Ziade Investments No 1 Property Ltd v Tricon Projects P/L [2004] Adj.L.R. 11/22

JUDGMENT : MASTER MACREADY Equity Div. New South Wales Supreme Court. 22nd November 2004

1 This is the hearing of an originating process seeking to set aside a statutory demand served by the defendant upon the plaintiff. The statutory demand is dated 20 May 2004 and it seeks to recover an amount of $337,374.35 claimed to be due under a District Court judgment entered in the District Court on 13 May 2004. That judgment arose out of a contested adjudication application under the **Building and Construction Industry Security of Payments Act** 1999 (NSW) (the Act).

2 The plaintiff in this matter is a property developer and the defendant is a construction manager. During late 2002 the plaintiff and the defendant entered into two construction management agreements in similar terms for the development of two sites. One site was at 84 Dudley Street, Coogee and the other at 145 Brook Street, Coogee. As construction manager, the defendant employed various sub-contractors and builders to construct the works on the site.

3 The projects were substantially commenced and were approaching completion when work was suspended. There was then a dispute and the defendant made applications for adjudication under the Act. These were contested before the adjudicator and the defendant received adjudications in its favour in that they were owed various amounts. In respect of the Dudley Street, Coogee project, the adjudication in favour of the defendant was in the sum of $337,374.35, which is the amount referred to in the statutory demand.

4 The amount in the demand was not paid and the plaintiff, the developer, seeks to raise an offsetting claim under s 459H (1)(b) of the **Corporations Act** 2001 (Cth). In ***Max Cooper & Sons (Builders) Pty Ltd v M E Booth & Sons Pty Ltd*** (2003) 201 ALR 680; NSWSC 929 I held that a contractual offsetting claim could be used to set aside a demand based upon an adjudication claim. This has been approved in ***Demir Pty Ltd v Graf Plumbing Pty Ltd*** [2004] NSWSC 553 at paragraphs 15-20.

5 There was a substantial debate before me as to whether the offsetting claim had been appropriately raised in the affidavit, which was filed within time. The only affidavit, which was filed within time, was one of Mr Luke Aiken, solicitor of 9 June 2004, which annexed two reports from a building expert dealing with each property. Each report dealt separately with the extent of completion of the work to date and also identified areas of faulty workmanship of each project. The report did not in any way quantify the cost of the rectification of defects. Mr Martin, a quantity surveyor quantified those defects outside of the 21-day period of time allowed for an affidavit. Mr Martin quantified the cost of rectification of the defective work as follows:

Brook Street, Coogee $182,781.00
Dudley Street, Coogee $241,211.00
Total $423,992.00

6 The questions that arise in relation to this are:

1. Whether this was an appropriate supplementation of the initial affidavit or whether the initial affidavit should have provided estimates of the cost.
2. Whether regard could be had to the rectification of Brook Street in the circumstances that Brook Street has now been sold by the developer.
3. Was the offsetting claim genuine?

7 There are a number of other areas of evidence where it was sought to advance an offsetting claim. One was in relation to the costs order in other proceedings and in the course of the hearing I rejected that evidence on grounds that I set out in my reasons. I did however admit it provisionally so that I could have submissions as to whether a condition should be imposed as to the terms of setting aside a demand.

8 However, it is clear that it cannot be considered as an offsetting claim.

9 Other evidence outside the 21 days was also adduced in the affidavit of Mr Mariano Rossetto, an accountant, who analysed various invoices and payments in order to demonstrate that the developer had overpaid the defendant, the project manager, by the end of Progress Claim No 13. His conclusion as to the analysis was that there was a sum of $433,863.00 overpaid. Mr Rossetto also did an analysis up to the end of Progress Claim No 17. It is plain that this exercise was certainly not apparent from any affidavit filed within time.

10 In my earlier judgment I referred to the law as summarised by White J in **Tokich** ***Holdings Pty Ltd v Sheraton Constructions (NSW) Pty Limited (In liq)*** [2004] NSWSC 527 where his Honour summarised the debate at paragraphs 53 to 56 in these terms: "In ***Process Machinery Australia Pty Limited v ACN 057 262 590 Pty Limited*** (2002) NSWSC 45 at [21] - [22] Barrett J, are reviewing the authorities, said:

'[21] It is thus reasonably clear that the relevant concept of "raising" or "identifying" a particular ground involves some verbal delineation of that ground in the section 459G(3)(a) affidavit. If a debt of $10,000 were claimed as one year's interest under a contract providing for interest at the rate of 9% per annum on a principal sum of $100,000, it would not, in my opinion, be sufficient for the affidavit to annex the loan agreement and say no more. It would have to refer at least to the connection between the contract and the debt claimed and put in issue the calculation of interest - even if it merely said, "The debt does not accord with the annexed contract".

[22] The real point is that the application and affidavit filed and served within the 21 day period must fairly alert the claimant to the nature of the case the company will seek to make in resisting the statutory demand. The content of the application and affidavit must convey, even if it be by necessary inference, a clear delineation of the area of controversy so that it is identifiably with one or more of the grounds made available by s459H and s459J.

That process of delineation may not be extended after the end of the 21 day period, although it is open to the plaintiff to supplement the initial affidavit by way of additional evidence relevant to the area of controversy identified within the period.'

*54 The authorities were again reviewed Austin J in **POS Media Online Limited v B Family Pty Limited** (2003) 21 ACLC 533 where His Honour concluded in respect of the passage from **Process Machinery Australia Pty Limited v ACN 057 262 590 Pty Ltd** which I have quoted (at 541):*

*'With respect, these observations are a logical application of the principle enunciated in **Energy Equity**. However, they might arguably take Sunberg J's observations in **Graywinter** further than the **Financial Solutions** case would now take them, and be inconsistent with the decision in **Callite**. If it was unnecessary for the supporting affidavit in **Callite** to do anything more than annex the solicitor's invoices, on the face of which there were non-compliances with the **Legal Profession Act**, why would it be necessary for the supporting affidavit in Barrett J's hypothetical example to do anything more than annex the loan agreement showing a different rate of interest from the one claimed?'*

*55 His Honour's reference to the "**Financial Solutions Case**" was to **Financial Solutions Australasia Pty Limited v Predella Pty Limited** (2002) 26 WAR 306; 167 FLR 106. The reference to **Callite** was to the decision of Santow J **Callite v Adams** [2001] NSWSC 52.*

*56 Although in **Process Machinery** Barrett J referred to a need for verbal delineation of the ground of dispute, His Honour went on to say that what was necessary was that 'the application and affidavit filed and served within the 21 period must fairly alert the claimants to the nature of the case the company will seek to make in resisting the statutory demand'. It will be sufficient if the area of controversy is clearly delineated by necessary inferences so that it is identifiable as one or more of the grounds made available by s459H and s459J."*

11 Although, according to the transcript, I had only deferred the admission of that evidence, in my view it should clearly not be admitted. In submissions there was an attempt to combine some of that evidence together with the value of works as determined by Mr Martin to whom I have referred. That suffers from the same vice and should be excluded.

12 I turn to the questions referred to above.

Whether this was an appropriate supplementation of the initial affidavit or whether the initial affidavit should have provided estimates of the cost

13 The defendant's submissions were that in the supplementary affidavit the applicant must adduce "some evidence to show the basis upon which the losses are said to arise and how that loss is calculated". It was submitted that both of these matters should have been addressed the affidavit filed in the 21 day period. Reference was made to the case of ***Elm Financial Services Pty Ltd v MacDougal*** [2004] NSWSC 560.

14 In that case the question arose as to whether an offsetting claim had been appropriately delineated in the affidavit filed within time under the Act. Barrett J. found that there was sufficient delineation of the nature of an offsetting claim that related to a financial adviser's failure to account for fees he received from his employer's customers. His Honour made reference to the well-known words from a judgment of Sundberg J. in ***Graywinter Properties Pty Ltd v Gas and Fuel Corporation Superanuation Fund*** (1996) 70 FCR 452 which are in these terms: *"In several cases it has been held that an applicant is not restricted on the hearing to the affidavit that is served with the application. See **Scanhill** at 467 and **Mibor Investments Pty. Limited v Commonwealth Bank of Australia** (1993) 11 ACSR 362 at 368. An applicant whose initial affidavit has satisfied the threshold test must be able to supplement the material, because while the 'supporting' affidavit does not have to deploy the evidence, on the hearing only admissible evidence can be relied on. In **Louisbridge**, Ryan J said that 'provided that an affidavit is filed and served within the 21 day period which supports the application by providing grounds for concluding that there is a genuine dispute ... or that the company has an offsetting claim', supporting affidavits may be filed under the period has expired. Apart from **Hire Works**, the cases do not support the proposition for which the applicant contended, namely that an affidavit that does not satisfy the threshold test can be supplemented later on. That issue did not arise in **Scanhill** or **Mibor**. It did arise in **Hire Works**, but for the reasons I have given, I am respectfully unable to agree that the court can entertain as an application under s 459G a case in which an affidavit containing the minimum requirements has not been served within time."*

15 Bearing in mind that it is open to the plaintiff to supplement the initial affidavit by way of additional evidence relevant to the area of controversy identified within the period, Barrett J turned to a further affidavit, which was apparently filed after the time-limited, and which provided sufficient quantification of the offsetting claim. His Honour commented that the affidavit represented amplification in a manner not contrary to the ***Graywinter*** principle of what was outlined and delineated in the supporting affidavit of 26 February 2004. That approach clearly allowed the quantification to be dealt with in a later affidavit. In my view that approach is quite correct particularly when one considers the time that might be taken to quantify such a claim.

16 In the present case the reports attached to the affidavit filed in time clearly identified areas of controversy. Accordingly the appropriate qualifications have been provided in the later affidavit of Mr Martin.

Whether regard could be had to the rectification of Brook Street in the circumstances that Brook Street has now been sold by the developer.

17 This issue arises because the plaintiff sold the Brook Street property at auction for $1,310,000.00. The sale was to a party related to the vendor. The contract disclosed the part completed nature of the buildings and that legal proceedings have been commenced in Supreme Court by the vendor and its related companies, which would continue against the builder who carried out the works on the property. The contract provided that any order or judgment, costs or compensation arising out of the proceedings were for the sole benefit of the vendor and his related companies.

18 There were no substantive submissions put on this aspect but I have considered the matter of whether damages for defective work are recoverable after a sale of the subject property in detail in the case of **SAS v Carver** [2003] NSWSC 1097. For convenience I will repeat the analysis of the authorities that I carried out in that case.

19 There are a number of cases that touch upon the problem and it is necessary to deal with them in some detail. The first is ***Bellgrove v Eldridge*** (1954) 90 CLR 613 a case where due to faulty construction of foundations a plaintiff cross-claimed against a builder for the cost of demolition and rebuilding of the house. At p 616 the court expressed the principle as to the assessment of damages in these terms: *"It is true that a difference in the values indicated may, in one sense, represent the respondent's [owner'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 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 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 [owner] was entitled to have the 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 [contractor] 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 …"*

20 The plaintiff cited this passage to indicate that the lack of diminution in value of the building as a whole is not the true measure.

21 However, the Court went on at 617 to say the following: *"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 . . . . . 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. *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 or it would, to use a term current in the United States, constitute* ***'economic waste'****. (See* ***Restatement of the Law of Contracts****, (1932) para 346). We prefer, however, to think that the building owner's right to undertake remedial works at the expense of a builder is not subject to any limit other than is to be found in the expressions* ***'necessary'*** *and* ***'reasonable'*** *for the expression 'economic waste' appears to us to go too far and would deny to a building owner the right to demolish a structure which, though satisfactory as a structure of a*

particular type, is quite different in character from that called for by the contract. Many examples may, of course, be given of remedial work, which though necessary to produce conformity would not constitute a reasonable method of dealing with the situation and in such cases the true measure of the building owner's loss will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials."

22 The plaintiff's submission that a claim for remedial costs was not recoverable was not based upon rectification not being a reasonable course to adopt. Such a submission would have been inconsistent with the decision in ***Bellgrove v Eldridge*** where the example of an "unreasonable course" involved the demolition of a house in order to replace the bricks used in the exterior walls. The example provides a useful guide to what is "unreasonable". Rectification, were it to occur, would not destroy a significant part of the works. As is discussed below, the sale of the building does not affect the right of the plaintiff to take action for loss of value of the works.

23 The next case is ***Director of War Service Homes v Harris*** *[*1968] Qd R 275 which concerned an action for damages brought by an initial building owner against the builder of a number of houses. The defects were not discovered until after the initial owner, who then sued the builder for the cost of remedying defects, had sold the houses that it had rectified, although was not obliged to do so. Sir Harry Gibbs, with whom Stable and Hart JJ agreed, said: "*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.*** *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 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. 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 Q.B.D. 67 at 77:* ***Williams Brothers v. Ed. T. Agius Ltd.*** *[1914] A.C. 510;* ***Slater v. Hoyle*** *[1920] 2 K.B. 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 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.*"

24 Certainly the case is not precisely on point with the present in that the defects were rectified, but it is a case that considered the circumstance of the sale of the building.

25 The next case of interest is **De Cesare v Deluxe Motors Pty Ltd** (1996) 67 SASR 28. The case concerned the situation where building work performed under a contract with the building owner was not completed and it was necessary to rectify work, which had been done defectively. The question arose as to whether the building owner was able to recover damages measured by the cost of that further work even though the owner had sold the building, did not intend to carry out the further work, and had not established by evidence that the price for which the building was sold was less than would have been if the building work had been completed in accordance with the contract. Notwithstanding this later finding the case proceeded on the basis that the price paid by the buyer of the building was less than it otherwise would have been. The case was a decision of Full Court of South Australia and there was consideration of the cases by Knox CJ and Nyland J including, of course, **Harris**' case.

26 Knox CJ referred to the passage, which I have italicised in the quote from **Harris**' case and suggested that what was said might be too absolute. He went on to say that in principle the relevance of the sale of the building is limited to the question of whether it would be reasonable to effect the remedial work. He concluded at page 35: "*In my opinion, in the present case, having regard to the findings of the magistrate it was reasonable for the building owner to carry out the remedial work. Prima facie the building owner was entitled to damages measured according to that cost. There is no doubt at all, in my opinion, that that would be the measure of damages if the property had not been sold, and that that would have been the measure without inquiry as to the owner's intention to carry out the work.*

"*The performance of that work and the claim for the cost of doing it, does not cease to be reasonable because the building has been sold. The fact that the building owner in the present case no longer intends to carry out the work throws no light on the reasonableness of doing so. The reasonableness of doing so is to be judged, in a case like this, objectively and does not depend in any way upon an inquiry as the likelihood of the work in fact being done.*"

27 Reference is made in the cases to the English decision of ***Ruxley Electronics & Construction Limited v Forsythe*** [1996] AC 344. There was extensive reference to this case in ***De Cesare v Deluxe Motor Pty Ltd***. In ***Ruxley's*** case the owner of a property had contracted with the builders to build a swimming pool in his garden, the maximum depth of which was to be 7 feet 6 inches. After the work had been completed the owner discovered that the maximum depth was only 6 feet 9 inches and that at the point where people were diving into the pool the depth was only 6 feet. There was no adverse effect on the value of the property. The House of Lords held that the work involved in the reinstatement would be out of all proportion to the benefit to be obtained and therefore held that the plaintiff was entitled only to any diminution in value caused by the breach. Contrary to Australian authority, the court said that the innocent parties' intention or lack of it to reinstate was relevant to the reasonableness and hence to the extent of the loss sustained. As is made clear in the Chief Justice's judgment in ***De Cesare, Ruxley*** was a case where there had been substantial performance. At page 35 he said: *"In my opinion the cost of remedying the defect in contractual performance remains a primary measure of damages, subject to the test of reasonableness and a careful consideration of what was contracted for and what has been lost. I make these qualifications because the caselaw makes it quite clear the plaintiff may recover damages for the completion of a pointless but decorative and desired structure. I make the further point as is made by their Lordships in **Ruxley Electronics & Construction Limited v Forsyth** it may be necessary to distinguish between cases in which there has been substantial performance and cases in which there has not."*

28 He distinguished **Ruxley's case** by concluding at page 36 in these terms:- *"This is not one of those cases like **Ruxley Electronics & Construction Limited v Forsyth** in which one can say that the defective performance had no practical significance, that one is concerned only with a desire by the building owner to be compensated for non-performance which has no effect upon the value or utility of the contract works. In the present case the position is the reverse."*

29 After careful consideration Nyland J also characterised ***Ruxley*** as a case of substantial performance having been achieved. This led to it being unreasonable to ask for reinstatement.

30 In order to see whether there has been substantial performance it is appropriate in my view to look at the matters referred to by Knox CJ. These include what was contracted for but not provided and whether there has been no effect upon the value or utility of the contract works.

31 A perusal of the expert's report indicates that the defects are such that there is an effect on the utility of the contract works and accordingly it would appear to me that this is an offsetting claim under which the plaintiff is likely to have a legal claim for the cost of remedying defects notwithstanding the sale of the property.

32 In Mr Martin's evidence there has been quantification of these two claims in excess of the amount sought to be recovered under the statutory demand.

Is the offsetting claim genuine?

33 The test to be applied in determining whether there exists a genuine offsetting claim of the kind contemplated by s 459H(1)(b) of the **Corporations Act** was stated by Palmer J in ***Macleay Nominees Pty Ltd v Belle Property East Pty Ltd*** [2001] NSWSC 743: *"In my opinion, a genuine offsetting claim for the purposes of CA s 459H(1) and s 459H(2) means a claim on a cause of action advanced in good faith, for an amount claimed in good faith. 'Good faith' means arguable on the basis of facts asserted with sufficient particularity to enable the Court to determine that the claim is not fanciful. In a claim for unliquidated damages for economic loss, the Court will not be able to determine whether the amount claimed is claimed in good faith unless the plaintiff adduces some evidence to show the basis upon which the loss is said to arise and how that loss is calculated. If such evidence is entirely lacking, the Court cannot find that there is a genuine offsetting claim for the purposes of s 459H."*

34 In this case, the basis of the claim and the quantification of that claim appear in the evidence. It is necessary to see whether it is claimed in good faith as referred to by His Honour.

35 The plaintiff commenced proceedings in the Technology and Construction list in the Equity division of this Court against the defendant to recover damages against the defendant in respect of these projects. Proceedings were commenced on 8 June 2004 shortly after service of the statutory demand, which was dated 20 May 2004.

36 Apart from some reference to the fact that the defendant was liable to pay all the contractors who had carried out work on the projects in a sum represented by the amount of the adjudication certificates there were two matters going to this issue.

37 The first was that by agreements with the owner of each of the parcels of land, the plaintiff was appointed as the developer of the properties with authority to engage consultants, builders and subcontractors to carry out the works. Various provisions of the agreement made it clear that there was no obligation on the property owner to contribute to the costs and that in respect of the development the plaintiff was to be responsible for any claims to the exclusion of the property owner.

38 The commercial operation of this agreement no doubt was to isolate the developer from the ownership of the land. That in my view does not have any effect on the genuineness of the claim made by the plaintiff. Presumably the defendant either knew or should have known that the company with which it contracted was not the owner of the land.

39 The other important issue goes to whether or not the claim for rectification lies against the defendant who it will be recalled was the project manager for the development. The construction management agreement for the properties contains clause five in which the plaintiff warranted that:

"*(a) the Construction Manager shall not be liable for --*

(i) the construction means, methods, techniques, sequences and procedures employed by Trade contractors in the performance of their Trade Contracts,

(ii) the failure of any Trade Contractor to carry out the work under the contract in accordance with the Trade Contracts; and

(iii) the design of the Works.

(b) the Construction Manager solely shall have the right to co-ordinate the construction of the Works; and

(c) any differences between the Construction Manager and any other member of the Project Team (not dealt with by the terms of this Contract) shall be resolved by the Principal."

40 It was also suggested that there might be no right to recovery because it was the plaintiff who determined the construction management agreement. That however would not prevent it recovering in respect of any of the then existing breaches if it was entitled to recover damages for rectification of defects.

41 The claim which the plaintiff brings, together with the owners of the two properties in the construction list proceedings goes far beyond a claim for defective work. It raises claims of breaches of the construction management agreement taking in most of the clauses in that contract. The plaintiff claims damages for breaches including: damages with respect to defective works, damages with respect to noncompliant works, additional costs of retaining trade contractors, administrative costs and other expenses and damages for delay and disruption of the works. It also claimed amounts back in respect of overpayment under the contract and raised claims of misleading conduct, negligence and interference with the business of the plaintiff. Although fairly lengthy, the summons is not particularised in any great detail. In any event, it was only admitted in evidence before me as to the fact of its issue and not as to the truth of the matters alleged in it.

42 If one peruses the list of defects and faulty workmanship, this being the foundation of the offsetting claim advanced in these proceedings, it is plain and that they are in respect of works that would have been carried out by trade contractors. In these circumstances, it is hard see how the offsetting claim can arise against the defendant.

43 The question is whether the offsetting claim, which is advanced in these proceedings, is advanced in good faith. Unfortunately as so often happens in these matters the initial claim advanced within time is quickly prepared because of the short time and therefore is of limited utility. Given the contractual provisions to which I have referred and the lack of any evidence linking the defects to defaults on the part of the construction manager I am satisfied that the claim advanced in these proceedings as against the defendant is fanciful. There is no doubt that the existence of defects and the possible cost of rectification is not fanciful and that trade contractors would be liable.

44 I dismiss the proceedings and order the plaintiff to pay the defendant's costs.

Mr PT Taylor SC & D Weinberger for plaintiff instructed by Deacons
Mr GM Watson SC & G Jones for defendant instructed by KQ Lawyers