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Written Submissions

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00202613

TITLE OF PROCEEDINGS	
First Appellant	85 PRINCESS PTY LTD ACN 165384510
First Respondent	Ian Alexander Fleming

FILING DETAILS	
Filed for	85 PRINCESS PTY LTD,Appellant 1
Legal representative	DEEPAK SHANKAR
Legal representative reference	
Telephone	
Your reference	250527

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (251001 85 Princess Pty Ltd ACN 165 384 510 v Ian Fleming NSW Submissions.pdf)

[attach.]

IN THE NEW SOUTH WALES COURT OF APPEAL CASE NO. 2025/00202613

APPELLANT'S SUBMISSIONS

A Introduction

1. The central issue on appeal is whether the primary judge in *85 Princess Pty Ltd v Fleming* [2025] NSWSC 407 (**J**) erred by finding that defendant discharged its onus on the issue of whether it was reasonable for the plaintiff to be awarded the damages it sought. The plaintiff was successful on all other issues. This was because the defendant, through his expert, Mr Hazelton, effectively conceded liability. Despite this concession, the defendant elected not to contest quantum in the ordinary way through a report outlining the cost of the repair method propounded by Mr Hazelton. Instead, the defendant chose to rely wholly on the following 19 words to bring itself within the "fairly exceptional" qualification to the ordinary rule that a plaintiff is to be restored to the position provided in the contract (Blue V1:87):

> "A suitable repair method would need to developmental [sic], designed and certified to ensure the design life of 20 years"

2. This contrasted to the evidence of the plaintiff who advanced quantum evidence through a quantity surveyor - Mr Whyte. Mr Whyte's report was tendered without objection, and he was not required for cross-examination (Black: 82G). Mr Whyte's report was carefully calibrated (Blue V1: 90-98, Blue V2: 547-695) to deal with the reality of a tenant, **Go Troppo** (a fruit wholesaler and distributer), who was operating an intensive and large-scale business which included a cold storage facility in one of the two warehouses on the premises (Go Troppo leased both warehouses - both warehouses hereafter "**Warehouse**") under a lease which extended to 2031 (Blue V1: 400P).

3. Mr Whyte prepared his report so that the internal remedial works were to be conducted in 5 stages (Blue V1:94 at [5.6]) whilst allowing Go Troppo to trade whilst still tenanting the property (Blue V1:94 at [5.5] and [5.7]). Mr Whyte allowed $2,040,772 for the tenant's removal and reinstatement of offices and cool room, temporary office accommodation whilst the failed slab was replaced (see table J[76] rows 3, 4 and5). The direct hard costs of rectifying the slab (by removal and replacement) was around a quarter of the relocation costs totalling only $601,236[1] (Black 191D and J[76] first 2 rows of table). The balance of Mr Whyte's assessment comprises consequential and indirect items (Black 191D and J[76] table).

[1] $485,420 for "warehouse 1" (the **Large Warehouse**) and $115,816 for "warehouse 2" (the **Smaller Warehouse**) noting that there are 2 warehouses on the property. The Large Warehouse has the cold storage facility.

4. Prior to Go Troppo's tenancy, the plaintiff repeatedly urged the defendant to repair the cracks in the concrete slab (Blue V1: 366I, 367H, 370N, 381H, 383H, 384I, 386G, 387I, 390H, 392H). At J[23] the primary judge found "85 Princess advised Mr Fleming that it would be much less costly to rectify the defects before Go Troppo commenced occupation" (see also Blue V1: 366, 367, 384, 392). However, the defendant did not take up this opportunity; Go Troppo moved in, the litigation commenced and the need to fashion rectification that accommodated Go Troppo crystallised (J[26]).

5. The primary judge accepted Mr Hazelton's causation evidence that the concrete slab was defective because the "saw cuts" [J58] were not made within the requisite 18 hours after the concrete was laid, and as a result, the saw cuts failed to "induce" stress cracking. Instead, the stress on the concrete was "relieved by cracking in places dictated by the will of the slab rather than in the places intended by the designer; that is, beneath the saw cuts" (J[53]).

6. The Court found that the concrete slab (the 2,211 square metres of it - Blue V1:302K) was defective and breached the following four warranties (see J[69] – [73]) i) to carry out the work in proper and skilful way in accordance with approved plans (cl 70.2(a)) (Blue V1: 223G), ii) that work would be fit for purpose or of such quality that was reasonably expected to achieve the result (cl 70.2(c)) (Blue V1: 223I), iii) that the building would be structurally sound (cl 70.2(d)) (Blue V1: 223K) and iv) that work would comply with relevant standards (cl 70.2(e) (Blue V1: 223K).

7. The primary judge correctly identified the "the starting point is that 85 Princess is entitled to damages in the amount of $5,313,593.39" (J[129]). The primary judge also correctly identified that the defendant bore an evidentiary and legal onus of discharging this prima facie position (J[130]). The primary judge also correctly found that there was a "paucity in the evidence about what [Mr Hazelton's] strategy is likely to cost, both now and into the future." J[131]".

8. Mr Hazleton' rectification method required the "development, design and certification" (Blue V1:87) of a "repair method" to have cracks in the concrete slab repaired. Mr Hazelton gave <u>no</u> evidence in chief about the details of this method, notwithstanding that he was qualified engineer and likely capable of developing the method. Further, Mr Hazelton did not detail the resources (cost and time) of relocating or otherwise accommodating Go Troppo whilst the method was implemented. In closing its case, the defendant did not propound Mr Hazelton's 19 words as the more reasonable solution. The defendant's case was that there was no breach. They were even so bold to submit that if the Court found that there a breach of the structural warranty then substantive damages would follow (Black 217[89]; Black

166.14-19 and 180.46 – 181.02). The Court did, in fact, find that there was such a breach (J[73]) but proceeded to find that the defendant, nevertheless, displaced the plaintiff's prima facie entitlement to the damages it contended for.

B Mr Hazelton's evidence

9. In Mr Hazelton's original report of 24 October 2023 (Blue V1: 57), Mr Hazelton did not concede that there was any identifiable defect. Rather his evidence was that "no new cracking was observed on site outside what had been previously documented in the supplied reports." (Blue V1:68H)". As such, Mr Hazelton only provided a rectification methodology on an "if found" basis (Blue V1:69L). However, Mr Hazelton reinspected the Warehouse in March 2024, as part of the conclave and changed his opinion about both liability and rectification.

10. From 18 March 2024 (Blue V1: 83I) (being the date of the joint expert report) Mr Hazelton's opinion on *liability* was "the cracking has increased since previous inspection, the new cracking can lead to further damage if not sealed and treated" (Blue V1:87). Further, from 18 March 2024, Mr Hazelton's opinion on *rectification* was the 19 words, namely "A suitable repair method would need to developmental [sic], designed and certified to ensure the design life of 20 years" (Blue V1:87). In essence, the joint expert report recorded the opinion of both experts that there were new cracks and something had to be done about them (Blue V1:87 – under the opinions of DE – David England and AH – Aaron Hazelton).

11. Although, the joint report did not expose Mr Hazelton's precise views on the cause of the "new cracking", the defendant had essentially conceded liability on the cracking issue because it was plain that there was new cracking which had to be addressed. Mr Hazelton's views were later exposed during cross-examination, during the second day of trial on 11 February 2025 when "Mr Hazelton elaborated on what he considered to be the cause of the cracking problem and the likely implications." (J[53] Red 35). The primary judge ultimately accepted Mr Hazelton's causation evidence, namely, that the saw cuts failed to serve their design purpose which resulted in the cracking (J[58]).

12. Although Mr Hazelton's views on causation were not fully exposed until 11 February 2025, the shift from "no cracking" to "new cracking" was obvious and of signal importance for the purposes of causation, the defendant's defence and the discharge of the defendant's onus to establish that the plaintiff's damages were unreasonable. Despite the importance of the shift in opinion, the defendant refrained from advancing detailed, costed and precise evidence on unreasonableness.

13. It was, of course, open to the defendant to seek leave to put on such evidence. The matter was not set down for hearing until 12 June 2024. Yet for the balance of 2024 and through to the hearing, the defendant was seemingly content to go to trial on only the 19 words to discharge its onus to avoid a potential liability of in excess of $ 5million. Further evidence would not have been difficult – Mr Hazelton himself was an expert engineer – and he proposed an engineering solution as repair method.

C The J and the alternative repair method

14. In the J, the primary judge describes the defendant discharging its onus by reference to a "program" (J[118W], [131S], [131W], [137D], [145, Red 61C]) "plan" (J[117] and "repair strategy" (J[61], [118 Red 55C]. These were not the words of Mr Hazelton. Rather, Mr Hazelton used the 19 words which included words such as "development" "design" and "certification" and "repaid method".

15. What emerges from the J is the primary judge's view that it was unreasonable to award the plaintiff reinstatement damages because an alternative option was available. This alternative option is expressed at (J[131]) and was to "to repair the cracks that now exist as required and then to implement a program to monitor for any new cracks and to have them repaired in a timely way… it is likely that a program of monitoring and repair will ensure that the slab performs as it is supposed to perform.". There are other references to "monitoring and repairing" (J[132], [133], [137]) and there is reference to "monitor and filled" (J[61D]). As above, these are not the words of Mr Hazelton who never propounded "monitoring" nor "filling".

16. At J[117] the primary judge does adopt some of Mr Hazelton's words when it is stated that "Acting prudently and reasonably, 85 Princess would retain an appropriate engineer to develop and design a plan to have the existing cracks repaired (to the extent that was needed) and would put in place a monitoring arrangement to ensure that any new cracks were repaired in a timely and appropriate way".

17. It is necessary to keep in mind the words which Mr Hazleton, in fact, used when analysing the primary judge's finding that the defendant established unreasonableness. The alternative solution the primary judge found was not what Mr Hazelton propounded. Rather, the alternative solution was an amalgam of Mr Hazelton's 19 words, evidence from the superseded pre-litigation reports, inference and speculation.

18. The amalgam, perhaps, has its source in the way the defendant put its case. The defendant never clearly propounded Mr Hazelton's 19 words as a viable alternative to removing and

replacing the slab (J[93] records that such a submission was put, however, the plaintiff has not been able to locate the reference). Rather, the defendant rested its case on there being no liability (and therefore no damages). The defendant also had an alternate position which was that nominal damages would follow for all non-structural breaches and in the case of a structural breach substantial damages would follow (Black 217[89]; Black 166.14-19 and 180.46 – 181.02).

19. However, it was never contended that it was reasonable for a "monitoring and repair" program to be implemented. Nor did the defendant contend for a repair method that involved "development, design and certification". Relatedly, the defendant never sought a finding that the plaintiff did not have the requisite intention to effect repairs – a point returned to below.

20. Given that the defendant's only witness was Mr Hazelton, it first falls to be examined what his evidence established in relation to the unreasonableness of the plaintiff's damage. As above, his evidence, primarily consisted of the 19 words. Mr Hazelton was cross-examined on these words (from Black 127.28) and an attempt was made to extract from Mr Hazelton what he meant by "development" "design" and "certification". The response to this attempt resulted in Mr Hazelton's evidence changing from the scant to the scant and uncertain.

"development"

21. It was not clear what Mr Hazelton meant by "development". Mr Hazelton gave evidence that "a more thorough inspection to nominate all the widths that are present" was required (Black 127.50) as well as "a measurement of <u>all</u> the crack widths" (Black 128.04). Mr Hazelton also gave evidence of the need to take samples from the slab and that there were two methods of obtaining samples. The first was "Schmidt hammer" (Black 128.41) the second was the "core crush". The core crush involved invasive drilling (Black 128.39 to 129.21). Mr Hazelton also gave evidence that the samples would need to be tested, with the possibility that further testing would be required (Black 129.16-17).

22. This evidence only served to highlight how uncertain and imprecise Mr Hazelton's evidence was. The defendant never adduced evidence concerning how long the measuring, sampling and testing would take. It was likely to be cost and time intensive. Recalling that the slab was over 2000sqm (Blue V1:302K). Adding to the cost and time were the complications involved with the Go Troppo's intensive operations. Mr Hazelton gave evidence that he was unable to inspect the slab under a large office structure which was situated on top of the slab (Black 125.7-12 - a photo of the office structure is at CB464-467: Supp Blue XX). There

were also other areas that Mr Hazelton was unable to inspect such as the cool room, and under the pallet racking (Black 125.7-12).

23. If the defendant had adduced detailed information on the "development" phase it, perhaps, would have involved the following processes and costings: retaining an engineer, having the engineer measure <u>all</u> of the cracks, documenting all the crack widths, categorising the crack by widths, invasively extracting the samples, testing, provision for retesting, temporarily relocating the office structure, removal of the floor stock.

"design"

24. In relation to the "design" as distinct from the "development" of the repair method, Mr Hazelton's evidence was equally, if not more, problematic. Mr Hazelton's only explicit evidence in relation to what the design involved was "so you calculate. Do calculations. And then from that calculation, you would suit a sealant that would - would allow for the expected crack movements." (Black 129.47-50). The types of calculations were not specified. If there was a standard that contained the relevant calculations (for example a manufacturer's standard or a BCA standard) the defendant never adduced evidence of what this standard was.

25. The design process is likely to be detailed and intensive process – multiple categories of cracks combined with calculations allowing for expected crack movements, allowances for different locations and the potential for "two or three different products." (Black 128.9-10). The person doing the design presumably would need access to all the detailed measurements of the cracking over the 2000 sqm and would then proced to determine "a suitable sealant material for that respective crack width" (Black 128.9-10). However, this is all speculation. There was no direct evidence about the processes involved nor the cost of it nor the time involved.

26. It was also not clear what "design" required by way of plans and drawings. For example, was there to be a detailed map, a fresh set of drawings, photographs, videos ? Was the design to set out the staging of the proposed "implementation" If the "development" step revealed extensive cracking under the office, pallets or pallet racking, would the "design" set out how the product would be applied to these cracks having regard to Go Troppo's ongoing business.

"certification"

27. When pressed on certification, Mr Hazelton said that a "chartered engineer" could provide the "certification" (Black 130.08). That was the extent of the evidence on the topic. The defendant adduced no evidence relating to at what point in the sequence "certification" took place. Conceivably, it could have been the certification of the "design" or the

"implementation" or "monitoring" or all of them. Again, there was no evidence allowing for the costs of engaging a chartered engineer. Nor was there any evidence concerning whether the engineer herself had to reinspect the Warehouse in order to be satisfied that the cracks were measured correctly, that the correct sealant had been nominated/applied (having regard to the crack width), that the correct product had been applied correctly. Any certification would be futile if it was undertaken prior to the cracking stabilising (whenever that might be).

Summary: Mr Hazelton's "development" "design" "certification"

28. The more Mr Hazelton was interrogated by what he meant by a "suitable repair method" the more imprecise, doubtful and speculative the "repair method" revealed itself to be. Mr Hazelton was not re-examined on this evidence. As such, the answers in cross examination combined with 19 words were the only evidence of the defendant's only witness.

29. As above, the references in the J to "monitoring" and "repair" or "repairing" (J[131]U, J[132]E, J[133]0, J[137]C, J[145]C) were not references to Mr Hazelton's evidence. Mr Hazelton was not cross-examined on what "monitoring" might require because it was not mentioned in the 19 words. Nor was it implicit in the 19 words.

30. These findings in relation to monitoring and repair are problematic. There is <u>no</u> evidence concerning what the "monitoring" involved. It may have required a complete digital mapping, surveillance, the use of seismic instruments or "calculations". It may have involved weekly, monthly, half yearly or annual inspections. These inspections may have required the slab under the office, pallet racking and stock to be inspected, recorded, re-measured on a rolling basis. It is noteworthy, that the plaintiff's quantum expert, Mr Whyte, considered the impact of removal and reinstatement on Go Troppo and produced a carefully calibrated staging program which would allow the office to be relocated and for Go Troppo to continue operating (see indicative staging and construction plans at CB470-482 Supp Blue:XX).

31. Importantly, the defendant adduced no evidence concerning when the cracks might stabilise. The method was so uncertain that the plaintiff is unable to divine when it might be restored to the position they contracted for. The cracks might not stabilise for years. The cracks might never stablise and *then* the slab will have to be replaced (J[117R]). The monitoring might result in a fresh round of measuring, sampling, testing, calculating, designing and implementation. The monitoring might result in multiple fresh rounds of these processes.

32. The impact on Go Troppo of all of this would be enduring and constantly frustrating. The primary judge seemed alive to the prospect that Go Troppo's may have to stop and start its

operations to accommodate the "monitoring and repair" program. At J[132] the primary judge speculated that the cracking will "slow and stop" and then acknowledged that there was a risk "that it will become apparent in due course that repairing the cracks by filling them will cease to be a sufficient response" J[132].

33. The primary judge then referred to the statement of Handley AJA in *Builders' Insurers'* ***Guarantee Corporation*** *v The Owners – Strata Plan No 57504* [2010] NSWCA 23 relating to the "elimination of risk". *Guarantee Corporation* concerned the installation of hobs that were not specified in the plans. At [83] Handley AJA stated that demolition and reinstatement was the "on the evidence, that the risk of water penetration could be eliminated". The primary judge's view was that the law didn't require an "an alternative to reinstatement to be entirely free of risk" (J[133]). Even accepting that to be so, the risk averted to by the primary judge was an unacceptable risk in the circumstances of this case.

34. This is so because the risk in this case was bound up in the rights of a third party, Go Troppo, who had a right of quiet enjoyment and a right to have structural defects repaired at the expense of the plaintiff (see J[109]). The plaintiff, for its part, was exposed to the risk at least until 2031 when the initial term of its lease with Reece expired which was also the date when Go Troppo's lease expired (see Blue V1:400 item 7 for the underlease expiry date and Blue V1:302O-P for the Reece lease expiry). The lease with Reece, no doubt, impacted the purchase price of the Warehouse. The plaintiff was prepared to finance the purchase and simply receive the rental payments under the lease to meet the finance requirements.

35. The plaintiff did not desire to be placed in a position of unceasing superintendence of uncertain "repair and monitoring" programs. Nor did it contract to be exposed to the risk and uncertainty of a "monitoring and repair program" for a wholly defective slab. The effect of the J is that the plaintiff should be exposed to the risk of an unknowable number of interferences with a tenant's quiet enjoyment and the cost of pursuing the program of monitoring and repair. This gives rise to the possibility of the plaintiff being liable for all manner of costs to the tenant. All of these risks, disruptions, uncertainties and exposure to unquantified costs, is incapable of displacing the plaintiff's prima facie entitlement to the damages it sought.

36. Both the plaintiff and Go Troppo should be taken as desiring the issue to be dealt with "once and for all" rather than being subject to the uncertainty, disruption and potential for future disruption entailed with the alternative method formulated by the primary judge. Indeed, the final paragraph of *Bellgrove v Eldridge*, sets out that a judge assessing damages must do so on the basis they will be assessed "once and for all". Such an approach does not admit a

"stop/start" "test and see" methodology (particularly one that is uncosted). The evidence relating to the alternative method of repair was insufficient to displace the plaintiff's entitlement to be restored to the position it contracted for by the damages it contended for. The findings that the evidence was sufficient should be set aside.

D The findings of intention

37. The primary judge was not satisfied that Dr Kapila's evidence on the slab cracking was "specific to the slab" and therefore concluded that the plaintiff had "no definite intention to replace the concrete slab if it obtains an award sufficiently large to enable it to do so" (J[114]). However, the defendant failed to plead that plaintiff did not have a genuine intention to reinstate (*Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* [2008] FCAFC 38; 166 FCR 494 at [119]), did not raise it in their opening in written opening submissions (Black 193-197), did not adduce any evidence from Dr Kapila specifically concerning the plaintiff's intention in relation to the cracking in the slab (see J[114]) and in closing never submitted the Court should find that plaintiff did not have the requisite intention (Black 216[88] was the highest it was put).

38. Further, the evidence that was adduced by the defendant was insufficient to discharge its onus in relation to intention. What was put to Dr Kapila was that the plaintiff did not have "any real intention of carrying out the repairs, were they to obtain … damages in this case?" (J[99] Red 48 – 49). Dr Kapila's answer was:

> "What I'm concerned about is the number of phone calls we're getting from the tenants. They have two warehouses, one they can't use because water is flooding it. They're concerned about the extension of the cracks. And we've had multiple site visits with the original owner, Frank Colosimo who passed away last year, and concreters on site about the damage that's occurring and progressing. I am very concerned that they are at some point going to say we can't run our business from here, that we are going to be responsible not only for the loss of rent, but also potentially the loss of income to that company that can't run. And it's a - it's a big operation. It travels fruits, vegetables all over New South Wales. So yes, I'm very concerned financially about what would happen if we allow a property to go into disrepair."

39. Further, Dr Kapila gave uncontradicted evidence that the plaintiff "was not in a financial position to do the kind of repairs that are required" (J[99], Black 24.17). In response to this question, Dr Kapila was asked to clarify whether her answer related to all of the alleged defects (Black 24.19) to which Dr Kapila replied "I'd have to go through the quantity surveyor's report of what each individual one is" (Black 24.21).

40. Counsel for the defendant then proceeded to ask questions about patching of walls, voids in dincel walls, surface corrosion, bolts, water diversion and concrete sealing (Black 24.10 to Black 25.6). These costs where then totalled by the defendant's counsel as "about $22,000 to $23,000" and the following exchanged occurred:

> Q. And the truth is you could pay for these defects out of the rental income from this property and have all of these minor defects rectified already. That's right, isn't it?
>
> A. No, the rental income goes to paying interest payments.

41. The cross-examiner then returned to the "patching of walls" and asked whether either of the directors could provide $1130 to carry out the patching. The answer was "There is an ability but at the cost of our own home mortgage we could pay for other repairs to investment properties rather than pay our mortgage." (Black 25.35). There was then a question about the absence of evidence plaintiff's ability to pay for damages in Dr Kapila's affidavit which was rejected on the basis that the witness could not "put things in her affidavit to justify an answer she's just given." (Black 25.35-47).

42. The evidence on the topic of intention (in addition to the fact that the plaintiff was making a claim) was insufficient for the Court to conclude that damages were unreasonable (see *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253 at [59]-[61] per Giles JA, McColl and Campbell JJA agreeing). The finding at J[116] should be set aside

E Relevant principles

Purkess and "precision"

43. At J[86] the primary judge stated that defendant carried an onus which was "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, when speaking of the "burden of proof in the secondary sense" of introducing evidence. The "secondary sense" of onus in *Purkess* concerned the onus on a defendant in a personal injury case to introduce evidence of a pre-existing condition being causative once a plaintiff has made out prima facie case of negligence. In *Purkess* it was held that for the defendant to "displace" a plaintiff's prima facie case for the defendant to "establish with some reasonable <u>measure of precision,</u> what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be." Then held that:

> <u>In the present case the evidence accepted by the learned trial judge by no means established with any reasonable degree of precision the extent of the appellant's pre-existing affliction or what its future effects, apart from the result of the defendant's negligence, were likely to be</u>. That being so we think it was proper for him to deal with the case on the basis that the defendant's negligence was the cause of the appellant's permanent disability and, accordingly, we propose to deal with this appeal on the same basis. (at p169)

44. As set out in Part C, the evidence was Mr Hazelton lacked the requisite "degree of precision" to discharge its onus. The 19 words were imprecise, uncertain and wholly inadequate. There was no evidence of what the monitoring program involved, there is doubt over the

sequencing of the steps in the plan and there is no evidence of how long the "plan" would take. There is no evidence that the "plan" would be less disruptive than Mr Whyte's stage program which accommodated Go Troppo and allowed them to continue to trade. The "plan" on one view could have been more invasive than what was so clearly detailed by Mr Whyte. Critically, there was no evidence of the cost the "plan". Nor was there any attempt made by Mr Hazelton to sample, test, design and develop his proposed rectification.

45. The building cases relating to onus have not yet focused on the "precision" of a breaching party's evidence. The adoption of the *Purkess* principle in building cases appears to have occurred for the first time in *Owners SP 92450 v* ***JKN*** *Para 1 Pty Limited* [2023] NSWCA 114 (per Gleeson JA, Brereton and White JJA agreeing) who analysed several building cases in which the onus arisen (at [71]). After setting out these cases, at [72] the following was stated:

> 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.

Guarantee Corporation and "functional equivalence"

46. Prior to *JKN*, the trend was to analyse whether the defendant had established a "functional equivalence between what was installed and was specified. This phrasing appears to have arisen from this Court's judgment in *Builders' Insurers'* ***Guarantee Corporation*** *v The Owners – Strata Plan No 57504* [2010] NSWCA 23 at [79] – [81] (see also, for e.g. *The Owners - Strata Plan No 89074 v* ***Ceerose*** *Pty Ltd* [2024] NSWSC 1494 at [99] per Rees J). In *Guarantee Corporation* the Court found that there was not a "functional equivalence" in relation to the "hobs" specified and the hobs installed. Applying the "functional equivalence" standard to this case results in rendering even more stark the defendant's failure in relation to its onus. There was no "functional equivalence" between removing and replacing the slab on the one hand and the "programme" with all of its uncertainties on the other hand. As set out in Part D, the alternative repair method was devoid of practical utility because it was so uncertain.

47. There was insufficient evidence to establish that the alternative monitoring and repair method would bring about the outcome that replacement would be "certain" to achieve (J[117).

A doubtful remedy

48. Some of the other cases in the area speak of unreasonableness not being established if a "doubtful remedy" is propounded (see Keane JA in *Kirkby v Coote* [2006] QCA 61 and J[89]). If this be the applicable standard, then the defendant also failed to meet that standard.

The “plan” was doubtful both as a concept and a reality. Conceptually, it was doubtful what the remedy entailed. There was doubt relating to sampling, testing, calculating, designing, certifying and monitoring. In reality, it was doubtful how the remedy could be implemented having regard to the fact that Go Troppo was operating its business in the Warehouse and having regard when (and if) the cracks would stabilise)

JKN and speculative evidence

49. *JKN* itself deployed the language of “speculative”. *JKN* concerned whether cladding installed on 28 storey building in Parramatta was fire resistant in accordance with the Building Code of Australia. The primary judge held that the Owners Corporation failed to prove that there was any “alternative solution” available and as such they were not entitled to reinstatement damages. On appeal, the Court of Appeal reversed the result, finding that because the Owners Corporation made out its case in relation to prima facie breach, it fell to the breaching parties to establish that there was a viable “alternative solution”. Mr Tatian was the expert called for the breaching parties, however, the Court found that as his evidence was speculative, the breaching parties had not discharged their onus The relevant passage is at [82] and is set out below:

> 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.

Summary

50. There is no difference in result in this case produced by reference to notions of “precision” “functional equivalence” “speculation” and “doubtful remedy”. Focus should be kept on the bright line principle enunciated by Dixon CJ, Webb and Taylor JJ in *Bellgrove v Eldridge* (1954) 90 CLR 613 at 618, namely:

> The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt.

51. The evidence adduced by the defendant in relation to whether removal and replacement of the slab was a "reasonable course to adopt" was deficient. It was 19 words in length. Those words did not establish that this was a case involving "fairly exceptional circumstances" *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; [2009] HCA 8 at [17]. Given the deficiencies in the defendant's evidence, the proven breach, and the uncontested evidence of Mr Whyte, judgment for the plaintiff for $5,313,593.39 should be entered.

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Dated: 1 October 2025