Court of Appeal
Supreme Court

New South Wales

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| Case Name: | Owners SP 92450 v JKN Para 1 Pty Limited |
| Medium Neutral Citation: | [2023] NSWCA 114 |
| Hearing Date(s): | 15 March 2023 |
| Date of Orders: | 26 May 2023 |
| Decision Date: | 26 May 2023 |
| Before: | Gleeson JA at [1]<br>White JA at [115]<br>Brereton JA at [116] |
| Decision: | (1) Grant leave to appeal.<br><br>(2) Appeal allowed.<br><br>(3) Direct the appellant to file a notice of appeal in the form contained in the White Book within seven days.<br><br>(4) Set aside the answers to separate questions (c), (d), (e), (f), (g) and (h) given on 19 July 2022, and in lieu, answer those questions as follows:<br><br>(c) Not necessary to answer.<br><br>(d) Not necessary to answer.<br><br>(e) Yes. JKN and Toplace breached the statutory warranty in s 18B(1)(c) of the Home Building Act 1989 (NSW).<br><br>(f) Yes.<br><br>(g) The Owners Corporation's loss is assessed as the reasonable cost of removing the cladding and replacing |

it with cladding which is non-combustible within the meaning of that term in the Building Code of Australia.

(h) The defendants are liable to the plaintiff for the reasonable cost of having the cladding removed and replaced with cladding which is non-combustible within the meaning of that term in the Building Code of Australia.

(5) Set aside orders (1) and (2) made on 27 July 2022 and in lieu, make the following orders:

(a) Pursuant to r 28.4 of the Uniform Civil Procedure Rules 2005 (NSW), the plaintiff's claim, insofar as it relies upon the contentions in paragraphs 27A, 27B, 27C, 27F and 28 of Part C of the Amended Technology and Construction List Statement filed on 5 April 2019, be allowed;

(b) Direct the parties to bring in short minutes of order before the primary judge in relation to the monetary judgment for damages in favour of the plaintiff in respect of the agreed cost of removal and replacement of the cladding.

(6) The respondents pay the appellant's costs of the appeal and the determination of the separate questions in the court below.

Catchwords:

BUILDING AND CONSTRUCTION — Contract — Implied terms — Statutory warranties — Whether building complied with Building Code of Australia (BCA) — Where performance requirements of BCA specified that external walls must be "non-combustible" — Whether external cladding met performance requirements for fire resistance — Where cladding did not comply with "deemed-to-satisfy" provisions — Where no "alternative solution" prepared prior to issue of construction certificate —Home Building Act 1989 (NSW), s 18(1)(c) — Where breach of s 18(1)(c) conceded

BUILDING AND CONSTRUCTION — Contract — Damages — Claim for reinstatement damages —

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| | Evidentiary onus of proving reinstatement would be unreasonable |
| Legislation Cited: | Building Products (Safety) Act 2017 (NSW), s 9(1)<br>Environmental Planning and Assessment Act 1979 (NSW), s 109H<br>Environmental Planning and Assessment Regulation 2000 (NSW), regs 98(1)(a), 145, 198<br>Home Building Act 1989 (NSW), ss 18B, 18C, 18D, 18E, 18F<br>Supreme Court Act 1970 (NSW), s 103<br>Uniform Civil Procedure Rules 2005 (NSW), rr 28.2, 42.1 |
| Cases Cited: | Bellgrove v Eldridge (1954) 90 CLR 613; [1954] HCA 36<br>Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (2008) 166 FCR 494; [2008] FCAFC 38<br>Brewarrina Shire Council v Beckhouse Civil Pty Ltd [2006] NSWCA 361<br>Builders' Insurers' Guarantee Corp v Owners – Strata Plan No 57504 [2010] NSWCA 23<br>Kirby v Coote [2006] QCA 61<br>Kuru v State of New South Wales (2008) 236 CLR 1; [2008] HCA 26<br>Metricon Homes Pty Ltd v Softley (2016) 499 VR 746; [2016] VSCA 60<br>Owners of Strata Plan No 77475 v Walker Group Constructions Pty Ltd [2016] NSWSC 1127<br>Purkess v Crittenden (1965) 114 CLR 164; [1965] HCA 34<br>Radford v De Froberville [1977] 1 WLR 1262<br>Renown Corporation Pty Ltd v SEMF Pty Ltd [2022] NSWCA 233<br>Roberts v Goodwin Street Developments Pty Ltd [2023] NSWCA 5<br>Robinson v Harman (1884) 1 Exch 850; 154 ER 363<br>Scott Carver Pty Ltd v SAS Trustee Corporation [2005] NSWCA 462<br>South Parklands Hockey & Tennis Centre Inc v Brown Falconer Group Pty Ltd [2004] SASC 81<br>Strata Plan 92450 v JKN Para 1 Pty Ltd [2022] NSWSC 958<br>Tabcorp Holdings Ltd v Bowen Investments Pty Ltd |

(2009) 236 CLR 272; [2009] HCA 8
Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436T [2021] VSCA 72
Taylor Construction Group Pty Ltd v Strata Plan 92888 [2021] NSWSC 1315
The Owners of Strata Plan 76888 v Walker Group Constructions Pty Ltd [2016] NSWSC 541
Wheeler v Ecroplot Pty Ltd [2010] NSWCA 61

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| Category: | Principal judgment |
| Parties: | Owners SP 92450 (Appellant)<br>JKN Para 1 Pty Ltd (First respondent)<br>Toplace Pty Limited (Second respondent) |
| Representation: | Counsel:<br>J Steele SC / R Size (Appellant)<br>R J Cheney SC / H Pintos-Lopez (Respondents)<br><br>Solicitors:<br>Eakin McCaffery Cox (Appellant)<br>EA Legal (Respondents) |
| File Number(s): | 2022/246531 |
| Decision under appeal: | |
| Court or Tribunal: | Supreme Court of New South Wales |
| Jurisdiction: | Equity Division – Building and Construction |
| Citation: | [2022] NSWSC 958 |
| Date of Decision: | 19 July 2022 |
| Before: | Black J |
| File Number(s): | 2019/75454 |

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

## HEADNOTE

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

The second respondent, Toplace, designed and constructed a 28-storey building at Parramatta pursuant to an agreement with the developer and then-owner, the first respondent, JKN. The building, which comprised residential, commercial and retail lots, was constructed using aluminium composite panels (ACPs) as the external cladding. Toplace applied to the principal certifying authority for a construction certificate on 5 July 2013. An interim occupation certificate was issued on 13 May 2017. On 18 May 2016, Fire & Rescue NSW identified concerns that the cladding was not adequately fire resistant, and recommended that it be rectified and the façade be certified compliant. On 15 July 2016, the strata plan in respect of the building was registered and the common property vested in the applicant as the Owners Corporation. The final occupation certificate was issued on 10 March 2017.

As the successor in title to the common property of the building, the Owners Corporation was entitled to the benefit of the statutory warranties in s 18B(1) of the *Home Building Act 1989* (NSW) (Home Building Act). The Owners Corporation alleged that by installing the ACPs as the external cladding, the respondents had breached warranties in the Home Building Act; namely, (1) the cladding did not comply with the Home Building Act or "any other law" (s 18B(1)(c)); (2) the cladding was not good and suitable material as it was combustible (18(1)(b)); and / or (3) the dwellings were not reasonably fit for occupation because they are combustible (s 18(1)(e)). The Owners Corporation sought rectification damages for the cost of replacing the cladding, which the parties agreed was in the amount of some $5 million. The reference to "any other law" in s 18B(1)(c) incorporated the requirements of the Building Code of Australia (BCA) as it applied at the time of Toplace's application for a construction certificate on 5 July 2013.

The 2013 BCA required the external walls of the building to be "non-combustible"; that is, constructed wholly of materials that are not deemed combustible. Compliance with this performance requirement of the BCA could be achieved through the "deemed-to-satisfy" provisions of the BCA or through

an “alternative solution” (or a combination of both). Whether a material is not deemed combustible is determined by an AS1530.1 test report. It was common ground that the cladding on the building did not comply with the deemed-to-satisfy provisions of the BCA as there was no evidence of an AS1530.1 test report. Further, no alternative solution that complied with the performance requirements of the BCA with respect to fire resistance was prepared prior to the issue of the construction certificate.

On the determination of several separate questions, the primary judge found that the cladding did not comply with the deemed-to-satisfy provisions and that the “strict answer” to whether the cladding was otherwise compliant with the BCA by way of an alternative solution was “no”. However, his Honour found no breach of the s 18(1)(c) warranty and declined to award reinstatement damages on the basis that the Owners Corporation had not established that an alternative solution “could not then or now be performed”. Addressing the warranties in s 18(1)(b) and (e), his Honour found that no breach had been established because the evidence did not show that the cladding was combustible for the purposes of the BCA, or in a general sense. On appeal, the respondents conceded a breach of s 18(1)(c) of the Home Building Act.

The main issues on appeal were whether the primary judge erred in:

finding no breach of s 18(1)(c) of the Home Building Act had been established by the installation of the cladding on the building; and

declining to award reinstatement damages on the basis that the Owners Corporation had not established that an alternative solution “could not then or now be performed”.

**The Court held** (Gleeson JA, Brereton and White JJA agreeing), allowing the appeal:

*As to breach of s 18(1)(c)*

The building did not satisfy the performance requirements of the BCA with respect to fire resistance because the external cladding did not comply with the deemed-to-satisfy provisions and no alternative solution was prepared prior to

the issue of the construction certificate. The respondents therefore breached the warranty in s 18B(1)(c) of the Home Building Act: [63]–[66].

*As to the issue of loss*

The burden of proof for establishing loss lies on the claimant. By contrast, the party in breach of contract has an evidentiary onus of displacing the prima facie rule for assessing damages as the cost of reinstatement, by showing that reinstatement would be unreasonable: [71]–[79].

*Builders' Insurers' Guarantee Corporation v The Owners – Strata Plan No 57504* [2010] NSWCA 23; *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* (2008) 166 FCR 494; [2008] FCAFC 38, applied.

*Metricon Homes Pty Ltd v Softley* (2016) 499 VR 746; [2016] VSCA 60; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; [2009] HCA 8; *Kirby v Coote* [2006] QCA 61; *Bellgrove v Eldridge* (1954) 90 CLR 613; [1954] HCA 36, considered.

The Owners Corporation did not acknowledge at trial that it had the onus of establishing that no alternative solution would have been possible at the time of issue of the construction certificate or would have been possible now: [84]–[101].

Having established that the respondents did not comply with the BCA, the Owners Corporation was not required to go further by proving that the respondents could not have complied with the BCA by acting differently with respect to hypothetical alternative solutions. Since the respondents did not establish that an alternative solution would have been available prior to the issue of the construction certificate or was now available, the respondents did not discharge the evidentiary onus of establishing that the costs of rectification would be unreasonable: [80]–[83].

The respondents' failure to prepare an alternative solution in respect of the cladding was not merely a formal or technical breach which did not warrant reinstatement damages. By installing cladding which did not comply with the performance requirements of the BCA with respect to fire resistance, the respondents provided the Owners Corporation with a building which did not

meet the minimum standards for public safety, which they were contractually obliged to provide: [102]–[110].

## JUDGMENT

1 **GLEESON JA:** The Owners – Strata Plan 92450 (Owners Corporation) is the registered proprietor of the common property of a 28-storey building located at Parramatta known as "The Rise" (the building). The building comprises 133 residential units, one retail and two commercial lots, and a carpark. The building was designed and constructed by Toplace Pty Ltd (Toplace) pursuant to an agreement with the owner/developer, JKN Para 1 Pty Ltd (JKN).

2 In the underlying proceedings, the Owners Corporation claimed damages for breach of three statutory warranties in s 18B(1) of the *Home Building Act 1989* (NSW) arising from defects in the building, the most significant being the installation by the respondents of aluminium composite panels (the ACPs or the cladding) on the exterior of the building. The alleged breaches were that (1) the cladding did not comply with the requirements of the Building Code of Australia (BCA) with respect to fire resistance of buildings, (2) was not good and suitable material as it was combustible, and (3) the dwellings were not reasonably fit for occupation because they are combustible. The Owners Corporation sought reinstatement damages for the cost of removing and replacing the cladding. As at 26 April 2021, the agreed estimated cost of rectification was some $5 million (excl GST). The respondents, JKN and Toplace, contended that the cladding complied with the BCA at the time of installation. They otherwise did not admit the other alleged breaches of the statutory warranties.

3 On 30 May 2022, Ball J ordered the separate determination of nine questions relating to the alleged cladding defects. The primary judge (Black J) answered those questions on 19 July 2022 and concluded that the Owners Corporation had not established any breach of the statutory warranties: *Strata Plan 92450 v JKN Para 1 Pty Ltd* [2022] NSWSC 958. His Honour made formal orders on 27 July 2022 dismissing the Owners Corporation's claims against JKN and Toplace relating to the alleged cladding defects and ordered the Owners Corporation to pay the costs of the determination of the separate questions.

4 The Owners Corporation seeks leave to appeal against those orders and the answers to the separate questions. Leave to appeal is required because the decision below involves the determination of separate questions: *Supreme Court Act 1970* (NSW), s 103. The respondents did not oppose the grant of leave. Leave should be granted since the arguments raised by the Owners Corporation raise substantial issues beyond a merely arguable injustice.

5 For the reasons given below, the appeal should be allowed and the answers to separate questions (c)-(g), together with the orders made on 27 July 2022, should also be set aside. In lieu, those questions should be answered in the manner set out below, and orders should be made upholding the Owners Corporation claim for damages for reinstatement, being the agreed cost of removal and replacement of the cladding.

**Background**

6 The primary facts are not in dispute and may be summarised as follows.

7 On 18 February 2013, Toplace made application to the principal certifying authority, Vic Lilli & Partners, for the issue of a construction certificate, which was received by the certifier on 5 July 2013. It is common ground that the 2013 edition of the BCA is the applicable version for the construction of the building by Toplace as the application for a construction certificate was made on 5 July 2013. Reference hereafter to the BCA is a reference to the 2013 BCA.

8 The ACPs were manufactured by Fairview Architectural Pty Ltd (Fairview) under the product name "Vitrabond FR". The external cladding performed a waterproofing function. In its product brochure issued in 2019, Fairview stated that Vitrabond FR was not suitable for use where non-combustible materials are required. The document also stated that Vitrabond FR "can generally be used on a performance basis to meet fire resistance and building safety requirements" but recommended another product, Vitracore G2, "for use where non-combustible material is required".

9 An interim occupation certificate was issued on 13 May 2016.

10 On 18 May 2016, Fire & Rescue NSW provided a "Final Fire Safety" report to Vic Lilli & Partners which:

- stated that adequate provisions had not been made for the prevention and extinguishment of fires and the protection and saving of life and property in the case of fire and referred to several performance requirements in the BCA;
- recommended that the external façade cladding be "certified compliant with an internationally recognised fire protection listing for full-scale façade tests"; and
- sought written advice be forwarded once the necessary rectification works had been completed.

11 There is no evidence that Vic Lilli & Partners ever responded to this report.

12 On 15 July 2016, the strata plan in respect of the building was registered and the common property vested in the Owners Corporation. The final occupation certificate was issued on 10 March 2017.

13 On 10 August 2018, pursuant to the power conferred by the *Building Products (Safety) Act 2017* (NSW) (BPSA), s 9(1), the Commissioner for Fair Trading NSW announced a building product use ban prohibiting the use in a building of ACPs with a core greater than 30 per cent polyethylene on the basis that the use of such products is unsafe due to the fire risk. Following the announcement of that prohibition, the Owners Corporation obtained two reports relating to the combustibility of the cladding installed on the external walls of the building.

14 UQ Materials Performance reported on 15 February 2019 that examination of the cladding cores by infrared spectroscopy demonstrated the cores to be between approximately 35 per cent and 41 per cent polyethylene.

15 AE & D Pty Ltd reported on 25 March 2019 to Accor Consulting that the cladding is combustible because the core is 35-40 per cent polyethylene. It recommended that the cladding be removed and replaced with a product deemed non-combustible pursuant to AS-1530.1. This was a reference to the requirements of Australian Standard AS1530.1-1994 – Combustibility Test for Materials.

16 On 24 April 2019 in a letter to the Owners Corporation, the City of Parramatta Council raised fire safety concerns in relation to the cladding, and requested the Owners Corporation immediately take action, including (a) engage a suitably qualified professional to review and inspect the overall fire safety of the building, in particular, the installation of any external wall cladding, (b) provide a report to the Council about "how this cladding will permit the spread of fire,

along with any recommendations to improve building fire safety", and (c) take action to make any recommended changes to the building. The Council reserved the right to issue orders to the same effect.

17 The solicitors for the Owners Corporation replied to the Council on 28 May 2019 outlining the steps being taken in the proceedings which the Owners Corporation had commenced against the respondents to recover damages to replace the cladding, and the fire safety measures being taken in the intervening period, which included banning the use of barbecues and smoking on all balconies and in the common areas of the property.

**Nature of the case**

18 The *Home Building Act* contains warranties which are implied into contracts to do residential building work. It was admitted on the pleadings that the construction of the common property of the building was the undertaking of "residential building work" within the meaning of the *Home Building Act*, and that by operation of ss 18C and 18D of that Act, the Owners Corporation was entitled to the benefit of the statutory warranties contained in s 18B as the successor in title to JKN, being the party to the construction contract with Toplace.

19 Section s 18B(1) relevantly provides:

> **18B Warranties as to residential building work**
>
> (1) The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work—
>
> …
>
> (b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,
>
> (c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,
>
> …
>
> (e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,
>
> …

20 As the primary judge observed at J[6], the reference in s 18B(1)(c) of the Act to "any other law" includes the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) and associated regulations which gave legal effect to the BCA: *Taylor Construction Group Pty Ltd v Strata Plan 92888* [2021] NSWSC 1315 at [33]. The relevant provisions of the EPA Act and the regulations include:

- s 109H(3)(c) of the EPA Act provides that an interim occupation certificate must not be issued unless the partially completed building is suitable for use in accordance with its classification under the BCA;
- s 109H(5)(c) provides that final occupation certificate must not be issued unless the building is suitable for use in accordance with its classification under the BCA;
- cl 98(1)(a) of the Environmental Planning and Assessment Regulation 2000 (NSW) (EPA Regulations) provides that any building work performed pursuant to a development consent must be carried out in accordance with the requirements of the BCA; and
- cl 145(1)(b)https://jade.io/article/278384/section/224795 of the EPA Regulations provides that the certifying authority must not issue a construction certificate for building work unless the proposed building will comply with the relevant requirements of the BCA, as in force at the time the application for the construction certificate was made.

21 The Owners Corporation's primary case relied on breach of the statutory warranty in s 18B(1)(c). It contended that BCA compliance required that the external cladding installed on the building comply with the performance requirements (as defined) of the BCA, relevantly, with respect to fire resistance. This could be established by compliance with the deemed-to-satisfy provisions (as defined) or formulating an alternative solution (as defined), or a combination of those matters, *prior* to the issue of the construction certificate. It further contended that the external cladding did not comply with the deemed-to-satisfy provisions, and since no alternative solution which complies with the performance requirements, or is shown to be at least equivalent to the deemed-to-satisfy provisions, or a combination of both, was prepared *prior* to the issue of the construction certificate (EPA Regulation, cl 145(1)(b)), the work was not done in compliance with the provisions of the EPA Act and the EPA Regulations.

22 The alternative case advanced by the Owners Corporation relied on breach of the statutory warranties in s 18(1)(b) and (e). It contended that the cladding installed on the external walls of the building was not good and suitable material for its purpose (s 18(1)(b)) because the cladding is combustible and poses a danger to health and risk to life and limb to the occupants of the building. This was supported by reference to the manufacturer's representation in its publication "Understanding ACM Fire Compliance" that Vitrabond FR was only suitable for use where non-combustible materials were required when installed pursuant to an alternative solution.

23 It also contended that "the building's residential units were" not reasonably fit for occupation as a dwelling (s 18(1)(e)), as the cladding that forms part of the (external) wall of the building is "Vitrabond FR" manufactured by Fairview, which has a core of between 36-42 % polyethylene and is combustible because of the polyethylene core. Therefore, it was said, the cladding poses a danger to health and risk to life and limb to the occupants of the building.

**The relevant provisions of the 2013 BCA**

24 The BCA is an instrument, produced by a board on behalf of the federal, state and territory governments, intended to achieve nationally consistent, minimum necessary standards of relevant safety (including structural safety and safety from fire). It contains technical provisions for the design and construction of buildings and other structures, including with respect to fire resistance of buildings. In the summary of the relevant provisions below, capitalised terms are used consistently with the drafting technique adopted in the BCA. However, the balance of this judgment does not use capitalised terms for the defined terms in the BCA.

25 Section A of the BCA sets out the general provisions. Part A0 headed "Application" states that a Building Solution will comply with the BCA if it satisfies the Performance Requirements, which can only be achieved by complying with the Deemed-to-Satisfy Provisions or formulating an Alternative Solution that complies with the Performance Requirements, or is shown to be at least equivalent to Deemed-to-Satisfy Provisions, or a combination of both, and that the 'Objectives' and 'Functional Statements' may be used as an aid to

interpretation: A0.4, A0.5 and A0.6. A Building Solution which complies with the Deemed-to-Satisfy Provisions is deemed to comply with the Performance Requirements: A0.7. An Alternative Solution will only comply with the BCA if the assessment methods used to determine compliance with the Performance Requirements have been satisfied: A0.8; and the Performance Requirements relevant to an Alternative Solution must be determined in accordance with A0.10 by identifying the relevant Performance Requirements relevant to a Deemed-to-Satisfy Provision that is to be the subject of an Alternative Solution.

26 A0.9 specifies the following assessment methods, or any combination of them, which can be used to determine that a Building Solution complies with the Performance Requirements:

> (a) Evidence to support that the use of a material form of construction or design meets a *Performance Requirement* or a *Deemed-to-Satisfy Provision* as described in A2.2.
>
> (b) *Verification Methods* such as—
>
> > (i) the *Verification Methods* in the BCA; or
> >
> > (ii) such other *Verification Methods* as the *appropriate authority* accepts for determining compliance with the *Performance Requirements*.
>
> (c) Comparison with the *Deemed-to-Satisfy Provisions*.
>
> (d) *Expert Judgement*.

27 Under the heading "Documentation of Decisions", it is stated in the Introduction to the BCA that decisions made under the BCA should be fully documented and copies of all relevant documentation should be retained. Examples of the kind of documentation which should be prepared and retained in cases where an alternative solution has been proposed are:

> (i) details of the relevant *Performance Requirements*; and
>
> (ii) the *Assessment Method* or methods used to establish compliance with the relevant *Performance Requirements*; and
>
> (iii) details of any *Expert Judgement* relied upon including the extent to which the judgement was relied upon and the qualifications and experience of the expert; and
>
> (iv) details of any tests or calculations used to determine compliance with the relevant *Performance Requirements*; and
>
> (v) details of any Standards or other information which were relied upon.

28 A1.1 headed "Interpretation" sets out Definitions, which relevantly include:

Alternative Solution means a *Building Solution* which complies with the *Performance Requirements* other than by reason of satisfying the *Deemed-to-Satisfy Provisions*.

Building Solution means a solution which complies with the *Performance Requirements* and is—

(a) an *Alternative Solution*; or

(b) a solution which complies with the *Deemed-to-Satisfy Provisions*; or

(c) a combination of (a) and (b).

Combustible means—

(a) Applied to a material — combustible as determined by AS 1530.1.

(b) Applied to construction or part of a building — constructed wholly or in part of combustible materials.

Deemed-to-Satisfy Provisions means provisions which are deemed to satisfy the *Performance Requirements*.

Evacuation time means the time calculated from when the emergency starts for the occupants of the building to evacuate to a *safe place*.

External wall means an outer wall of a building which is not a common wall.

Fire hazard means the danger in terms of potential harm and degree of exposure arising from the start and spread of fire and the smoke and gases that are thereby generated.

**Fire Intensity** means the rate release of calorific energy in watts, determined either theoretically or empirically, as applicable.

Fire hazard properties means the following properties of a material or assembly that indicate how they behave under specific fire test conditions:

(a) Average specific extinction area, critical radiant flux and Flammability Index, determined as defined in A1.1.

(b) Smoke-Developed Index, smoke growth rate index, smoke development rate and Spread-of-Flame Index, determined in accordance with Specification A2.4.

(c) Group number, determined in accordance with Specification C1.10.

**Fire load** means the sum of the net calorific value of the *combustible* contents which can reasonably be expected to burn within a *fire compartment*, including furnishings, built-in and removable materials, and building elements. The calorific values must be determined at the ambient moisture content or humidity. (The unit of measurement is MJ.)

**Non-combustible** means—

(a) Applied to a material — not deemed *combustible* as determined by AS 1530.1 — Combustibility Tests for Materials.

(b) Applied to construction or part of a building — constructed wholly of materials that are not deemed *combustible*.

**Performance Requirement** means a requirement which states the level of performance which a *Building Solution* must meet.

**Safe place** means—

(a) a place of safety within a building—

(i) which is not under threat from a fire; and

(ii) from which people must be able to safely disperse after escaping the effects of an emergency to a road or *open space*; or

(b) a road or *open space*.

29 Australian Standard AS 1530.1, which is referred to in the defined terms "combustible" and "non-combustible", was not in evidence. However, it is common ground that cl 3.4 of AS 1530.1 was set out in Mr Tatian's report (at par 37), which is reproduced below:

> Clause 3.4 of AS 1530.1-1994 sets out the circumstances that will see a material deemed to be "combustible". It provides:
>
> "A material shall be deemed to be combustible under any of the following circumstances:
>
> (a) The mean duration of sustained flaming, as determined in accordance with Clause 3.2, is other than zero.
>
> (b) The mean furnace thermocouple temperature rise, as determined in accordance with Clause 3.1, exceeds 50°C.
>
> (c) The mean specimen surface thermocouple temperature rise, as determined in accordance with Clause 3.1, exceeds 50°C."

30 Section C headed "Fire Resistance" contains the critical provisions relevant to these proceedings concerning the Objective and performance requirements with respect to fire resistance. The Objective is stated in CO1 as:

CO1

The Objective of this Section is to—

(a) safeguard people from illness or injury due to a fire in a building; and

(b) safeguard occupants from illness or injury while evacuating a building during a fire; and

(c) facilitate the activities of emergency services personnel; and

(d) avoid the spread of fire between buildings; and

(e) protect other property from physical damage caused by structural failure of a building as a result of fire.

31 The performance requirements in relation to the fire resistance of buildings include:

CP2

(a) A building must have elements which will, to the degree necessary, avoid the spread of fire—

(i) to exits; and

(ii) to sole-occupancy units and public corridors; and

Application:

CP2(a)(ii) only applies to a Class 2 or 3 building or Class 4 part of a building.

(iii) between buildings; and

(iv) in a building.

(b) Avoidance of the spread of fire referred to in (a) must be appropriate to—

(i) the function or use of the building; and

(ii) the fire load; and

(iii) the potential fire intensity; and

(iv) the fire hazard; and

(v) the number of storeys in the building; and

(vi) its proximity to other property; and

(vii) any active fire safety systems installed in the building; and

(viii) the size of any fire compartment; and

(ix) fire brigade intervention; and

(x) other elements they support; and

(xi) the evacuation time.

…

**CP4**

To maintain tenable conditions during occupant evacuation, a material and an assembly must, to the degree necessary, resist the spread of fire and limit the generation of smoke and heat, and any toxic gases likely to be produced, appropriate to—

(a) the *evacuation time*; and

(b) the number, mobility and other characteristics of occupants; and

(c) the function or use of the building; and

(d) any active *fire safety systems* installed in the building.

…

CP8

Any building element provided to resist the spread of fire must be protected, to the degree necessary, so that an adequate level of performance is maintained—

(a) where openings, construction joints and the like occur; and

(b) where penetrations occur for building services.

CP9

Access must be provided to and around a building, to the degree necessary, for *fire brigade* vehicles and personnel to facilitate *fire brigade* intervention appropriate to—

(a) the function or use of the building; and

(b) the *fire load*; and

(c) the potential *fire intensity*; and

(d) the *fire hazard*; and

(e) any active *fire safety systems* installed in the building; and

(f) the size of any *fire compartment*.

32 Part C1 headed "Fire Resistance and Stability" contains the relevant Deemed-to-Satisfy Provisions and specifications with respect to fire resistance of buildings. C1.0 states that the manner of complying with Performance Requirements where a Building Solution is proposed to comply with the Deemed-to-Satisfy Provisions or a Building Solution is proposed as an Alternative Solution to the Deemed-to-Satisfy Provisions. Importantly for the present case, Part C1 cl C1.1(b) states that for Type A construction, the most fire-resistant type of construction is required for Class 2 buildings (residential) of three or more storeys and Class 6 (retail) and class 7 (car park) buildings of four or more storeys: Table C1.1.

33 Specification C1.1 headed "Fire-Resisting Construction" contains requirements for the fire-resisting construction of building elements and cl 3.1(b) relevantly states that in a building required to be of Type A construction "external walls … must be non-combustible".

*Summary of BCA requirements*

34 "The Rise" building is more than four storeys in height; accordingly, it is classified as Type A under the BCA and was required to be the "most fire-resistant": Part C1 cl C1.1(b). BCA compliance could be achieved through the deemed-to-satisfy provisions or through an alternative solution (or a combination of both), provided that the relevant performance requirements are satisfied. The performance requirements included that a building must have elements which will, to the degree necessary, avoid the spread of fire to exits and to sole occupancy units and public corridors, appropriate to the matters

listed in CP2(b), which include the fire load, the potential fire intensity and the fire hazard.

35 The deemed-to-satisfy provisions of the BCA required the external walls of the building to be "non-combustible", that is, constructed wholly of materials that are not deemed combustible: Specifications C1.1 cl 3.1(b). Whether a material is not deemed combustible is determined by AS1530.1. It was common ground that the cladding installed on the external walls of the building did not comply with the deemed-to-satisfy provisions of the BCA as there was no evidence of an AS1530.1 test report in respect of the subject cladding.

36 It was also common ground that no alternative solution that complies with the performance requirements of the BCA with respect to fire resistance or is shown to be at least equivalent to the deemed-to-satisfy provisions, or a combination of both, was prepared *prior* to the issue of the construction certificate.

**The expert evidence**

37 Evidence on the issue of BCA compliance and combustibility of the cladding was given by three experts. Mr Mark McDaid of MCD Fire Engineering Pty Ltd, was appointed by the parties by order of the Court as their single joint expert to provide an opinion to the Court on various matters relating to the fire safety systems and the cladding installed on the building, including the compliance or otherwise of the cladding with the BCA and any other relevant law or standard, and the rectification required in respect of the fire safety systems and cladding. Mr McDaid issued the final version of his joint expert report on 10 February 2020.

38 The parties also adduced their own expert evidence. The respondents relied upon reports from Mr Mardiros Tatian dated 26 April 2021 and 13 April 2022. The Owners Corporation relied upon reports by Mr Alan Harriman dated 11 February 2022 and 20 June 2022.

*Mr McDaid*

39 In response to question 4 – whether the cladding was installed on the external walls of the property in compliance with the BCA and all other relevant

legislation, codes and standards during its design and construction in 2015-2017 – Mr McDaid answered (at par 34):

> The subject cladding, if forming part of an external wall would not comply with the general DtS Provisions of the BCA 2013 that requires external walls to be non-combustible, as it has been confirmed from the UQ Materials Performance/Acor Consulting testing to contain combustible polyethene core (irrespective of the percentage of its context by mass)

40 In response to question 10 in relation to recommended remediation for any non-compliance in the fire safety systems at the property, Mr McDaid recommended the removal and replacement of the ACPs installed as the external cladding on the building, stating (at par 59(k)):

> **ACP panels containing more than 30% polyethylene (PE) Core** – remove and replace with a product that has been tested and attained a "non-combustible" criteria against AS1530.1 or has been deemed non-combustible in accordance with the DtS Provisions of NCC Clause C1.9. (Emphasis in original.)

41 Mr McDaid answered further questions in a letter to the parties' solicitors dated 30 June 2020. In response to the question 7 whether in recommending that cladding be removed and replaced, did he consider and investigate the feasibility of adopting any solution whereby the cladding could be retained, and if so, what solution(s) and what was his conclusion about those solutions, Mr McDaid answered (in par A.8.1):

> A. In my recommendation as set out in paragraph 59 and elsewhere, I did consider and investigate the possibility of adopting alternative solutions that would retain some/all of the Cladding, but when considering these against the relevant fire safety performance requirements of the BCA, I concluded that the performance requirements could not be met.
>
> B. I have detailed my considerations in paragraph 48 and 49 of the Report.

(The reference to par A.8.1 in pars 48 and 49 of the final McDaid report can be ignored as these pars of the final report were not admitted into evidence.)

*Mr Tatian*

42 The respondents' case, relying on the evidence of Mr Tatian, was that the as-built building, without modification, was capable of being certified at the relevant time by way of an alternative solution under cl A0.5 of the BCA. Whilst Mr Tatian did not identify what an alternative solution would be, he gave evidence of an assessment method to be adopted for an alternative solution to comply with the performance requirements under Part C of the BCA.

43 After referring to six matters in par 61 of his first report (proximity of the cladding to any fire-source feature, the sprinkler system to AS 2118.1 as installed, the fire resistance of the external walls of the building, all external walls with the cladding are non-loadbearing, the furnace test procedure outlined in cl 2.10 of AS 1530.4-2005, and his opinion that the cladding is not expected to adversely contribute to the fuel load as the temperature generated by an external fire is unlikely to exceed 1000C), Mr Tatian concluded in pars 62-63:

> 62. For the purposes of complying with Performance Requirements CP1 & CP2 in Part C of the BCA and considering the building from a holistic view, *the above Alternative Solution assessment* demonstrates that the loadbearing structure supporting the Building is not compromised by the low added fuel loads provided by the subject cladding. As such, in my opinion the subject cladding operates exactly as would an attachment under clause 2.4 of Specification C1.1 of the BCA from a fire safety performance standpoint in accordance with Part C of the BCA in relation to fire spread.
>
> 63. Based on the above reasoning, it is my opinion that an assessment of the type described above would demonstrate compliance with Performance Requirements CP1 & CP2 and therefore demonstrate that the as-built building complied with the BCA. [Emphasis added]

*Mr Harriman*

44 The Owners Corporation's case, relying upon the evidence of Mr Harriman, was that whilst a performance solution could have been carried out in 2013 (which his Honour noted at J[22] was clarified when giving evidence as merely a reference to the availability of that option), certain information was not available, which is still the case, to allow a comprehensive performance solution to be undertaken. This information was identified in Mr Harriman's first report (par 11.1.3):

> (a) There are no test reports outlining the calorific value of the Vitrabond FR ACP, which means an accurate assessment of the fire load, fire hazard and fire intensity could not be calculated;
>
> (b) the lack of available knowledge of the calorific value means that the likely spread of fire by the façade, effect on evacuation time, and fire brigade intervention cannot be assessed in detail;
>
> (c) there were no commercially available cavity barriers in Australia, therefore a performance solution could not address the cavities behind the cladding as there were no products available suitable for this purpose;
>
> (d) the NFPA285 test was limited in its application as the wall building up was very different to the subject building, in particular with respect to the fire

> blankets immediately behind the cladding whereas the subject building had an open cavity;
>
> (e) with the lack of test data, it is my opinion that it would not be possible to undertake an assessment of openings (windows) and service penetrations though the ACP and therefore the criteria of CP8 could not be satisfied;
>
> (f) with the lack of test data and no details on the calorific value of the ACP in my opinion a fire safety engineer could not prepare a report in a suitable format to submit to the fire brigade, but in the event they did, there would not be sufficient detail for the fire brigade to assess to establish whether or not the access available for fire vehicles and fire brigade personnel was adequate.

45 Mr Harriman concluded in his first report (par 11.1.4) that a performance solution that satisfied all of the performance requirements of CP2, CP4, CP8 and CP9 of the BCA could not have been undertaken in 2013, either for the cladding which formed part of the external wall or for the cladding formed the attachment to the building elements.

**The primary judge's reasons**

46 The primary judge referred to the requirements of the BCA (at J[5]-[8]), addressed the report of Mr McDaid (at J[9]-[13]) and made findings in relation to the evidence, including the expert evidence (at J[15]-[42]).

47 Addressing the expert evidence concerning the availability of an alternative solution, his Honour said of the evidence of Mr Harriman at J[22]:

> [22] Mr Harriman was asked the important question in concurrent oral evidence as to whether, if an Alternative Solution had been formulated, the ACP cladding as installed would have been capable of meeting the Performance Requirements of the BCA. He noted that an Alternative Solution could have been carried out in 2013, which he clarified in concurrent evidence was merely a reference to the availability of that option, but he considered that information was not available to allow a comprehensive Alternative Solution to be undertaken. The difficulties with that answer are, first, that one would ordinarily expect that, if information was not then available, then attempts would be made to obtain it, including, for example, undertaking the cone calorimeter test of Vitrabond FR to make an assessment of its fire load, fire hazard and fire intensity, as Mr Harriman indicated could have been done in his concurrent evidence, so as to obtain the information which Mr Harriman had noted was not then available. Second, if the result of undertaking an Alternative Solution is not known, because the relevant tests were not performed at the relevant time or in leading evidence for this hearing, then it is also not known whether the ACP cladding could have complied with the BCA at the relevant time, had that Alternative Solution been undertaken. I recognise that Mr Harriman also identified other difficulties in developing an Alternative Solution, including the absence of commercially available cavity barriers at the relevant time and the question of the application of the NFPA 285 test to the Building, to which I referred above, but his evidence did not extend beyond

identification of issues to be addressed in that process to establish that it could not be done.

48 Turning to the evidence of Mr Tatian, his Honour found at [37]:

> Mr Tatian also indicated the steps which, in his view, would demonstrate compliance with Performance Requirements CP1 and CP2 and that the as built Building complied with the BCA which relied, relevantly, on the fact that non-load bearing external walls of the Building were located more than 3 metres from any fire-source feature; the Building was provided with an AS2118.1-1999 sprinkler system and certain fire resistance requirements were not applicable on that basis; the as-built external wall construction will not compromise the structural stability of load-bearing elements during a fire; and the ACP cladding would not expected adversely to contribute to the fuel load during a fire. *I am not persuaded that I could give substantial weight to Mr Tatian's evidence in that regard, which also involves a degree of speculation to steps which were not taken to develop a full Alternative Solution*, *had it been necessary for the Defendants affirmatively to establish compliance with the Alternative Solution path under the BCA. It is not necessary for them to do so, where the Owners Corporation has not established, in their affirmative case, that an Alternative Solution was not available at the relevant time so* [sic] *or is not available now as to support the relief they seek*. (Emphasis added.)

49 With respect to the statements by Fairview in its 2019 publication, which were relied upon by the Owners Corporation on the issue of combustibility of Vitrabond FR, his Honour said at J[24], [28]:

> [24] … Ms Steele sought to read that document as going further to demonstrate the unsuitability of Vitrabond FR for use as cladding. That document does not demonstrate that matter, not least because it makes an affirmative statement that Vitrabond FR *can* generally be used on a "performance basis" to meet fire resistance *and building safety* requirements. While it implied either that Vitrabond FR (as distinct from Vitracore G2) had not then been tested to or that it had had not then passed the AS1530.1 test, that had the consequence only that it could not meet the DtS requirements under the BCA as distinct from the performance-based requirements under an Alternative Solution under the BCA.
>
> …
>
> [28] The Owners Corporation relied on the 2019 publication to seek to establish that Vitrabond FR *was* combustible under an AS1530.1 test and unsuitable for use in the Building. I cannot reach that conclusion. First, and most importantly, I cannot reasonably treat the reference to not passing an AS1530.1 test as indicating *the fact* of combustibility of the bonded Vitrabond FR panels installed at the Building, where the additional inquiries recorded in Ms Holland's second affidavit (to which I refer below) indicate the AS1530.1 test was not properly applicable to those bonded panels, as distinct from their separate component parts. There is plainly an available reading of the 2019 publication that it indicated no more than that the Vitrabond FR ACPs did not and could not pass that test where it was not applicable to them in their bonded form. Second, there is no evidence that the composition of Vitrabond FR was constant between 2016-2017 when it was installed in the Building and 2019 or later when that publication was issued. Mr Harriman, who was asked about that matter in concurrent evidence, fairly accepted that he did not know

> whether the composition of the product had remained the same in that period. That document did not otherwise demonstrate unsuitability of the product for use in a building required to be of Type A construction, as distinct from the need for any use to be based on a Performance Solution or Alternative Solution. (Emphasis in original.)

*No breach of the statutory warranties*

50 Addressing the asserted breach of the warranty in s 18B(1)(c), his Honour found that:

(1) the cladding on the building did not comply with the deemed-to-satisfy provisions of the BCA, noting that such non-compliance was admitted by the respondents in answer to a notice to admit facts: J[43];

(2) the "strict" answer to question (b) (whether the cladding is otherwise compliant with the BCA by way of alternative solution under the BCA) was no, "because an alternative solution under the BCA was not prepared prior to the issue of a construction certificate for the building and has not been prepared now": J[48];

(3) however, the strict answer would not assist the Owners Corporation in obtaining substantive relief since the Court would plainly be less likely to order damages in excess of $5 million in respect of the rectification cost of removing and replacing the existing cladding "if that existing cladding would comply with the BCA if an Alternative Solution was now prepared". For that reason, senior counsel for Owners Corporation rightly noted in opening submissions that it sought to establish that an alternative solution could not be prepared to satisfy the BCA requirements: at J[48]; and

(4) the evidence does not establish that an alternative solution would not have been available, nor had the respondents established the availability of any alternative solution had it been necessary for them to do so: at J[51].

51 Turning to the alternative case relying on breach of the warranty in s 18B(1)(b), his Honour found at J[54]-[55] it had not been established by an AS1530.1 test that the cladding was combustible within the meaning of the BCA, and the 2019 publication by Fairview did not establish that matter; there was no other evidence that the cladding was combustible in any event, where neither a cone calorimeter or any other test of it had been performed; and the evidence did not establish that the cladding was composed of material that was not good and suitable for the purpose for which it was used, because it was combustible, and gave rise to a real risk of fire spreading via the façade, through the cavity behind the cladding and into the windows of the apartments.

52 His Honour accepted at J[56] that had it been established that there was a real risk of fire spreading by the façade, through the cavity behind the cladding and into the windows of the apartments, then he would have found that the statutory warranty in s 18(1)(b) was breached.

53 His Honour concluded that he could not find that the combustibility of the Vitrabond FR cladding has been established for the purposes of AS1530.1 or otherwise. On his Honour's view, the evidence did not adequately address the rate at which combustion would occur or the effect of other design features of the building, including the sprinkler system, which also would have been relevant to the availability of an alternative solution at the relevant time: at J[57].

54 For the same reasons with respect to s 18(1)(b), his Honour found that that there was no breach of the warranty in s 18(1)(e): at J[60].

55 His Honour concluded that the Owners Corporation had not established any breach of the statutory warranties in s 18B(1)(b), (c) or (e) of the *Home Building Act*: at J[61].

*Loss and damage*

56 Given the conclusions on breach, the questions of compensable loss and whether reinstatement damages were appropriate, did not arise: at J[62], [63].

57 Nevertheless, his Honour went on to address on a contingent basis, assuming breach of warranty, whether the respondents would be liable to pay damages to the Owners Corporation for the cost of rectification by removing the cladding and replacing it with cladding that conforms to the requirements of the BCA as it now applies. Although his Honour referred to *Bellgrove v Eldridge* (1954) 90 CLR 613; [1954] HCA 36 and subsequent authorities, his Honour proceeded on the basis that the Owners Corporation had an onus to establish that an alternative solution "could not then or now be performed": at J[67]. (The Owners Corporation contends on appeal that his Honour erred in finding that the Owners Corporation had such an onus of proof.)

58 His Honour gave the following reasons for concluding that rectification works at substantial cost would not be proportionate to any benefit to be obtained or a reasonable course to adopt (at J[67]):

> …it seems to me that the Owners Corporation could *not* establish that rectification works at substantial cost would be proportionate to any benefit to be obtained or are a reasonable course to adopt, where (1) the only breach of the BCA which the Owners Corporation established was the failure to perform an Alternative Solution at the relevant time; (2) the Owners Corporation has not established that an Alternative Solution could not then or now be performed; and (3) most importantly, the Owners Corporation has also not established that the ACP cladding is combustible to the AS1530.1 standard or otherwise or whether it would, in fact, perform adequately in a fire. In expressing that view, I put aside any need to undertake those rectification works by reason of later arising obligations under the BPSA, which does not in itself impose liability on the Defendants. [emphasis added]

59 At J[70], his Honour summarised his answers to the separate questions:

> *Question (a) – Whether the cladding installed on the building complies with the DtS provisions of the BCA*
>
> Answer - No, because no AS1530.1 test was or is available to establish that the Vitrabond FR ACP cladding is not Combustible (as defined) for the purposes of the BCA.
>
> *Question (b) - Whether the cladding is otherwise compliant with the BCA by way of Alternative Solution under the BCA*
>
> Answer – No, because an Alternative Solution under the BCA was not prepared prior to the issue of a construction certificate for the Building and has not been prepared now.
>
> *Question (c) – Whether the cladding is composed of material that is not good and suitable for the purpose for which the cladding is used*
>
> Answer – The Owners Corporation has not established this matter.
>
> *Question (d) – Whether the cladding resulted in a dwelling that is not reasonably fit for occupation as a dwelling*
>
> Answer – The Owners Corporation has not established this matter.
>
> *Question (e) - Whether JKN and Toplace breached the statutory warranties*
>
> Answer – The Owners Corporation has not established this matter.
>
> *Question (f) - Whether the Owners Corporation has suffered loss*
>
> This question does not arise.
>
> *Question (g) – How the loss is assessed*
>
> This question also does not arise.
>
> *Question (h) – Liability to pay damages*
>
> This question does not arise. If it had arisen, then a basis for compensation on the footing that the cladding should reasonably be replaced is also not

established where the only breach of the BCA which the Owners Corporation established was the failure to perform an Alternative Solution at the relevant time, and they have not established that an Alternative Solution could not then or now be performed or the fact of combustibility of the ACP cladding.

*Question (i) – Quantum of damages*

This question also does not arise.

60 On 27 July 2022, his Honour made orders dismissing the Owners Corporation's claim in relation to the cladding defects as follows:

1. Pursuant to r 28.4 of the Uniform Civil Procedure Rules 2005 (NSW), the Plaintiff's claim, insofar as it relies upon the contentions at paragraphs 27A to 28 of Part C of the Amended Technology and Construction List Statement filed on 5 April 2019 (List Statement), and the related contentions at paragraph 1(a) of Annexure A to the List Statement and Item no. 1 of the Schedule of Defects, be dismissed.

2. The Plaintiff is to pay the costs of and incidental to the determination of the separate questions as agreed or as assessed.

**Issues on appeal**

61 There are two parts of the appeal. The first concerns the challenge his Honour's findings that the respondents did not breach the statutory warranties in s 18(1)(c) (grounds 1 and 2), or alternatively, s 18(1)(e) (grounds 3-9) or s 18(1)(b) (ground 10).

62 The second part concerns the issue of loss and damage. The Owners Corporation challenges in various ways his Honour's conclusion that the question of liability to pay damages does not arise, the finding that the Owners Corporation had the onus of establishing that an alternative solution "could not then or now be performed", and the contingent finding that the award of reinstatement damages would be unreasonable.

**Breach of s 18B(1)(c): BCA compliance**

63 The respondents did not press their objection in writing that the Owners Corporation's reliance on non-compliance with planning laws raised a new case on appeal.

64 The Owners Corporation says that his Honour's conclusion that there was no breach of s 18(1)(c) of the Act is a clear error because this breach was established as the building did not satisfy the performance requirements of the BCA. It is said that the external cladding did not comply with the deemed-to-satisfy provisions and, since no alternative solution was prepared *prior* to the

issue of the construction certificate, the work was not done in compliance with the relevant provisions of the EPA Act and associated regulations. So much was acknowledged by his Honour at J[48] when stating that the "strict" answer to question (b) is "no", before finding that there was no breach of s 18B(1)(c).

65 The respondents correctly accepted in oral argument that the statutory warranty in s 18B(1)(c) had been breached. Ground 1 is established.

66 The focus of argument on appeal turned to the question of loss and damage for breach of the warranty in s 18(1)(c). It is convenient to immediately turn to that issue.

**Principles: loss and damage**

67 In *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; [2009] HCA 8 at [13], the joint judgment reiterated the "ruling principle" with respect to damages at common law for breach of contract is that stated by Parke B in *Robinson v Harman* (1884) 1 Exch 850 at 855; 154 ER 363 at 365:

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

68 Consistent with this principle, rules have been developed in particular types of cases for the bases of assessing damages. In a case like the present, where the claimant is entitled to have a building erected upon its land in accordance with the contract and the plans and specifications which formed part of it, the prima facie measure of damages is the cost of reinstatement, not the diminution in value of the defective building. In *Bellgrove v Eldridge*, Dixon CJ, Webb and Taylor JJ said (at 617):

> 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. (Emphasis in original.)

69 *Bellgrove v Eldridge* recognised a qualification to the rule it stated in regard to damages recoverable by a building owner for the breach of a building contract.

"The qualification … is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt" (at 618). The joint judgment gave as an example of unreasonableness, demolishing the walls of a house which were to be cement rendered with second-hand bricks, to replace second-hand bricks with new bricks, which was said to be "quite unreasonable", whilst indicating that the expression "economic waste" goes too far in stating the test (at 618-619). Importantly, the test of "unreasonableness" is only to be satisfied "by fairly exceptional circumstances": *Bellgrove v Eldridge* at 617, cited in *Tabcorp* at [17].

70 *Tabcorp* at [16] referred by way of an example of unreasonableness to the situation where the innocent party was "merely using a technical breach to secure an uncovenanted profit", citing Oliver J in *Radford v De Froberville*https://jade.io/citation/14902208 [1977] 1 WLR 1262. Other examples include where the cost of the "proposed rectification is out of all proportion to the benefit to be obtained": *Brewarrina Shire Council v Beckhouse Civil Pty Ltd* [2006] NSWCA 361 at [87]-[88]https://jade.io/article/3590/section/14536, citing *South Parklands Hockey & Tennis Centre Inc v Brown Falconer Group Pty Ltd*https://jade.io/article/177892 [2004] SASC 81 at 90https://jade.io/article/177892/section/140033 (Debelle J); and *Scott Carver Pty Ltd v SAS Trustee Corporation* [2005] NSWCA 462 at [120] (Ipp JA); see also *Wheeler v Ecroplot Pty Ltd*https://jade.io/article/139985 [2010] NSWCA 61 at [81] (Macfarlan JA, McColl and Basten JJA agreeing). For a recent application of this principle in this Court, see *Renown Corporation Pty Ltd v SEMF Pty Ltd* [2022] NSWCA 233.

*Onus of proof*

71 The burden of proof for establishing loss lies on the claimant, in this case, the Owners Corporation. By contrast, the party in breach of contract has the onus of displacing the prima facie rule for assessing damages as the cost of reinstatement: *Builders' Insurers' Guarantee Corporation v The Owners – Strata Plan No 57504* [2010] NSWCA 23 at [79]; *Owners of Strata Plan No 77475 v Walker Group Constructions Pty Ltd* [2016] NSWSC 1127 at [50] (Bergin CJ in Eq); *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* (2008) 166 FCR 494; [2008] FCAFC 38 at [27], [29]-[31] (Finkelstein and Gordon JJ),

[115] (Rares J, although in dissent on the facts); *Metricon Homes Pty Ltd v Softley* (2016) 499 VR 746; [2016] VSCA 60 at [246]; and *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5 at [102], [106], [115], [119] (Kirk JA and Griffiths AJA).

72 The onus is at least an evidentiary onus in the sense referred to by Barwick CJ, Kitto and Taylor JJ in *Purkess v Crittenden* (1965) 114 CLR 164 at 168; [1965] HCA 34 when speaking of the "burden of proof in the secondary sense" of *introducing evidence*.

73 *Builders' Insurers' Guarantee Corp v Owners – Strata Plan No 57504*, involved a claim by the owners against the Guarantee Corporation as the insurer of the builder's work. The contract obliged the builder to construct a concrete or brick hob at the junction between a residential unit and its balcony on the same level to prevent storm water entering the unit from the balcony, but the builder had installed inferior hobs. Handley AJA (Tobias and Campbell JJA agreeing) said that the Guarantee Corporation had "at least" an evidentiary onus in terms of adducing evidence that the hobs as installed in that case were just as effective as those specified: at [79]. His Honour also remarked, without deciding, that a defendant may actually have the legal onus of proving functional equivalence, so that reinstatement would be unnecessary: at [80]. His Honour observed that the evidence called by the Guarantee Corporation, taken at its highest, did not establish functional equivalence and its evidentiary onus was not discharged: at [81].

74 *Kirby v Coote* [2006] QCA 61 involved an unsuccessful appeal against an award of damages for the cost of demolishing and re-erecting a pole house on steeply sloping land which the builder had constructed on inadequate footings. The builder argued that partial underpinning of the footings at a cost of $193,200 would be adequate and that the damages of $581,200 for the cost of demolition and reconstruction were excessive. The primary Judge accepted expert evidence that partial underpinning involved a real risk of failure although this could not be quantified with any certainty.

75 Keane JA referred (at [52]) to the reluctance of the High Court in *Bellgrove v Eldridge* to confine the plaintiff to "a doubtful remedy" "contrasting the case

before it with a case where it is clear that the expenditure imposed on the defendant is disproportionate to any benefit to the plaintiff in terms of the vindication of the plaintiff's right to recover its actual loss from the defendant".

76 Keane JA continued (at [59]): "The respondent's house is a house which is affected by a degree of instability which would not have been present had the first appellant properly discharged his duty … because the respondents' damages are assessed 'once and for all' the law must be astute to ensure that the measure of damages accurately reflects the restoration of the respondents to the position they would have been in had the appellants not failed in their duty." The cheaper option advocated by the builder involved risks and Keane JA said (at [60]) that "reasonableness does not require the respondent to carry those risks".

77 *Metricon Homes v Softley* involved an unsuccessful appeal against an award of damages for the cost of demolition and reconstruction a house which the builder had constructed with a concrete slab that was defective. After referring to the statements of Keane JA in *Kirby v Coote*, Robson AJA (Warren CJ and Tate J agreeing) said at [245]:

> In my view, the Tribunal properly applied the principles laid down in *Bellgrove* and considered whether an award of damages for demolition and reconstruction was necessary and reasonable and in so doing, the Tribunal had regard to whether the award of a remedy, other than damages based on demolition and reconstruction, would constitute a doubtful remedy. I consider that the approach of the Tribunal follows the approach of Keane JA, namely determining whether damages based on demolition and reconstruction was an appropriate measure of damages, and assessing whether there was a real risk to the continuing stability of the property in the future.

78 *Bowen Investments* involved a claim by a landlord against a tenant for breach of a covenant not to alter the demised premises without approval. In the Full Federal Court, after noting at [27] that the landlord's wish to have the foyer restored was important, and "her attitude has not been shown to be unreasonable", Finkelstein and Gordon JJ said at [29] and [31]:

> Speaking generally in cases of work done (or not done) or damage caused to property in breach of contract, the bases for assessing damages are: (a) the cost of reinstatement; or (b) the diminution in the value of the property due to the breach of contract. The correct measure is whatever is reasonable for the wronged party to recover. An assessment of what is reasonable in a particular case is not to be measured in purely economic terms: *Ruxley* [1996] ACat 353, 358-359, 360-361, 370-371. Personal preferences of a subjective nature are

> not irrelevant when choosing the appropriate measure of damage: *Atkins (GW) Ltd v Scott* (1991) Construction Law Journal 215 at 331; *Radford v De Froberville* [1977] 1 WLR 1262 at 1270-1273. This is especially so if the plaintiff's "predelictions" (the word used by Oliver J in *Radford* [1977] 1 WLR at 1271) are not excessive or extravagant: *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 312. See also *Black Creek Deer Farm Pty Ltd v Australia and New Zealand Banking Group Ltd* [1996] V ConvR 66,534 (54-549) at 66,541-66,542.
>
> …
>
> In our opinion the respondent did not discharge the onus of displacing the prima facie method of calculating damages in this case. …

79 On appeal to the High Court, the majority judgment of Finkelstein and Gordon JJ was affirmed. Whilst the High Court did not comment on those parts of the Full Court's judgments at [29]-[31], the discussion in *Tabcorp* at [17] leading to the conclusion that the test of "unreasonableness" is only to be satisfied by fairly exceptional circumstances, implies that there is an onus on a defendant to displace a claim for rectification costs by establishing that it is unreasonable.

*Error of approach to onus of proof that reinstatement would be unreasonable*

80 The Owners Corporation submits that the respondents bore an evidentiary onus of displacing the prima facie rule for assessing damages as the cost of reinstatement. That should be accepted. It is not necessary to address the issue raised by Handley AJA in *Builders' Insurers' Guarantee Corp v Owners – Strata Plan No 57504* at [80] as to whether if the rectification work is regarded as an act of mitigation, there is a legal onus on the defendant to show that the work proposed by way of mitigation was unreasonable.

81 His Honour erred in finding that the Owners Corporation had the onus of establishing that an alternative solution "could not then or now be performed": at J[67]. Having established that the respondents did not comply with the BCA, the Owners Corporation were not required to go further by proving that the respondents could not have complied by acting differently with respect to an alternative solution.

82 The respondents do not challenge by way of a notice of contention his Honour's findings that Mr Tatian's evidence involves a degree of speculation to steps which were not taken to develop a full alternative solution (at J[37]) and that the respondents had not established the availability of any alternative solution (at J51]). The evidence adduced by the respondents did not establish

the functional equivalence of an alternative solution to the deemed-to satisfy provisions of the BCA and their evidentiary onus was not discharged. That is, the respondents did not adduce evidence which, if accepted, would have shown that an alternative solution that would satisfy the performance requirements of the BCA with respect to the fire resistance of the cladding could have been formulated, assessed, and certified prior to the issue of the construction certificate, or could now be formulated, assessed, and certified.

83 The respondents resist an award of reinstatement damages on two grounds. One is that his Honour's approach to the issue of "onus" was correct based on asserted acknowledgements by the Owners Corporation's in the conduct of its case at the hearing. The other is that the breach of the warranty in s 18B(1)(c) is not a substantive breach and is "purely formal". Neither argument should be accepted.

*No concession was made by the Owners Corporation accepting the onus*

84 The respondents say that the Owners Corporation's senior counsel acknowledged at the hearing that (1) it sought to establish that no alternative solution would have been possible at the time of the issue of the construction certificate, and (2) the Court would not reasonably order the removal and replacement of the cladding unless the Owners Corporation positively established the unavailability of an alternative solution.

85 The Owners Corporation disputes that it made these concessions.

86 The starting point is to consider how the parties put their respective cases at the hearing. The Owners Corporation's written opening submissions contended that Mr Tatian's opinion that the building was "capable of being certified at the relevant time by way of an alternative solution" was not to the point because BCA compliance required that any alternative solution had to be formulated, assessed and approved prior to the issue of the construction and occupation certificates.

87 It was further contended:

> Nevertheless, the court ought not accept Mr Tatian's opinion that the building was capable of being certified by way of an alternative solution.

88 That submission was directed to disputing Mr Tatian's opinion that the building was "capable of being certified at the relevant time by way of an alternative solution". It did not involve an acknowledgement by the Owners Corporation that it had the onus to disprove the availability of an alternative solution. Rather, the submission joined issue with Mr Tatian's opinion.

89 Consistent with the respondent having the onus of proof that reinstatement would be unreasonable, the respondents' written opening contended:

> In the present case, the cladding can be shown to be compliant with the BCA 2013 without any further building work and without requiring their removal. Accordingly, it would not be reasonable or necessary to remove and replace the cladding when compliance can be achieved by far less costly means.

90 During the Owners Corporation's oral opening, his Honour raised the question of whether it sought to establish affirmatively that an alternative solution could not be prepared at the time of the construction certificate. The Owners Corporation's senior counsel initially agreed that, although not pleaded, disproving the availability of an alternative solution formed part of its case in chief. However, counsel also said that "there is no evidence that any alternative solution was ever undertaken in respect of the cladding".

91 A little later, the following exchange occurred:

> HIS HONOUR: Yes. So there seem to be three possibilities. The first is, it is accepted that there was not a deemed satisfaction. The second is, you have non-obtaining of an alternate solution but you do not have a substantive result that an alternate solution was not or is not available and what I'm putting to you or raising with you for comment is whether that is simply a distraction because that finding, if that is all that it is, cannot lead to a substantive remedy in the sense that—
>
> STEELE: You mean, finding three?
>
> HIS HONOUR: If one found that there was a non-obtaining of an alternate solution without any substantive finding that an alternate solution was not available. The third result is obviously that there is a non-obtaining of an alternate solution which was never available which is the proposition with which you opened.
>
> STEELE: Yes. Well, just to clarify, and just to make sure that I understand your Honour—.

92 His Honour then put to the Owners Corporation's counsel that he was seeking to raise that the "second" possibility seemed to be a distraction, because it did not seem likely to lead to the substantive relief sought by the Owners Corporation. Counsel responded:

> … we say that it was only possible to do an Alternative Solution at the time of the construction certificate, so if an Alternative Solution was not done at that point in time, then you can't have an Alternative Solution now. That's one argument and then we say, but if your Honour disagrees and says that it is possible, even though there wasn't an alternative solution done at the time to say, well, it could've been done at the time in compliance with the EP and A Act, then in that instance we say it would never have been possible to do an alternative solution.

93 Contrary to the respondents' characterisation of this exchange, it did not follow that the Owners Corporation was acknowledging that it had the onus on that issue. That counsel went on to make the further submission that it would never have been possible to do an alternative solution did not amount to an acknowledgment that the Owners Corporation had the onus of disproving that an alternative solution was available. That submission was in response to the respondents' case that an alternative solution was available: see [85] above.

94 Further exchanges occurred during the opening in which his Honour put to the Owners Corporation's counsel that it did not seem to be an attractive proposition to order a replacement of the cladding at a cost of some $5 million where "an alternative solution could've been obtained, was open to be able to be obtained on the merits but was not obtained". Counsel responded, "[y]es. I think we would agree with that". His Honour then observed "[w]ell, yes, that is common ground". His Honour suggested to the Owners Corporation's counsel that she consider the matters he had raised and clarify the Owners Corporation's position and invited counsel to "come back to [the issue] once [counsel] had a fair opportunity to think about [it]".

95 Again, contrary to the respondents' submissions, it did not follow from this exchange that the Owners Corporation was acknowledging that reinstatement damages were unreasonable if the Owners Corporation could not positively establish the unavailability of an alternative solution prior to the issue of the construction certificate. What his Honour was putting to counsel was that reinstatement damages may be unreasonable if an alternative solution *could* have been obtained prior to the issue of the construction certificate but had not been obtained. That was a matter on which the parties' experts had joined issue.

96 On a fair reading of the transcript, it is evident that whilst the Owners Corporation initially agreed that disproving the availability of an alternative solution to form part of its case in chief, after further discussion and some confusion at least with respect to the "second" possibility mentioned by his Honour, the primary judge invited the Owners Corporation to come back to that issue once it had a fair opportunity to think about it.

97 In closing submissions, the respondents contended that the Owners Corporation had conceded in opening, in effect, that the Owners Corporation had the burden to establish that no alternative solution could have been prepared at the time of the construction certificate demonstrating compliance with the performance requirements. The Owners Corporation's counsel denied that any concession had been made. Counsel reiterated that there had been a failure to prepare an alternative solution at the relevant time.

98 The respondents point to a submission in closing by the Owners Corporation that it had demonstrated that "it would be incredibly difficult to have an alternative solution" and that there was "no realistic possibility that any solution would have been determined to comply with the relevant performance requirements". Contrary to the respondents' submissions in this Court, this was not a concession in relation to the onus of disproving the availability of an alternative solution but was in response to the respondents' case, that an alternative solution was capable of being formulated. That submission had been advanced by the respondents in their opening written submissions (par [32]), by reference to the reasoning of Meagher JA in *The Owners of Strata Plan 76888 v Walker Group Constructions Pty Ltd* [2016] NSWSC 541 at [44]-[46], [66]-[67]. In written closing submissions (pars [94]-[99]) the Owners Corporation submitted that *Walker Group* was distinguishable. The respondents' submissions mischaracterise the arguments advanced by the Owners Corporation in answer to a different point.

99 In the course of further argument, the following exchange occurred:

> HIS HONOUR: The difficulty is still the difficulty that I put to you in opening, which is you don't get $5 million worth of rectification because you get non-compliance; you get $5 million worth of rectification if $5 million worth of

> rectification is reasonably undertaken. And that really draws one's attention to whether the breach reflects substantive risk in the building, does it not?
>
> STEELE: Yes, it does, and ought also ask the question that if it wouldn't have been possible to come up with an alternative solution then that product would not have been applied. But as for risk, we say that we clearly have demonstrate[d] risk, through the evidence of Mr Harriman, through the NFPA test, through the cavity barriers, through the UQ test, showing that this does have a flammable core, that Mr Harriman described was like petrol, and we also say that the Court can draw an inference with respect to the two brochures, that the product is combustible. When one takes all those circumstances together, there is clearly a significant risk.

100 That the Owners Corporation contended that reinstatement damages were reasonable because the non-compliance with the BCA was a substantive risk in the building did not involve an acknowledgement that it would be unreasonable to award reinstatement damages unless the Owners Corporation positively established the unavailability of an alternative solution.

101 On a fair reading of the whole of the transcript, the Owners Corporation did not accept – contrary to the authorities referred to above – the onus of establishing that no alternative solution would have been possible at the time of the construction certificate or would have been possible now. Nor did the Owners Corporation acknowledge that reinstatement damages would be unreasonable, unless the Owners Corporation positively established the unavailability of an alternative solution. His Honour erred at J[48] in assuming that the Owners Corporation's senior counsel made such concessions. Ground 14 has been established.

*Whether unreasonable to award reinstatement damages?*

102 The respondents' "purely formal" characterisation of the breach of the BCA relies upon the following arguments.

103 It is said that no alternative solution was prepared for the cladding at the time because none was required by the principal certifying authority. That misses the point, especially as the respondents now acknowledge the breach of the warranty in s 18(1)(c).

104 It is said that it is beside the point that the preparation of an alternative solution was not a simple matter. That also misses the point. There is an unchallenged finding that Mr Tatian's evidence involves a degree of speculation to steps which were not taken to develop a full alternative solution: at J[37]. That finding

was well-open to his Honour. As the Owners Corporation correctly submits, for an alternative solution to have satisfied the performance requirements of the BCA, would have required the following steps:

(1) the respondents having an alternative solution that would have to be formulated and assessed pursuant to the "Assessment Methods" included in the BCA (cll 8.05, 8.08, 8.09);

(2) the respondents obtaining a report and/or compliance certificate from a fire safety engineer stating and/or certifying that the alternative solution complies with the relevant performance requirements;

(3) the respondents submitting the compliance certificate and/or report to the principal certifying authority as part of the application for a construction certificate: EPA Regulation, cl 144A(1);

(4) the principal certifying authority, within 7 days of receiving the application, forwarding to the Fire Commissioner a copy of the application, plans and specifications for the building, details of the relevant performance requirements the alternative solution was intended to meet, and details of the assessment methods used: EPA Regulation, cl 144(2);

(5) the Fire Commissioner, within 23 days of receiving the documents, furnishing the certifying authority with an initial fire safety report specifying, among other things, whether the Fire Commissioner is satisfied that the alternative solution will meet the relevant performance requirements: EPA Regulation, cl 144(3), (5)(b), (9);

(6) the certifying authority, before issuing a construction certificate, taking the initial fire safety report into account: EPA Regulation, cl 144(5)(a); and

(7) the certifying authority, if the initial fire safety report recommended a condition be imposed on the building, ensuring the terms of the recommended condition are included in the plans and specifications of the building work or attached to the construction certificate, or if the certifying authority does not adopt the recommendation, giving written notice to the Fire Commissioner of the fact that the recommendation has not been adopted and of the reasons why: EPA Regulation, cl 144(6), (7).

105 It is said that the Owners Corporation failed to prove a substantive failure because its expert conceded that further information was required to assess the combustibility of the cladding. This was a reference to evidence of Mr Harriman during concurrent evidence that cone calorimeter testing would have supplied information necessary to assess the cladding's combustibility, which his Honour regarded as a significant concession: at J[49]. This evidence was directed to the sources of information as to the combustibility of the

cladding in the absence of an AS1530.1 test. The respondents did not adduce evidence by reference to any such testing of functional equivalence, that an alternative solution would satisfy the performance requirements of the BCA with respect to the fire resistance of the cladding. Nor did Mr Harriman resile from his evidence that the cladding was combustible or that the cladding ought to be replaced for that reason.

106 Contrary to the premise of the respondents' submissions, compliance with the performance requirements of the BCA does not distinguish between substantive and purely formal breach. There is an unchallenged finding that the respondents had not established the availability of any alternative solution: at J[51]. The failure to comply with the deemed-to-satisfy provisions or to formulate, assess and certify an alternative solution prior to the issue of the construction certificate was not a technical breach. It was a failure to comply with either of the only two methods of meeting the performance requirements of the BCA with respect to the fire resistance of buildings: BCA, A0.5, C1.1(b). Contrary to his Honour's implicit characterisation of the breach as a *de minimis* or technical breach (at J[67]), the breach was substantive. Ground 2 is established.

107 The performance requirements of the BCA require that the materials used on the external wall of a building either meet a particular test standard to ensure that they are not combustible (AS 1503.1) or are assessed and certified by a fire engineer, certifying authority and the Fire Commissioner, so as to ensure the materials' functional and performance equivalence during a fire. By installing cladding which did not comply with the performance requirements of the BCA, the respondents provided the Owners Corporation with a building which did not meet the minimum standards for public safety: *Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436T* [2021] VSCA 72 at [209].

108 The Owners Corporation was entitled to a building with cladding that either complied with the deemed-to-satisfy provisions or had been assessed by a fire engineer, certifying authority and the Fire Commissioner as an alternative solution to ensure that the cladding's functional and performance equivalence was resistant to fire as that required by the deemed-to-satisfy provisions. That

did not occur prior to the issue of the construction certificate. Nor did the respondents establish the functional equivalence of an alternative solution which could now be formulated, assessed, and certified.

109 The non-compliance with the performance requirements of the BCA with respect to the minimum standards of safety from fire, impacts not only upon the occupants of the building, but also the public and the Fire Brigade which has the responsibility to deal with any fire that may occur. It is not necessary to find that a fire will occur: *Coote v Kirby* at [55]; *Metricon* at [249]. It is sufficient to find, as I do, that given the noncompliance with the minimum standards in the BCA for safety from fire, there is a real risk of damage occurring in the future from fire in the building and of harm for the safety for occupants of the building and the public. As Keane JA said in *Coote v Kirby* at [60], reasonableness does not require the Owners Corporation to carry those risks.

110 Grounds 12 and 13 have been established insofar as these grounds refer to breach of s 18B(1)(c). Orders should be made upholding the Owners Corporation claim for damages for reinstatement, being the agreed cost of removal and replacement of the cladding.

**Grounds 3-10 and 15-17**

111 Given the above conclusion is dispositive of the appeal, it is strictly unnecessary to address the other grounds. I have considered whether, in accordance with *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12], I should do so and concluded that I should not.

112 It is not necessary to address grounds 3-10 which relate to other alleged breaches of s 18B(1), in the alternative to breach of s 18B(1)(c), given the respondents' concession that there had been a breach of s 18B(1)(c). Nor is it necessary to address grounds 15-17 which assume that the Owners Corporation had the onus of proof of proving that an alternative solution was not available, given that the premise of these grounds does not arise.

**Conclusion and Orders**

113 The appeal has succeeded and there is no reason why costs should not follow the event: Uniform Civil Procedure Rules 2005 (NSW), r 42.1.

114 I propose the following orders:

(1) Grant leave to appeal.

(2) Appeal allowed.

(3) Direct the appellant to file a notice of appeal in the form contained in the White Book within seven days.

(4) Set aside the answers to separate questions (c), (d), (e), (f), (g) and (h) given on 19 July 2022, and in lieu, answer those questions as follows:

(c) Not necessary to answer.

(d) Not necessary to answer.

(e) Yes. JKN and Toplace breached the statutory warranty in s 18B(1)(c) of the *Home Building Act 1989* (NSW).

(f) Yes.

(g) The Owners Corporation's loss is assessed as the reasonable cost of removing the cladding and replacing it with cladding which is non-combustible within the meaning of that term in the Building Code of Australia.

(h) The defendants are liable to the plaintiff for the reasonable cost of having the cladding removed and replaced with cladding which is non-combustible within the meaning of that term in the Building Code of Australia.

(5) Set aside orders (1) and (2) made on 27 July 2022 and in lieu, make the following orders:

(a) Pursuant to r 28.4 of the Uniform Civil Procedure Rules 2005 (NSW), the plaintiff's claim, insofar as it relies upon the contentions in paragraphs 27A, 27B, 27C, 27F and 28 of Part C of the Amended Technology and Construction List Statement filed on 5 April 2019, be allowed;

(b) Direct the parties to bring in short minutes of order before the primary judge in relation to the monetary judgment for damages in favour of the plaintiff in respect of the agreed cost of removal and replacement of the cladding.

(6) The respondents pay the appellant's costs of the appeal and the determination of the separate questions in the court below.

115 **WHITE JA:** I agree with Gleeson JA.

116 **BRERETON JA:** I agree with Gleeson JA.

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**Amendments**

26 May 2023 - Headnote - amend "Paramatta" to read "Parramatta".