundness and life expectancy of the development." Similar considerations are pleaded as likely to persuade the District Court, absent the unanimous approval of lot owners, to make whatever orders would be necessary for a demolition and rebuilding.

[35] It must again be noted that the plaintiff's case is not that the buildings are presently dangerous and should be vacated. It is that they have a reduced life expectancy. Assuming that to be so, it is likely that their value is less than would be the case if they were likely to last longer. But if they could be occupied for at least another ten years, they could not be valueless and the plaintiff's pleading in one way seems to accept that. Similarly the allegations about amenity and safety seem to be directed to a future time, as the buildings would near the end of their effective life due to the alleged structural problems.

[36] So 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 in these terms:

> "82. 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."

[37] This paragraph 82 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 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.

[38] 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.

[39] 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."[26]

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

[41] I turn now to some other arguments raised by the defendants. In view of my decision to strike out the demolition and rebuilding claim, consideration of these is unnecessary at this point. But because they may be relevant upon any further re-pleading of the plaintiff's case, I will discuss them.

[42] 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

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[26] *UI International Pty Ltd v Interworks Architects Pty Ltd & Ors* [2006] QCA 434 at [22] per Keane JA.

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.

[43] The next point concerns the case against the third defendant. It applies to strike out the pleading of an implied term in paragraph 30(b), which it says is the basis of the claim against it for the cost of demolition and rebuilding. That term is pleaded in paragraph 30(b). Paragraph 30 as a whole, apart from its particulars, is as follows:

> "30. There were implied terms in the construction management agreement that the Third Defendant would, as construction manager of the development:
>
> (a) carry out its duties with reasonable care, skill and competence to a standard measured by reference to a professionally competent construction manager skilled and experienced in construction and construction management of projects such as the development.
>
> (b) ~~deliver up the development on final completion free of defective work.~~ exercise such reasonable care, skill and competence in seeking to ensure that the development, as constructed, would be reasonably fit for its intended purpose (as made known by the Plaintiff to the Third Defendant by the provision to it of the drawing of the development which, by their contents, indicated that purpose), namely, as a good quality marketable mixed purpose commercial, retail and residential complex.
>
> (c) ~~deliver up the development on final completion in a state such that it would have a structural life expectancy of more than one hundred years and a service life of sixty to seventy years.~~"

I have set out also the parts of paragraph 30 which were struck out by my judgment last year. I held that there could not have been implied terms of the third defendant's contract by which it was obliged to produce a result[27].

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[27] *UI International Pty Ltd v Interworks Architects Pty Ltd & Ors* [2006] QSC 079 at [51] to [55].

[44] Paragraph 30(b) appears to meet that problem by limiting the obligation to one of the use of reasonable care, skill and competence in seeking to bring about a result. But the third defendant's complaint is that such a term cannot be implied because it would require the third defendant to exercise care, skill and competence beyond the ambit of its contractual responsibilities. The third defendant's argument compares the implied term within paragraph (a), which is specifically referable to "its duties", (meaning its contractual duties) with that in paragraph (b) which is not so limited. As the term pleaded in (b) must have a different ambit from that pleaded in (a), it is said that the term in (b) could not be implied because it would operate the scope of the third defendant's agreed responsibilities. In my view that point is well taken. Accepting as the third defendant does, that its contractual duties had to be performed with reasonable care, skill and competence, I do not see the basis for the implication of the term pleaded in paragraph (b). The apparent purpose of the pleading of this implied term is to further the claim against that defendant for damages for the cost of demolition and rebuilding. That is why the terms of paragraph 30(b) largely correspond with the terms of paragraph 73A, which is as follows:

> "73A. As a result of the architect's retainer, the construction management agreement, the engineer's retainer and the terms of engagement or appointment of the Fifth and/or Sixth Defendant (each as pleaded herein, those contracts being collectively referred to hereafter as "the development contracts"), the Plaintiff was, in respect of the First, Second, Third, Fourth, Fifth and Sixth Defendants, contractually entitled 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, (that purpose being referred to hereafter as "the development objective"), and, in respect of the Third Defendant, contractually entitled to receive the benefit of the exercise of reasonable care in achieving the development objective."

[45] Arguably at least, a failure to perform the implied term pleaded in paragraph 30(a) could itself result in loss and damage which, subject to the plaintiff's attention to the matters already discussed, would warrant an award of damages quantified by the cost of rebuilding. Accordingly if the only problem with the rebuilding case against the third defendant was paragraph 30(b), I would not have been persuaded to strike out that claim against this defendant. As to paragraph 30(b) itself, it seems to me that the plaintiff's real case would be reflected by an allegation of an implied term which inserted, within paragraph (b) after the word "exercise", the words "in the performance of its duties". The plaintiff may or may not be content with that. The question is whether paragraph 30(b) ought to be struck out now. It does not seem to me that there would be any utility in striking out paragraph 30(b) although it seems to me to be something of an overstatement. The fate of the rebuilding case against the third defendant does not depend upon this paragraph, despite the plaintiff's perception that its demolition claim should be bolstered by it.

[46] The fourth defendant argues that clearly it had no contract with the plaintiff because it was retained as the engineer by the first defendant and that the documents which

evidence its contract disprove the plaintiff's allegation that it was a contract for the plaintiff's benefit and enforceable by it pursuant to s 55 of the *Property Law Act* 1974 (Qld). The fourth defendant tendered the documents said to constitute its contract. There is apparent force in its argument that this contract did not engage s 55. However that point is particularly relevant to the second basis upon which the cost of demolition and rebuilding are claimed, which is the argument upon *St Martin's Property Trust Corporation*. The defendant's point would not preclude a properly pleaded claim of what I have described as the third basis. If the fate of a claim for demolition and rebuilding rested entirely upon this question, there would be some utility in determining it now. For the above reasons, that is not so and despite the apparent force of the point, it need not be decided at present.

[47] The fourth defendant challenges specifically paragraph 37(i), which alleges that it was an implied term of its contract that it would "ensure that the development, constructed to its design and as inspected and supervised by it, would be reasonably fit for its intended purposes". I think that this pleading is likely to overstate the fourth defendant's obligation, quite apart from whether that contract was enforceable by the plaintiff. The fourth defendant was not obliged to produce a result but to perform certain services with reasonable skill and care. But again a properly pleaded case in negligence might provide a basis for recovering damages measured by the cost of demolition and rebuilding. So the utility of deciding the point raised by the application to strike out paragraph 37(i) is not high. For reasons similar to those relating to paragraph 30(b) pleaded against the third defendant, this paragraph will not be struck out.

[48] Next there is the argument by the Redland Shire Council, the seventh defendant, that the demolition and rebuilding claim should not stand against it because it is not within paragraph 73A of the pleading. However the seventh defendant is within paragraph 73D because that paragraph refers to the allegations of negligence which include those made against the Council[28]. It is there alleged that by reason of the negligence of the Council as well as other defendants, "the development, as constructed, departs substantially from the development objective, as particularised in paragraph 73B above." And that is followed by the allegation in paragraph 73E that the demolition and reconstruction is a necessary, a reasonable and the only practical method of achieving the development objective. From those paragraphs it is clear enough that the Council is said to be responsible for the cost of demolition and rebuilding. But then paragraph 73H, which pleads the alternative claim on the basis of *St Martin's Property Trust Corporation*, pleads in paragraph 73H(e) that "the Plaintiff is the only party to whom the Defendants owed the relevant duties of care (as pleaded in paragraphs 43 to 49 above)." The duty of care alleged to have been owed by the Council is pleaded in paragraph 50. Accordingly the Council is apparently outside the ambit of paragraph 73H. However the plaintiff's argument indicates that it would wish to claim the costs of rebuilding from the Council also upon this basis. As already discussed, I would accept the basis for reliance upon *St Martin's Property Trust Corporation* against the Council is especially weak at least because it is not sued upon a contract.

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[28] Paragraph 73 of the statement of claim.

[49] I turn then to the claims for diminution in value by reason of the defects. In paragraph 86, the plaintiff repeats the allegations in paragraph 73A to 73F and says that:

> "(a) 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, as pleaded above;
> (ii) been negligent, as pleaded above;
>
> **Particulars**
>
> The Defendants' breaches of contract and negligence are pleaded in paragraphs 58, 59(e), 59(f), 59(g), 60(c), 60(d), 60(e), 60(f), 60A, 60B, 60C, 61, 62, 63, 64 and 73 above.
>
> (b) as a result of the Defendants' breaches of contract and negligence, as pleaded above the Plaintiff has suffered loss and damage and is entitled to damages calculated as 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, as pleaded above;
> (ii) the Defendants' negligence, as pleaded above.
>
> **Particulars**
>
> At present, the Plaintiff is unable to provide particulars of the current market value of the land and the development or of the market value of the land and the development had the development not been affected by the Defendants' breach of contract and negligence. The Plaintiff will provide such particulars as soon as possible and expects to be able to do so by 5 March 2007."

[50] By paragraph 87 it is alleged that the plaintiff as the owner of the lots it has retained ("the plaintiff's Lots") has suffered a loss as follows:

> "(b) the current market value of the Plaintiff's Lots is substantially less than the market value that the Plaintiff's Lots would have been had the Defendants not:
>
> (i) breached the development contracts, as pleaded above;
> (ii) been negligent, as pleaded above;

Particulars

The Defendants' breaches of contract and negligence are pleaded in paragraphs 58, 59(e), 59(f), 59(g), 60(c), 60(d), 60(e), 60(f), 60A, 60B, 60C, 61, 62, 63, 64 and 73 above.

(c) as a result of the Defendants' breaches of contract and negligence, as pleaded above, the Plaintiff has suffered loss and damage and is entitled to damages calculated as the difference between the current market value of the Plaintiff's Lots and that market value had the development not been affected by:

(i) the Defendants' breach of the development contracts, as pleaded above;
(ii) the Defendants' negligence, as pleaded above.

Particulars

The Plaintiff will provide particulars of the current market value of the Plaintiff's Lots or of the market value of the Plaintiff's Lots had the development not been affected by the Defendants' breach of contract and negligence when they become available. The Plaintiff will provide such particulars as soon as possible and expects to be able to do so by 5 March 2007."

[51] It will be seen that each paragraph foreshadowed the provision of particulars by 5 March 2007. A search of the court file reveals that no particulars have been filed. Without those particulars each of these claims does not comply with UCPR r 158. However, there are other problems with these paragraphs.

[52] Most importantly 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.

[53] 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.

[54] 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.

[55] 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[29].

[56] 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.

Conclusions

[57] Paragraphs 73A through 76 and 79 through 82 will be struck out. Paragraphs 86, 88 and 89 will be struck out. Unless particulars of paragraph 87 are provided within fourteen days of this judgment, paragraph 87 will be struck out. Subject to any further argument the plaintiff should pay the costs of each of the applicant defendants of this application.

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[29] *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640