

AFTER *TABCORP*, FOR WHOM DOES THE *BELMGROVE* TOLL? CEMENTING THE EXPECTATION MEASURE AS THE ‘RULING PRINCIPLE’ FOR CALCULATION OF CONTRACT DAMAGES

MATTHEW BELL*

[The High Court case of Tabcorp v Bowen Investments offers an opportunity to reassess the body of law which has grown around the calculation of contractual damages for defective building work. This article undertakes such an analysis, placing Tabcorp within the dual contexts of defective work damages specifically (in particular, the Court’s confirmation that Bellgrove v Eldridge provides the applicable test) and the broader debate in contract law as to which interest is primarily to be afforded protection through damages. In respect of the latter, it is submitted that the Court’s vigorous restatement of the primacy of Parke B’s ‘ruling principle’, based upon the expectation interest, may be expected to have resonance well beyond the sphere of defective building.]

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* BA (Hons), LLB (Hons), MConstrLaw (Melb); Lecturer and Co-Director of Studies for Construction Law, Melbourne Law School, The University of Melbourne; Professional Support Lawyer to the Construction and Major Projects Group, Clayton Utz. This article is partially based upon the author’s paper which was adjudged ‘Highly Commended’ in the Society of Construction Law (UK)’s Hudson Prize for 2008. The author acknowledges with thanks the research assistance provided by the Law Research Service at the Melbourne Law School in the preparation of this article.

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I INTRODUCTION

Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (*‘Tabcorp’*) was one of the first judgments to be handed down by the High Court of Australia under French CJ.¹ Decided by the Court in early 2009, the case was set in train more than a decade prior to that when a tenant acted with ‘contumelious disregard’²

¹ (2009) 236 CLR 272. Early commentaries on the case include: Peter Butt, ‘Breach of Covenant against Alterations: *Tabcorp v Bowen* in the High Court’ (2009) 83 *Australian Law Journal* 365; Nick Christopoulos and Jack Fan, ‘When Can Rectification Costs Be Recovered as Damages for Breach of Contract? The Australian High Court Clarifies’ (2009) 4(2) *Construction Law International* 33; WD Duncan and Sharon Christensen, ‘Tenant Fails Reasonableness Test in Making Alterations without Consent’ (2009) 23(8) *Australian Property Law Bulletin* 91; Mark Holler, ‘Measure of Damages for Breach of Contract — Reinstatement Cost or Reduction in Value?’ (2009) 36(3) *Brief* 30; Justice G A A Nettle, ‘Landlord and Tenant: Damages for Breach of Covenant’ (2009) 83 *Australian Law Journal* 296; Anthony Papamatheos, ‘Reinstatement Damages for a Tenant’s Alteration of Premises’ (2009) 125 *Law Quarterly Review* 397; Solène Rowan, ‘Protecting Contractual Expectations: An Australian Perspective’ (2009) 68 *Cambridge Law Journal* 276. There are, in addition, numerous reviews of the case published on the internet.

² The ‘contumelious disregard’ description, arising from the trial judgment (*Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* [2007] FCA 708 (Unreported, Tracey J, 18 May 2007) [84] (*‘Bowen Investments’*)), was regarded by the High Court as ‘not hyperbolic’ (*Tabcorp* (2009) 236 CLR 272, 282 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ)). The appearance of this phrase, which has been recognised as a basis on which exemplary damages may be awarded in tort (see, eg, *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 129 (Taylor J), 154 (Windeyer J)), may, at first blush, point to an exemplary (or, indeed, punitive) element to the substantial contract damages award which ultimately was upheld by the High Court. However, nowhere is it suggested in the judgments that the Federal or High Court took the deliberate nature of the breach into account in such a way as to move the damages award away from being compensatory in nature. (As Griffith CJ observed in *Butler v Fairclough* (1917) 23 CLR 78, 89, absent fraud, ‘[t]he motive or state of mind of a person who is guilty of a breach of contract is not relevant to the question of damages for the breach’; this effectively rules out the availability of a contractual damages award on an exemplary basis unless the breach of contract also constitutes tortious conduct (see, eg, *Zhu v Treasurer (NSW)* (2004) 218 CLR 530) or there is a statutory basis for such an award (of relevance to defective building work: see, eg, *Domestic Building Contracts Act 1995* (Vic) s 53(2)(b)(ii), which empowers the Victorian Civil and Administrative Tribunal to award exemplary damages in residential building actions).) Rather, as observed by French CJ during argument, the Court’s approach was ‘not ... so much a case of punishing contumelious conduct as not rewarding it’: *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2008] HCA Trans 395 (2 December 2008) 3634–5. See also Graeme S Clarke, ‘*Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8: Contract Breakers Beware!’ (Paper presented at the Victorian Bar’s Continuing Legal Education Program, Melbourne, 17 March 2009) 13.

for the provisions of a lease by demolishing and replacing the foyer of a commercial building in Melbourne.

As conceived by the Court, the case was ultimately to be decided by applying the principles for the calculation of contractual damages for defective building work as laid down by the Court in *Bellgrove v Eldridge* ('*Bellgrove*') more than half a century earlier.³ Those principles were themselves explained by the Court as being based upon the 'ruling principle'⁴ for ascertaining the quantum of damages for breach of contract derived from the famous dicta of Parke B in *Robinson v Harman* ('*Robinson*'): '[The plaintiff] is, so far as money can do it, to be placed in the same situation ... as if the contract had been performed.'⁵

Of itself, the Court's reiteration of the fundamental nature of this principle was not groundbreaking:⁶ its importance has been emphasised repeatedly by the Court over the years,⁷ and the passage — along with that in which it is identified as the 'ruling principle' — are said to be '[t]he two most quoted judicial statements on the basis of assessment of damages in contract'.⁸ Indeed, even within the specific field of damages for defective building work,⁹ the principle

³ (1954) 90 CLR 613.

⁴ As acknowledged by the High Court in *Tabcorp* (2009) 236 CLR 272, 286 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ), the 'ruling principle' description is derived from *Wertheim v Chicoutimi Pulp Company* [1911] AC 301, 307 (Lord Atkinson for Lords Macnaghten, Atkinson, Collins and Shaw).

⁵ (1848) 1 Ex 850, 855; 154 ER 363, 365.

⁶ Having said that, the reiteration has already been cited in a number of cases at the trial and appellate level in Australia: see, eg, *Australian Goldfields NL (in liq) v North Australian Diamonds NL* (2009) 72 ACSR 132, 149 (Pullin JA), 204 (Buss JA); *Outback Health Screenings Pty Ltd v Gwam Investments Pty Ltd* [2009] SADC 30 (Unreported, Judge Tilmouth, 26 March 2009) [97]; *Evans & Associates v European Bank Ltd* (2009) 255 ALR 171, 185 (Campbell JA); *Haviv Holdings Pty Ltd v Howards Storage World Pty Ltd* (2009) 254 ALR 273, 281 (Jagot J); *National Foods Milk Ltd v McMahon Milk Pty Ltd [No 2]* [2009] VSC 150 (Unreported, Hargrave J, 23 April 2009) [15]; *European Bank Ltd v Robb Evans & Associates* (2010) 264 ALR 1, 4 (French CJ, Gummow, Hayne, Heydon and Kiefel JJ); *First East Auction Pty Ltd v Ange* [2010] VSC 72 (Unreported, Hargrave J, 16 March 2010) [177].

⁷ See, eg, *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653, 667 (Wilson, Deane and Dawson JJ); *Wenham v Ella* (1972) 127 CLR 454, 460 (Barwick CJ), 471 (Gibbs J).

⁸ Michael Tilbury, Michael Noone and Bruce Kercher, *Remedies: Commentary and Materials* (4th ed, 2004) 194.

⁹ For commentaries on the Australian position in respect of defective work damages, see generally Bryan Thomas, 'The Assessment of Damages for Breach of Contract for Defective Building Work' (2004) 20 *Building and Construction Law* 230; Chris Fenwick, 'Necessity, Reasonableness and Intention to Rebuild: A Reconciliation of the Australian and English Approaches to Quantification of Damages in Building Cases' (2004) 16 *BDPS News: Building Dispute Practitioners' Society Inc Newsletter* 4; Douglas Bates, 'The Assessment of Contractual Damages for Defective Building Work in Australia: Is Loss of Amenity an Available Measure?' (1999) 15 *Building and Construction Law* 2; Jocelyn Winterton, 'The Use of Damages for Rectification Works: Should the Courts Intervene?' (1998) 14 *Building and Construction Law* 2; John Darter and John Sharkey, Law Book Company, *Building and Construction Contracts in Australia: Law and Practice*, vol 1 (at Update 67) [1.830]; Doug Jones, *Building and Construction Claims and Disputes* (1996) 49–57; Philip Davenport, *Construction Claims* (2nd ed, 2006) 184–92; Damien J Cremean, B A (Toby) Shnookal and Michael H Whitten, *Brooking on Building Contracts* (4th ed, 2004) 186–95; Ian H Bailey, *Construction Law in Australia* (2nd ed, 1998) 92–3; Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (3rd ed, 2009) 382–4; J W Carter, Elisabeth Peden and G J Tolhurst, *Contract Law in Australia* (5th ed, 2007) 849–50; N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (9th Australian ed, 2008) 1105–7; J L R Davis, 'Damages' in P D Finn (ed), *Essays on Contract* (1987) 200, 211–15. For consideration of the particular issues arising in respect of design and

has long been recognised as being the starting point for judicial analysis and commentary.¹⁰

It has never been seriously doubted that the ‘ruling principle’ in this context leads to the cost of rectification being the prima facie measure of damages.¹¹ What has, however, been highly contentious — and continues to be — is the appropriate formulation of the principle (or principles) governing the circumstances in which the applicability of that measure is to be displaced. In this context, it is submitted that the Court’s upholding of the right of the plaintiff in *Tabcorp* to have their contractual expectations upheld through an award of damages may well have a significant impact in at least two areas.

The first of these relates to the application of contract damages principles within the specific sphere of breach of an obligation — typically arising in a construction contract — to design, build or repair physical works so as to meet a particular standard. *Tabcorp* has, in this context, provided a forceful restatement, with ‘elucidat[ion]’,¹² of the principles laid down in *Bellgrove*.

Secondly, *Tabcorp* may be viewed within the context of a broader debate which has occupied contract law scholars for the best part of a century, especially since the seminal article of L L Fuller and William R Perdue Jr in 1936¹³ — that is, whether the plaintiff’s expectation ought to be the default interest protected by contractual damages. Here, *Tabcorp* arguably represents an

build contracts, see Bryan Thomas, ‘Quantification of Damages for Breach of a Design and Construct Contract’ (2004) 17 *BDPS News: Building Dispute Practitioners’ Society Inc Newsletter* 10, and the recent treatment in the New South Wales courts in *Roluke Pty Ltd v Lamaro Consultants Pty Ltd* [2008] NSWCA 323 (Unreported, Basten, Campbell JJA and Sackville AJA, 27 November 2008) (but note that a component of the damages awarded there was reassessed in *Roluke Pty Ltd v Lamaro Consultants Pty Ltd [No 2]* [2009] NSWCA 21 (Unreported, Basten, Campbell JJA and Sackville AJA, 23 February 2009)). For the English position, see, eg, Stephen Furst and Sir Vivian Ramsey, *Keating on Construction Contracts* (8th ed, 2006) 284–6; I N Duncan Wallace, *Hudson’s Building and Engineering Contracts* (11th ed, 1995) vol 1, 722–4; John Uff, *Construction Law* (10th ed, 2009) 215–17; H G Beale (ed), *Chitty on Contracts* (30th ed, 2008) vol 2, 770; Harvey McGregor, *McGregor on Damages* (18th ed, 2009) 988–95; Adrian Williamson, ‘Damages against Construction Professionals — Current Situations’ (2008) 122 *Australian Construction Law Newsletter* 46.

¹⁰ See, eg, *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, 689 (Viscount Haldane LC); Beale, above n 9, vol 2, 766; Adrian Chandler, ‘Defective Performance of Building Contracts: Expectations in a Straitjacket’ (1996) 13 *International Construction Law Review* 255, 255; Dorfer and Sharkey, above n 9, vol 1, [1.820]; Cremean, Shnookal and Whitten, above n 9, 185; Bates, above n 9, 4; Paterson, Robertson and Duke, above n 9, 379–80; Uff, above n 9, 215–16; *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, 355 (Lord Jauncey), 365 (Lord Lloyd); *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, 562 (Lord Jauncey); *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158, 190 (Keane JA); *Pacific Century Production Pty Ltd v Tysoe* [2005] QCA 189 (Unreported, McPherson, Williams and Jerrard JJA, 3 June 2005) [19] (Williams JA). See also *Roluke Pty Ltd v Lamaro Consultants Pty Ltd* [2007] NSWSC 349 (Unreported, Nicholas J, 17 April 2007) [86].

¹¹ For examples of current editions of leading texts which cite rectification as the default measure (subject to applicable qualifications), see, eg, Jones, above n 9, 49–50; Cremean, Shnookal and Whitten, above n 9, 186; McGregor, above n 9, 988–92; Furst and Ramsey, above n 9, 284; Duncan Wallace, *Hudson’s* (11th ed, 1995), above n 9, vol 1, 722.

¹² *Willshee v Westcourt Ltd* [2009] WASCA 87 (Unreported, Martin CJ, Buss JA and Newnes AJA, 18 May 2009) [61] (Martin CJ).

¹³ L L Fuller and William R Perdue Jr, ‘The Reliance Interest in Contract Damages’ (Pt 1) (1936) 46 *Yale Law Journal* 52.

example of the expectation measure's bailiwick being further extended, in this case to the species of damages quantification applicable to the breach of a lease covenant against alteration of premises. The effect of the case is to subsume the method of calculation of such damages within the *Bellgrove* principle, which itself has been explained as being based squarely upon Parke B's seminal statement as to the primacy of the expectation measure.

Hence, it is the submission of this article that, whilst, on its face, *Tabcorp* appears to be a straightforward application of the principles laid down in *Bellgrove*,¹⁴ the case may be regarded as extending the reach of the expectation measure and therefore further eroding any claims that alternative measures may have to general application.

The article lays out this argument as follows:

- Part II provides an outline, by way of background to the *Tabcorp* series of cases, of the principles generally applicable to the assessment of damages for defective building work in Australia, including the leading case of *Bellgrove* and the influential — yet not uncontroversial — English decision of *Ruxley Electronics & Construction Ltd v Forsyth* ('*Ruxley*').¹⁵
- Parts III (in relation to the Federal Court trial and appeal to the Full Court) and IV (in relation to the appeal to the High Court) set out a detailed analysis of the *Tabcorp* cases.
- Part V assesses the practical impact of *Tabcorp* upon the continuing relevance of *Bellgrove* (the scope of which now includes, as noted above, not only defective building work but also breaches of lease covenants against unauthorised alterations). The May 2009 case of *Willshee v Westcourt Ltd* ('*Willshee*'),¹⁶ in which the Western Australian Court of Appeal provided the first detailed analysis of *Tabcorp* by an Australian appellate court, provides a focus for this assessment.
- Part VI places *Tabcorp* within the ongoing debate as to the primacy of the expectation measure, explaining the distinctive features of commercial expectations in respect of building work which contribute to expectation being the preferred measure in that sphere and proposes, by way of conclusion, that *Tabcorp*'s forceful reiteration of the centrality of expectation may be expected to find resonance within contract law generally.

¹⁴ Clarke, above n 2, 4, has made a similar observation about *Tabcorp*'s impact in respect of property damage cases — he noted that, whilst 'the High Court's reasoning at first blush appears conventional, on analysis it represents a considerable shift' in that context.

¹⁵ [1996] AC 344.

¹⁶ [2009] WASCA 87 (Unreported, Martin CJ, Buss JA and Newnes AJA, 18 May 2009).

II DAMAGES IN CONTRACT FOR DEFECTIVE BUILDING WORK

A Establishing the Breach

Put succinctly, building work is ‘defective whenever it falls short of a standard that it was supposed to meet.’¹⁷ The relevant standard may be stipulated in the contract expressly (such as by way of a ‘materials and workmanship’ clause applying generally across the work¹⁸ or a requirement applying to a particular item of the work as set out in a contractual specification) or it may be the subject of an implied term.

Parties undertaking construction works often find themselves seeking recourse to implied terms, either because the contract does not deal expressly with a matter¹⁹ or — as is not infrequently the case — because no contract is agreed to by the parties.²⁰ Terms may, in the usual way, be implied ad hoc in particular contracts through the application of the principles derived from *BP Refinery (Westernport) Pty Ltd v Hastings City Council*.²¹ There is, moreover, a considerable body of law about quality-related terms which (subject to any

¹⁷ Jones, above n 9, 4. See also Cremean, Shnookal and Whitten, above n 9, 182; Dorter and Sharkey, above n 9, vol 1, [11.10].

¹⁸ Standard form construction contracts typically set default benchmarks for such matters — see, eg, Standards Australia, *AS 4000-1997: General Conditions of Contract* (1997) cl 29.1, which requires that ‘suitable new materials’ be used and that the workmanship be ‘proper and tradesmanlike’. For a detailed analysis of such provisions as set out in commonly used Australian forms, see Ian H Bailey and Matthew Bell, *Understanding Australian Construction Contracts* (2008) ch 10.

¹⁹ See, eg, *Willshee* [2009] WASCA 87 (Unreported, Martin CJ, Buss JA and Newnes AJA, 18 May 2009) [4] (Martin CJ), discussed in detail below in Part V, where the plaintiff had to rely upon an implied term as to the applicable standard of the relevant work.

²⁰ All too often, and even on complex projects with a substantial construction cost, a formal document recording the agreement is never entered into: see, eg, *Monarch Building Systems Pty Ltd v Quinn Villages Pty Ltd* [2005] QSC 321 (Unreported, de Jersey CJ, 4 November 2005), affd [2006] QCA 210 (Unreported, Williams, Jerrard JJA and Mullins J, 9 June 2006), reported in (2007) 23 *Building and Construction Law Journal* 121, in which the Supreme Court of Queensland was called upon to unravel the rights and liabilities of the parties where they had failed to sign a formal contract document on a project with a value of about \$1 million, due, primarily, to their inability — despite lengthy negotiations — to agree upon a liquidated damages clause. Here, the Court regarded the lack of agreement upon that term as meaning that there was no applicable contract; in turn, the contractor was entitled to be paid upon a *quantum meruit* basis: *Monarch Building Systems Pty Ltd v Quinn Villages Pty Ltd* [2005] QSC 321 (Unreported, de Jersey CJ, 4 November 2005) [58], affd [2006] QCA 210 (Unreported, Williams, Jerrard JJA and Mullins J, 9 June 2006) [44], [51] (Williams JA), reported in (2007) 23 *Building and Construction Law Journal* 121, 127–8. See generally Frazer Moss and Kyle Trattler, ‘Get That Contract Signed!’ (2006) 1(3) *Construction Law International* 36.

²¹ (1977) 180 CLR 266, 283 (Lord Simon for Viscount Dilhorne, Lords Simon and Keith). The five criteria for implication laid down by the Privy Council are referred to in one of the leading construction law texts as ‘well summaris[ing]’ the relevant principle for implication in fact: Duncan Wallace, *Hudson’s* (11th ed, 1995), above n 9, vol 1, 95. See, however, the recent observations on these criteria by Lord Hoffmann in *A-G (Belize) v Belize Telecom Ltd* [2009] 2 All ER 1127, 1134–5 (discussed in, for example, Elizabeth Macdonald, ‘Casting Aside “Officious Bystanders” and “Business Efficacy”?’ (2009) 26 *Journal of Contract Law* 97). Lord Hoffmann’s dicta has already been noted in Australia: see, eg, *Cifuentes v Furgo Spatial Solutions Pty Ltd* [2009] WASC 316 (Unreported, Murray J, 11 November 2009) [373]–[374]; *Sam Management Services (Aust) Pty Ltd v Bank of Western Australia Ltd* [2009] NSWSC 676 (Unreported, Rein J, 17 July 2009) [28].

express terms to the contrary or supervening statutory provisions) may be expected to apply in construction contracts generally.²²

As summarised by John Dorter and John Sharkey, the contractor's implied warranty as to workmanship will '[o]rdinarily ... require that the building be constructed with the skill, care and competence of an ordinary contractor and in accordance with good building practice'.²³ Implied warranties of merchantability and (where reliance upon the contractor's skill and judgement is established) of fitness for purpose also apply; whilst they are 'analogous' to those derived from sale of goods legislation,²⁴ the exact ambit of such warranties is the subject of detailed case law which is beyond the scope of this article.²⁵

Terms may also be implied into construction contracts by statute. Depending upon the type of contract, they may include the terms as to due care and skill and fitness for purpose applicable to contracts for the supply of services generally under s 74 of the *Trade Practices Act 1974* (Cth) ('TPA'), or the various terms implied into contracts for residential building work by statute in most states and territories of Australia.²⁶

²² See generally Furst and Ramsey, above n 9, 77–82; Duncan Wallace, *Hudson's* (11th ed, 1995), above n 9, vol 1, 99; Dorter and Sharkey, above n 9, vol 1, [1.470]–[1.530].

²³ Dorter and Sharkey, above n 9, vol 1, [1.470] (citations omitted).

²⁴ *Ibid* vol 1, [1.490].

²⁵ See generally John Dorter, 'Performance' (1999) 15 *Building and Construction Law* 361, 367–88. Moreover, the recent Victorian Supreme Court case of *Barton v Stiff* [2006] VSC 307 (Unreported, Hargrave J, 8 November 2006) provides a detailed consideration and application of the authorities relating to the implied warranty of fitness for purpose. Hargrave J concluded that the absolute nature of that warranty is to be qualified by reference to the 'purpose as properly identified' (at [37]); thus, in this case, the warranty did not extend to require the supply of bricks that were able to resist 'highly unusual' salty groundwater (at [39]). The complexity of the common law applicable in this area means that parties are generally well advised to enter into an appropriately worded form of construction contract. As noted above in n 18, the standard forms which are commonly used in Australia typically set out express warranties in this regard.

²⁶ These implied terms include warranties as to workmanship and materials: see, eg, *Building Act 2004* (ACT) s 88; *Home Building Act 1989* (NSW) s 18B; *Domestic Building Contracts Act 2000* (Qld) pt 4; *Building Work Contractors Act 1995* (SA) s 32; *Housing Indemnity Act 1992* (Tas) s 7; *Domestic Building Contracts Act 1995* (Vic) ss 8–10, 20; *Home Building Contracts Act 1991* (WA) s 9 (unlike the warranties contained in the other jurisdictions' provisions, however, the WA provisions relate only to the obtaining of relevant approvals for the works rather than workmanship and materials). There is no such implication by statute in the Northern Territory. *Hrouda v Vermeulen* [2009] NSWCTTT 89 (Unreported, Member Hennings, 12 March 2009) provides an example, decided in the wake of *Tabcorp*, of defective work constituting a breach of a term implied by statute leading to damages being awarded based upon the rectification measure. Whilst there was no formal agreement in place (indeed, the builder claimed that he was simply giving the home owner 'a hand as a friend': at 4), the Tribunal was satisfied that the circumstances were such that there was an agreement to carry out residential building work within the meaning of the *Home Building Act 1989* (NSW). In turn, the builder's work in constructing a ceiling, which — among other things — did not comply with current building standards, was in breach of the warranty requiring that work be 'proper and workmanlike' under s 18B(a) of that Act. Similarly, the installation of defective hobs was found to be a breach of s 18B (giving rise to reinstatement-based damages) in *Owners, Strata Plan 57504 v Building Insurers' Guarantee Corporation* [2008] NSWSC 1022 (Unreported, McDougall J, 3 October 2008) [142], *affd* [2010] NSWCA 23 (Unreported, Tobias, Campbell JJA and Handley AJA, 15 March 2010).

B *Quantum of Damages: The Special Nature of Building Cases*

When Parke B made his pronouncement that the general object of damages for breach of contract is that the plaintiff 'is, so far as money can do it, to be placed in the same situation ... as if the contract had been performed',²⁷ Queen Victoria had been on the throne for barely a decade. It was not until a century had passed and the next Queen had been crowned that the common law embraced a principle of sufficient flexibility to be capable of applying the 'ruling principle' to the myriad situations constituting defective building work. That occurred in 1954 with the High Court's handing down of *Bellgrove*.

Although no comprehensive principle was established during the 19th and early 20th centuries, case law and commentary throughout this period reflected the idea that the default measure ought to be based upon the cost of rectification.²⁸ Indeed, it is Parke B himself who is credited by *McGregor on Damages* as providing the seminal statement of principle to that effect.²⁹ Sixteen years before *Robinson* and whilst a Justice of King's Bench, his Honour allowed the owner to make a deduction from the contract price on account of defective slate roofing measured by 'the sum which it would take to alter the work, so as to make it correspond with the specification.'³⁰

The rule was said by Professor Duncan Wallace to be 'perhaps best summed up' by a Canadian case dating from 1895, *Allen v Pierce*.³¹ Rejecting difference in value as the applicable measure on the basis that such would result in there being 'no point in a man contracting for the best materials', Wetmore J there stated that '[t]he owner of the building is ... entitled to recover such damages ... as will put him in a position to have just the building he contracted for.'³²

Despite this, given that, conceptually, construction work may be seen as an activity akin to the supply and installation of goods, it is perhaps surprising that diminution in value did not gain currency as the *prima facie* measure.³³ However, as Professors Tilbury, Noone and Kercher have observed, '[c]lassical

²⁷ *Robinson* (1848) 1 Exch 850, 855; 154 ER 363, 365.

²⁸ See, eg, I N Duncan Wallace, *Hudson's Building and Engineering Contracts* (10th ed, 1970) 585–7 (and the cases cited therein); A E Randall, *Principles of the Law of Contracts* (5th ed, 1906) 740 fn (d); W Wyatt-Paine, *Chitty's Treatise on the Law of Contracts* (17th ed, 1921) 942. The last of these refers to the applicable measure in this context as the 'difference between that which should have been supplied or done and the *cost* of obtaining something equally good in work or materials' (emphasis added). Davis, above n 9, 203 (citations omitted), sees the influence of the 'guiding spirit' as predating its formal statement by Parke B, noting that 'there would appear to be little doubt that it has been the guiding spirit in the assessment of damages since the early years of the 18th century.'

²⁹ McGregor, above n 9, 988 fn 31.

³⁰ *Thornton v Place* (1832) 1 Mood & R 217, 219; 174 ER 74, 75.

³¹ (1895) 3 Terr LR 319, cited in Duncan Wallace, *Hudson's* (10th ed, 1970), above n 28, 588, and Duncan Wallace, *Hudson's* (11th ed, 1995), above n 9, vol 1, 1047. Lord Millett in his Lordship's dissenting judgment in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, 591, went further, omitting the 'perhaps'.

³² *Allen v Pierce* (1895) 3 Terr LR 319, 323.

³³ The general position at common law, where goods for which there is a market are supplied in breach of contract and retained by the purchaser, is that the purchaser is entitled to 'the difference between the value of the goods as delivered, and the value they would have had if they had conformed to the contract': Seddon and Ellinghaus, above n 9, 1104.

contract theory does not cope well with situations where there is no market.³⁴ Thus, an analysis based upon difference in value becomes problematic in the construction context when the individual materials are formed into the conglomerate which constitutes the building as a whole. In turn, Professor Davis has argued that to have diminution in value as the preferred measure would rest on an assumption — which, he notes, ‘is not always borne out in real life’ — that ‘every building owner is a completely informed, economically rational, person’.³⁵

The difficulty in achieving what Professor Tilbury has termed ‘equivalence compensation’³⁶ becomes particularly acute where the losses sustained by the building owner as a result of defective work are non-economic in nature;³⁷ such a situation highlights the importance of Parke B’s acknowledgement — through the phrase ‘so far as money can do it’ — that in certain circumstances there may be limitations upon the ability to achieve substitute performance through damages.³⁸

In *Tabcorp*, the High Court noted that it was concerns of this type which underlaid the Court’s decision, half a century earlier, in *Bellgrove*.³⁹ There, the Court had emphasised that the relevant contract entitled the building owner to ‘have a building erected *upon her land* in accordance with the contract’⁴⁰ and that damages assessed according to the rectification measure — rather than that of diminution in value — were the appropriate means of giving her ‘the equivalent of a building on her land which is substantially in accordance with the contract.’⁴¹ Thus, a significant step was taken towards the establishment of a principle which has provided flexibility grounded in certainty in the ensuing decades.

C *An Unstable Building Leads to a Foundation Case: Bellgrove*

On 6 June 1949, Miss Marjorie Eldridge signed a building contract to have a home built in a seaside suburb of Melbourne.⁴² The builder committed ‘a very substantial departure from the specifications and, indeed, such a departure as to result in grave instability in the building.’⁴³ Thus legal proceedings were set in train which were to have a deep and lasting impact upon the jurisprudence of damages for breach of contract constituted by defective building work.

³⁴ Tilbury, Noone and Kercher, above n 8, 195.

³⁵ Davis, above n 9, 212.

³⁶ M J Tilbury, *Civil Remedies* (1990) vol 1, 53 (emphasis omitted).

³⁷ See generally Seddon and Ellinghaus, above n 9, 1105–6; Paterson, Robertson and Duke, above n 9, 382–3.

³⁸ As noted below in Part IV(B)(1), in *Tabcorp*, the High Court emphasised the importance of this qualification in upholding the plaintiff’s entitlement to compensation for non-pecuniary loss.

³⁹ *Tabcorp* (2009) 236 CLR 272, 287 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

⁴⁰ *Bellgrove* (1954) 90 CLR 613, 617 (Dixon CJ, Webb and Taylor JJ) (emphasis in original).

⁴¹ *Ibid.*

⁴² *Ibid* 614.

⁴³ *Ibid* 615.

Ultimately, the High Court of Australia upheld an award of damages to Miss Eldridge representing the cost of demolishing and rebuilding her house.⁴⁴ In doing so, the Court laid down the principle that, in cases of defective work, the building owner is prima facie entitled to damages representing the cost of rectification of the work so that it achieves conformity with the contract, along with any ‘appropriate consequential damages’.⁴⁵ The Court imposed two qualifications upon the application of such a measure — the work must be necessary to achieve conformity and it must be a reasonable course to adopt.⁴⁶

Where the necessary work was not a reasonable method of dealing with the situation, the Court said that ‘the true measure of the building owner’s loss will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials.’⁴⁷

D *Testing the Boundaries of Bellgrove*

1 *A Swimming Pool Muddies the Waters: Ruxley*

Some three decades after *Bellgrove*, Mr Stephen Forsyth entered into a contract to have a swimming pool built next to his house in the market town of Cranbrook, south-east of London.⁴⁸ The agreement reached with the defendant builder (trading as Home Counties Swimming Pools) was that the deep end would be 7 feet 6 inches deep. The pool originally built by a subcontractor cracked, and the builder replaced it free of charge (and, later, reluctantly agreed to a £10 000 price reduction to compensate Mr Forsyth for disturbance during the rebuilding of the pool).

The builder commenced proceedings against Mr Forsyth to recover the amount owed to him. Three days after the trial commenced, Mr Forsyth amended his

⁴⁴ Ibid 620.

⁴⁵ Ibid 617–18. McDougall J recently applied this aspect of the test in *Waterbrook at Yowie Bay Pty Ltd v Allianz Australia Insurance Ltd* [2008] NSWSC 1451 (Unreported, McDougall J, 11 December 2008) [76], noting that ‘[i]t is clear from *Bellgrove* that damages for defective work and materials, in the context of a building contract, may include consequential loss.’ Whilst this statement may, with respect, appear trite at first glance (given that the High Court had pronounced upon the issue in clear terms in *Bellgrove*), his Honour’s confirmation of its continued application (which was not disturbed on appeal: *Allianz Australia Insurance Ltd v Waterbrook at Yowie Bay Pty Ltd* [2009] NSWCA 224 (Unreported, Giles, Hodgson and Ipp JJA, 10 August 2009) [69] (Ipp JA)) offers an important measure of certainty in light of the Victorian Court of Appeal’s recent reconception of where ‘consequential loss’ sits within the limbs of *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145 (see *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* (2008) 19 VR 358, 386–9 (Nettle JA), discussed, for example, in Anais d’Arville, ‘Consequences of Excluding Consequential Loss: Australian Development’ (2008) 82 *Australian Law Journal* 697).

⁴⁶ *Bellgrove* (1954) 90 CLR 613, 618 (Dixon CJ, Webb and Taylor JJ). In a case decided shortly after *Tabcorp* was handed down, Hammerschlag J emphasised that the applicability of each limb of the qualification is a question of fact: *Campbell v C.J Cordony & Sons Pty Ltd* [2009] NSWSC 63 (Unreported, Hammerschlag J, 2 March 2009) [155].

⁴⁷ *Bellgrove* (1954) 90 CLR 613, 619 (Dixon CJ, Webb and Taylor JJ).

⁴⁸ The facts are taken primarily from Lord Lloyd’s speech in *Ruxley* [1996] AC 344, 361–3. Further insights into the background to the case were provided by I N Duncan Wallace, ‘Cost of Repair or Diminution of Value: An Intermediate Measure? (Or, the Too Shallow Deep End and How Both Sides Lost)’ (1996) 13 *International Construction Law Review* 338. See also Chandler, above n 10, 265–6.

defence and counterclaim to raise, for the first time, the issue that the diving end of the pool was only 6 feet 9 inches deep.⁴⁹ Whilst it was safe for diving, it was some nine inches shallower than had been agreed.

The trial judge, Diamond J, awarded Mr Forsyth £2500 on account of lost amenity but dismissed his counterclaim, amounting to £21 560, for the cost of rebuilding the pool.⁵⁰ By a majority, the Court of Appeal of England and Wales reversed this decision and allowed Mr Forsyth to recover damages representing that cost.⁵¹ The House of Lords restored the award of the trial judge.⁵²

In the result, therefore, the House of Lords confirmed the possibility of recovery in contractual damages for non-pecuniary loss as a third measure of damages in defective work claims.⁵³ Their Lordships also provided guidance on the circumstances in which the other measures (rectification and diminution in value) would apply.⁵⁴ Having reviewed *Bellgrove*, Lord Lloyd emphasised

the central importance of reasonableness in selecting the appropriate measure of damages. If reinstatement is not the reasonable way of dealing with the situation, then diminution in value, if any, is the true measure of the plaintiff's loss. If there is no diminution in value, the plaintiff has suffered no loss. His damages will be nominal.⁵⁵

Ruxley was generally welcomed as an advance in the law. Despite his criticisms of the case,⁵⁶ Professor Duncan Wallace anticipated that the House of Lords' judgment would 'prove to be of the greatest importance in all common law jurisdictions',⁵⁷ and Harvey McGregor saw it as an 'eminently sensible decision'.⁵⁸ Likewise, initial reviews of the case regarded *Ruxley* as opening up

⁴⁹ *Ruxley* [1996] AC 344, 362 (Lord Lloyd).

⁵⁰ *Ibid* 363.

⁵¹ *Ruxley Electronics & Construction Ltd v Forsyth* [1994] 3 All ER 801, 811 (Staughton LJ), 812 (Mann LJ). Duncan Wallace, 'Cost of Repair or Diminution of Value', above n 48, 342, pointed out, however, that Mr Forsyth claimed the cost of rectification as £33 800.

⁵² *Ruxley* [1996] AC 344, 353 (Lord Keith), 354 (Lord Bridge), 359 (Lord Jauncey), 361 (Lord Mustill), 375 (Lord Lloyd).

⁵³ See generally Ewan McKendrick and Katherine Worthington, 'Damages for Non-Pecuniary Loss' in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (2005) 287, 305–6.

⁵⁴ Moreover, Lord Mustill characterised the two measures as being examples of a single means of establishing the quantum — 'namely, the loss truly suffered by the promisee' — and emphasised that other measures may apply in appropriate circumstances: *Ruxley* [1996] AC 344, 360. His Lordship's observation resonates with the High Court's reference to the 'true measure of the building owner's damages' in *Bellgrove* (1954) 90 CLR 613, 619 (Dixon CJ, Webb and Taylor JJ) — see above n 47 and accompanying text. Duncan Wallace, 'Cost of Repair or Diminution of Value', above n 48, 348–9, was critical of *Ruxley* as being a lost opportunity to apply another alternative measure of damages, namely, 'the difference in cost to the contractor of providing the work contracted for as against the work actually carried out' (at 339). This measure could, he proposed, prove appropriate in cases where the owner had in fact paid a premium (and thereby increased the contractor's profit) for something, such as doubly strong foundations, which went more to the owner's peace of mind than increasing the objectively determined intrinsic value of the works: at 340. See also Duncan Wallace, *Hudson's* (10th ed, 1970), above n 28, 589; Duncan Wallace, *Hudson's* (11th ed, 1995), above n 9, vol 1, 723.

⁵⁵ *Ruxley* [1996] AC 344, 368.

⁵⁶ See above n 54.

⁵⁷ Duncan Wallace, 'Cost of Repair or Diminution of Value', above n 48, 341.

⁵⁸ McGregor, above n 9, 990.

the possibility of greater flexibility in the assessment of damages.⁵⁹ As will be seen below, however,⁶⁰ *Ruxley*'s influence has — at least in Australia — waned somewhat in the light of *Tabcorp*.

2 Intention and Ability to Rectify: Difficult Issues Make for Difficult Law

By the time *Tabcorp* reached the High Court, it was firmly established that Bowen Investments was 'adamant that the foyer should be reinstated.'⁶¹ Hence, the matter received scant explicit attention in the judgment,⁶² placing it beyond the core scope of this article.

Having said that, it seems fair to say that the greatest controversies in the law relating to defective building work damages over the past half-century have related to the issue of the plaintiff's intention and ability to rectify.⁶³ Moreover, and as discussed below in Part III(C), in *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* ('*Bowen*') (which was affirmed in *Tabcorp*) each of the judgments, especially that of Rares J, discusses the matter in detail. It is therefore worthwhile at least putting the issue in its context.

The issues have their root in the potential for two competing objectives to come into conflict. On the one hand, stemming from the 'ruling principle', the court has an overriding objective to ensure that defective work damages 'reflect, as accurately as the circumstances allow, the loss which the claimant has sustained because he did not get what he bargained for.'⁶⁴ On the other hand, there exists a legitimate anxiety to avoid a situation where 'the owner can keep and use the technically defective, but practically useful, work and, at the same time, have the whole of the cost of its rectification in his or her pocket.'⁶⁵

In *Bellgrove*, the Court dismissed as 'quite immaterial' the possibility that Miss Eldridge might retain the damages award and not undertake the rectification work,⁶⁶ in other words, the intentions of the plaintiff in relation to use of the award were irrelevant to the Court's decision as to which measure of damages was applicable. In *Ruxley*, however, their Lordships were not so willing to

⁵⁹ Chandler, above n 10, 255. Likewise, Sir Jack Beatson regarded the position in the light of *Ruxley* as allowing the assessment of 'the loss truly suffered by the claimant' in situations where 'the claimant's purpose in contracting is non-monetary' — in particular, for recovery of the so-called 'consumer surplus': J Beatson, *Anson's Law of Contract* (28th ed, 2002) 597–8 (citations omitted).

⁶⁰ See especially below Part IV(B)(3).

⁶¹ *Bowen* (2008) 166 FCR 494, 502 (Finkelstein and Gordon JJ).

⁶² Clarke has proposed, however, that the Court plainly took account of Mrs Bergamin's evidence in this regard, effectively upholding through the damages award her stated desire to have the foyer reinstated: Clarke, above n 2, 13. Moreover, as noted below in Part III(C)(2), the intention to reinstate underpinned the decision of the Full Federal Court (which was affirmed by the High Court): intention was explicitly identified by Finkelstein and Gordon JJ to be one of two key factors in their decision (*Bowen* (2008) 166 FCR 494, 502), and the matter was also discussed in detail by Rares J (at 519–23).

⁶³ A detailed recent survey of the relevant authorities and commentaries on this issue is provided by Rares J in *Bowen* (2008) 166 FCR 494, 520–3. See also *Building Insurers' Guarantee Corporation v Owners, Strata Plan No 57504* [2010] NSWCA 23 (Unreported, Tobias, Campbell JJA and Handley AJA, 15 March 2010) [51]–[58] (Handley AJA).

⁶⁴ *Ruxley* [1996] AC 344, 353 (Lord Bridge).

⁶⁵ *Bowen* (2008) 166 FCR 494, 518 (Rares J).

⁶⁶ *Bellgrove* (1954) 90 CLR 613, 620 (Dixon CJ, Webb and Taylor JJ).

disregard the distinct possibility that Mr Forsyth might not apply any damages award to the reinstatement of the pool.⁶⁷ Lord Jauncey expressed the concern that the Court might be creating a windfall for Mr Forsyth, noting that he

has acquired a perfectly serviceable swimming pool ... His loss is thus not the lack of a useable pool with consequent need to construct a new one. Indeed were he to receive the cost of building a new one and retain the existing one he would have recovered not compensation for loss but a very substantial gratuitous benefit, something which damages are not intended to provide.⁶⁸

Moreover, Lord Lloyd characterised the situation, if damages were awarded without an intention to rebuild, as one where Mr Forsyth would be ‘creat[ing] a loss, which does not exist, in order to punish the defendants for their breach of contract’⁶⁹ — in other words, such an award would stray from being compensatory to becoming punitive. To his Lordship, whilst he ‘fully accept[ed] that the courts are not normally concerned with what a plaintiff does with his damages ... it does not follow that intention is not relevant to reasonableness, at least in those cases where the plaintiff does not intend to reinstate.’⁷⁰

III *TABCORP*: BACKGROUND TO THE HIGH COURT PROCEEDINGS

A *Demolition of Foyer*

The stage on which the drama of the *Tabcorp* series of cases played out is the foyer of a commercial building in the St Kilda Road business district of Melbourne.

On 14 July 1997, Mrs Mary Bergamin (a director of Bowen Investments, the owner of the building) arrived for a meeting to discuss with Tabcorp’s personnel and consultants its proposals to alter the foyer. Even though she was a few minutes early for the meeting, Mrs Bergamin was already too late to stop the destruction of the foyer. As the High Court noted,

she found that the foyer of the building had been badly damaged. A glass and stone partition, timber panelling and stone floor tiles had been removed. She was shocked and dismayed to see what remained of the floor stone work being jack hammered. A large bin was filled with the debris of the foyer.⁷¹

⁶⁷ Mr Forsyth had taken a somewhat ambivalent stand in this respect — as Lord Lloyd noted in *Ruxley* [1996] AC 344, 362–3, 372–3, he eventually gave an undertaking that he would apply any damages to reinstatement, but the trial judge found as a matter of fact that no such intention would persist after the litigation was concluded.

⁶⁸ *Ibid* 358. As noted below in Part V(B)(3), this passage was relied upon by the trial judge in *Willshree v Westcourt Ltd* [2008] WASC 18 (Unreported, Templeman J, 22 February 2008) [335]–[336] in finding that the plaintiff in that case was not entitled to damages assessed by the rectification measure.

⁶⁹ *Ruxley* [1996] AC 344, 373.

⁷⁰ *Ibid* 372. Lord Jauncey expressed a similar view at 359.

⁷¹ *Tabcorp* (2009) 236 CLR 272, 282 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ). Perhaps the most detailed descriptions of the course of events to be found in the various judgments are those of Rares J in *Bowen* (2008) 166 FCR 494, 503–4, 507–10, and Tracey J at

In the words of Finkelstein and Gordon JJ, hearing (along with Rares J) the appeal from Tracey J's judgment, Tabcorp had 'not bother[ed] obtaining [Bowen Investments's] approval to begin the alteration works — it simply went ahead and demolished the foyer.'⁷² This unauthorised action was found at trial to constitute a breach of cl 2.13 of the lease,⁷³ by which Tabcorp covenanted:

Not without the written approval of the Landlord first obtained (which consent shall not be unreasonably withheld or delayed) to make or permit to be made any substantial alteration or addition to the Demised Premises.⁷⁴

Moreover, the foyer (which, despite written warnings from Bowen Investments, Tabcorp subsequently went on to fully demolish and refurbish)⁷⁵ had been the subject of 'particular care ... and interest' by Mrs Bergamin during its construction.⁷⁶ It was, noted the High Court, 'of high quality. It was made of special materials — San Francisco Green granite, Canberra York Grey granite, and sequence-matched crown-cut American cherry.'⁷⁷ Regardless of its aesthetic qualities, however, Tabcorp's Chief Executive Officer had taken the view, as was observed by Tracey J at trial, that 'the foyer area required a total redesign in order to project what he perceived to be Tabcorp's image as a progressive, technologically advanced business.'⁷⁸

Bowen Investments sought damages of \$1.38 million, calculated as the estimated cost of reinstatement of the foyer to its original condition (\$580 000) along with the loss of rental income during the reinstatement works (\$800 000).⁷⁹

B Trial

At trial, Bowen Investments sought to make its case against Tabcorp by alleging numerous causes of action, including actions under the *TPA*.⁸⁰ By the time the case came to the High Court, however, all of these had fallen away except the claim based upon Tabcorp's breach of the lease.⁸¹ For the purposes of this article, therefore, only the contractual claim will be examined.

trial in *Bowen Investments* [2007] FCA 708 (Unreported, Tracey J, 18 May 2007) [23]–[33]. The 'shock and dismay' reference picked up by the High Court comes from Tracey J's judgment at [33] and was reiterated by Rares J in *Bowen* (2008) 166 FCR 494, 510.

⁷² *Bowen* (2008) 166 FCR 494, 498.

⁷³ *Bowen Investments* [2007] FCA 708 (Unreported, Tracey J, 18 May 2007) [81]. See also below Part III(B).

⁷⁴ *Tabcorp* (2009) 236 CLR 272, 283 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

⁷⁵ *Ibid* 282. See also Marc Pallisco and Chris Vedelago, 'Tabcorp Loses Marathon Dispute with Landlord', *The Age* (Melbourne), 28 February 2009, 22.

⁷⁶ *Tabcorp* (2009) 236 CLR 272, 282 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

⁷⁷ *Ibid*.

⁷⁸ *Bowen Investments* [2007] FCA 708 (Unreported, Tracey J, 18 May 2007) [29].

⁷⁹ *Ibid* [90].

⁸⁰ These are summarised at *ibid* [55].

⁸¹ As was noted by Finkelstein and Gordon JJ in *Bowen* (2008) 166 FCR 494, 498, the *TPA* claims were found to be statute-barred. However, the claim in contract was able to proceed — counsel for Tabcorp noted his client's concession that a 15-year limitation period applied (presumably on

Bowen Investments based its claim upon cl 2.13 of the lease;⁸² as noted above, this prohibited Tabcorp from making any substantial alteration or addition to the demised premises without the landlord's prior consent. Tracey J found that a breach of this provision occurred by dint of the demolition work on 14 July⁸³ and that the continuation of the work despite Bowen Investments's protests constituted a further breach.⁸⁴

The difficulty for Bowen Investments, however, was that Tracey J regarded the law applicable to calculation of damages for these breaches as being derived from *Joyner v Weeks* ('*Joyner*'),⁸⁵ a Victorian-era case which — as was noted by the High Court⁸⁶ — had been referred to by neither party. Along with *Evans v Balog*,⁸⁷ *Joyner* was cited by Tracey J as the basis for the proposition that, in order for a plaintiff to recover reinstatement-based damages, it needed to prove a 'special interest in reinstatement arising from a radical change to the usage to which the property can be put following renovations by the tenant'.⁸⁸

As Bowen Investments was unable to establish this, and Tracey J also found that the unauthorised renovation was unlikely to lead to any substantial diminution in the value of the building by the time Tabcorp's tenancy ended, the plaintiff landlord was awarded only nominal damages for the breach, amounting to \$1000.⁸⁹

C Full Court

The Full Court of the Federal Court of Australia took a significantly different approach to the circumstances of the case than Tracey J had at trial, with the upshot that Bowen Investments was awarded the \$1.38 million it had originally sought.⁹⁰

Their Honours needed to unravel a number of complicated jurisprudential and procedural matters in order to reach this result⁹¹ — as Rares J noted, '[w]hat should have been a relatively straightforward case of construing the lease in

the basis that the lease was in the form of a deed): *Tabcorp* (2009) 236 CLR 272, 273 (N J Young QC).

⁸² *Bowen Investments* [2007] FCA 708 (Unreported, Tracey J, 18 May 2007) [77].

⁸³ *Ibid* [81].

⁸⁴ *Ibid* [84].

⁸⁵ [1891] 2 QB 31.

⁸⁶ *Tabcorp* (2009) 236 CLR 272, 283 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

⁸⁷ [1976] 1 NSWLR 36.

⁸⁸ *Bowen Investments* [2007] FCA 708 (Unreported, Tracey J, 18 May 2007) [92] (citations omitted).

⁸⁹ *Ibid* [103]. Bowen Investments was, however, awarded \$33 820 to restore a wall, the movement of which by Tabcorp during the renovations caused a reduction in the net lettable area of the building.

⁹⁰ *Bowen* (2008) 166 FCR 494, 503 (Finkelstein and Gordon JJ).

⁹¹ This included the Court's taking the step, unusual in the appellate context, of itself calculating the quantum of the damages award (albeit that it was identical to the amount claimed by the landlord) rather than remitting such a matter to the trial level. Finkelstein and Gordon JJ noted that such action was appropriate here in view of the claim being relatively small and the costs already accrued in the matter large: *ibid* 501.

accordance with ordinary principles ... regrettably became beset with confusion.⁹²

1 *Application of Joyner*

The primary legal issue to be dealt with, in the Full Court's view, was that the trial judge had misconstrued the applicable principle, being that, where a repair covenant is breached at or near the termination of the lease, the prima facie rule, as 'firmly established in *Joyner* ...', is that the landlord is entitled to recover the cost of repairs.⁹³

Underpinning the Full Court's conception of the application of *Joyner* as being the key issue for resolution was its view that there was 'no meaningful distinction between a full repair covenant and cl 2.13, at least as regards the extent to which the clause prohibits alterations or additions without approval.'⁹⁴

The Full Court's approach to *Joyner* was reliant upon viewing the lease as being close to its conclusion — as Finkelstein and Gordon JJ acknowledged, where the tenancy is continuing, the prima facie measure for assessment of damages for breach of the repair covenant is diminution in value.⁹⁵ This view was available to the Court, despite the fact that the lease had been renewed in 2006 so as to expire either five or 10 years later,⁹⁶ because of the 'important condition' included in the renewal agreement to the effect that the renewal of the lease did not prejudice the litigation proceedings in relation to the foyer.⁹⁷

2 *Interplay with the 'Building Cases'*

Whilst, as noted above, the Full Court's conception of the applicable provision of the lease as being a repair covenant meant that it was bound by *Joyner*, both of the judgments refer to the principles in *Bellgrove* in reaching their conclusion as to damages.

⁹² Ibid 504.

⁹³ Ibid 499 (citations omitted).

⁹⁴ Ibid 500. As discussed further below in Part IV(B)(2), the High Court did not support this approach, evidently regarding cl 2.13 as having a function distinct from that of the repair covenant. The Court saw cl 2.13 as serving 'a function of considerable practical utility in relation to the Landlord's capacity to protect its legitimate interest in preserving the physical character of the premises leased': *Tabcorp* (2009) 236 CLR 272, 285 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ). In turn, the High Court did not engage with the Full Court's (or, for that matter, Tracey J's) conception of the application of *Joyner*.

⁹⁵ *Bowen* (2008) 166 FCR 494, 499. Thus, the dichotomy in damages assessment based upon the timing of the breach continues to be recognised in those Australian jurisdictions — being all states and territories except NSW (see *Conveyancing Act 1919* (NSW) s 133A(1)) and Queensland (see *Property Law Act 1974* (Qld) s 112(1)) — which have not enacted provisions along the lines of s 18(1) of the *Landlord and Tenant Act 1927*, 17 & 18 Geo 5, c 36, which provides that damages are not to exceed the diminution in value of the reversion: see, eg, B J Edgeworth et al, *Sackville and Neave Australian Property Law* (8th ed, 2008) 791–2; Charles Harpum, Stuart Bridge and Martin Dixon, *The Law of Real Property* (7th ed, 2008) 902–4.

⁹⁶ *Bowen* (2008) 166 FCR 494, 501–2 (Finkelstein and Gordon JJ).

⁹⁷ Ibid 502. Their Honours went on to note that though '[t]his means that damages must be assessed in an artificial environment ... [this was] simply the bargain the parties [had] struck.' Peter Butt concurs with this assessment: Peter Butt, 'Damages for Breach of Covenant against Altering Premises without Landlord's Consent' (2008) 82 *Australian Law Journal* 513, 514.

Finkelstein and Gordon JJ appeared (without referring explicitly to *Bellgrove*) to indicate their preference for a basis for assessing damages which would apply generally to ‘work done (or not done) or damage caused to property in breach of contract’ — namely, reinstatement cost and diminution in value.⁹⁸ In a statement reminiscent of Lord Mustill’s comment in *Ruxley* that the two measures are not exhaustive,⁹⁹ they then went on to note that ‘[t]he correct measure is whatever is reasonable for the wronged party to recover.’¹⁰⁰

Rares J emphasised that *Bellgrove* provides ‘a different test to that provided by the rule in *Joyner* ... and *Graham*’¹⁰¹ and — presumably alluding to the possibility that *Bellgrove* might overtake *Joyner* as stating the common law position¹⁰² — that only the High Court is in a position to ‘develop the law of landlord and tenant to take account of later developments’.¹⁰³ Clearly, however, his Honour saw the ‘building cases’ as relevant to the assessment of damages in *Bowen*,¹⁰⁴ especially as to the landlord’s intention to rectify.¹⁰⁵

Ultimately, therefore, all three judges had recourse to the reasonableness of Bowen Investments’s insistence upon rectification in deciding that the prima facie measure under *Joyner* — reinstatement — was not to be displaced here.

Finkelstein and Gordon JJ referred explicitly to Mrs Bergamin’s being ‘adamant that the foyer should be reinstated’ — and the reasonableness of such an attitude — as one of two key factors in its decision.¹⁰⁶ However, they rejected ‘the view that objective reasonableness is to be determined solely from the viewpoint of an hypothetical rational economic actor’,¹⁰⁷ saying that it was

no answer to say that we are dealing with a commercial building. All over the world there are many beautiful commercial buildings. ... From a businessper-

⁹⁸ *Bowen* (2008) 166 FCR 494, 503.

⁹⁹ See above n 54.

¹⁰⁰ *Bowen* (2008) 166 FCR 494, 503. Having said that, it seems from the discussion which follows that statement, concerning the factors pertinent to the choice between those two measures, that their Honours were here referring to the choice of ‘correct’ measure as being between those two, rather than leaving the field open by having reasonableness as the sole criterion.

¹⁰¹ *Ibid* 519 (citations omitted); see also at 524–5. His Honour is referring here to *Graham v The Markets Hotel Pty Ltd* (1943) 67 CLR 567, 582 (Latham CJ), in which *Joyner* was applied by the High Court.

¹⁰² As noted below in Part IV(A), it underpinned Tabcorp’s submissions to the High Court (both upon the special leave application and upon appeal) that *Joyner* be supplanted by the principles generally applicable to assessment of contract damages. However, as discussed below in Part IV(B)(2), this desire was only partially realised in the approach of the High Court, through the extension of the *Bellgrove* principle to breach of non-alteration covenants rather than the repair covenants to which *Joyner* applies.

¹⁰³ *Bowen* (2008) 166 FCR 494, 525.

¹⁰⁴ See *ibid* 524.

¹⁰⁵ *Ibid* 519–23, where Rares J provided a detailed survey of these cases, including discussion of the significant recent decisions in *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253 (Unreported, Giles, McColl and Campbell JJA, 20 September 2007) (‘*Westpoint*’) and *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158.

¹⁰⁶ *Bowen* (2008) 166 FCR 494, 502.

¹⁰⁷ *Ibid* 503.

son's perspective a new structure may be as good as an old. But the view of a businessperson is not the only view that is important.¹⁰⁸

Rares J recognised that, in order to avoid creating 'commercial uncertainty' through 'use of a plaintiff's subjective intentions as to what will be done with the award as a criterion for assessing his or her entitlement to damages for a breach of contract',¹⁰⁹ application of the test needs to be grounded in objectivity. His Honour sought to reconcile the subjective and objective elements by reference to the parties' bargain, noting that '[r]easonableness goes to whether the performance provided, defective as it was, ought be corrected having regard to the objective intentions of the parties discerned from their contract.'¹¹⁰

In other words, so long as a matter of personal taste is enshrined in the contract, 'the other contracting party is not usually at liberty to depart from that specification in performing the work.'¹¹¹ His Honour observed that '[t]he purpose of the law of contract is to enforce bargains, good or bad, according to their terms. It is not to enforce or ignore what the subjective views of a party might be.'¹¹² This is a passage which was to find resonance in the High Court's judgment.¹¹³

IV *TABCORP* IN THE HIGH COURT

A *Special Leave Application*

By the time the decision of the Full Federal Court was handed down, it had been more than half a century since Miss Eldridge's case had come before the High Court. Other cases on defective work had reached Australia's court of final appeal, but none had established any significant new principle.¹¹⁴

On 11 August 2008, the High Court granted Tabcorp special leave to appeal. Mr Young QC, for Tabcorp, submitted that such leave provided an opportunity to ventilate the issue of whether the rule in *Joyner* should be replaced with the general principles for assessment of damages for defective work.¹¹⁵ Crennan J observed during her Honour's exchanges with counsel that 'there have been developments in the common law, as in *Bellgrove's Case*, in relation to the

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid* 520.

¹¹⁰ *Ibid* 522. Here, Rares J takes issue with Giles JA's conception of intention as being relevant 'for the light it sheds on whether the rectification is necessary and reasonable' (*Westpoint* [2007] NSWCA 253 (Unreported, Giles, McColl and Campbell JJA, 20 September 2007) [60]). Rares J's concern seems to be that this view, taking into account as it would that, for example, the plaintiff changed his or her mind about the desirability of what they originally specified in the contract, tends to distract from the key enquiry — rectification of the breach of contract.

¹¹¹ *Bowen* (2008) 166 FCR 494, 519–20 (Rares J).

¹¹² *Ibid* 520.

¹¹³ See *Tabcorp* (2009) 236 CLR 272, 290 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

¹¹⁴ See, eg, *Carosella v Ginos & Gilbert Pty Ltd* (1982) 47 ALR 761 (commented upon in Cremean, Shnookal and Whitten, above n 9, 191), in which the Court found no reason to interfere with the finding at trial that the cost of rectification was the appropriate measure of damages.

¹¹⁵ *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2008] HCATrans 266 (1 August 2008) 78–95.

measure of damages in building and land matters reflecting more closely [the] general approach to contract.’¹¹⁶

The scene appeared set, therefore, for a comprehensive consideration of the appropriate means of assessing damages by the only Court within the Australian system in a position to provide authoritative reconsideration of the application of *Bellgrove*.

B Judgment of the High Court

1 Overview

On 12 February 2009, the High Court handed down a joint judgment, finding in favour of Bowen Investments and dismissing all aspects of Tabcorp’s appeal,¹¹⁷ thus securing the landlord’s judgment of \$1.38 million as awarded by the Full Federal Court.

As noted below, the Court did not engage with many aspects of the Full Court’s decision; rather, the Court said, in respect of Tabcorp’s ‘numerous complaints about the reasoning of the Full Court’, that it was ‘convenient to put them on one side for the moment, because there is one short ground on which the Full Court’s orders are plainly to be supported.’¹¹⁸ The focus of the Court’s analysis, therefore, was upon the consequences of Tabcorp’s breach of cl 2.13 — the covenant against unauthorised alterations.

Based upon Tabcorp’s appeal submissions, however, there were a number of matters which, potentially, could have been the subject of broadly applicable guidance from the High Court in this case. These included:

- 1 whether *Joyner*, as a rule applicable to breach of repair covenants, remains good law in those jurisdictions (including Victoria) in which the operation of the rule has not been modified by statute, or whether it should be eschewed in favour of the application of the *Bellgrove* principle;¹¹⁹
- 2 whether Bowen Investments’s failure to run a case that emphasised the aesthetic value of the foyer should be taken into account in determining the applicable measure of damages (which, in turn, anticipated analysis relating to *Ruxley*);¹²⁰ and
- 3 in respect of the two limbs of *Bellgrove*, whether:

¹¹⁶ Ibid 380–3.

¹¹⁷ *Tabcorp* (2009) 236 CLR 272. The Court comprised French CJ, Gummow, Heydon, Crennan and Kiefel JJ. It is respectfully noted that, whilst some questions remain unresolved, the judgment represents a beacon of clarity, brevity (running to a mere 27 paragraphs, or 11 pages in the *Commonwealth Law Reports*) and speed of delivery (having been handed down barely two months after the appeal was heard).

¹¹⁸ Ibid 285 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ) (emphasis added).

¹¹⁹ See *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2008] HCATrans 395 (2 December 2008) 1416–77 (Gummow, Crennan JJ and N J Young QC). This argument is also set out in detail in *ibid* 274–7 (N J Young QC).

¹²⁰ See *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2008] HCATrans 395 (2 December 2008) 263–329 (Crennan J and N J Young QC).

- (a) ‘necessity’ referred to a requirement that it ‘must be necessary that conformity be achieved’¹²¹ — that is, raising an enquiry as to whether conformity was necessary; and
- (b) it would be regarded as an example of rectification not being a ‘reasonable course to adopt’¹²² where the cost of the rectification work exceeds the amount which would have been recoverable on the diminution in value test.

These three issues are discussed in detail below in Parts IV(B)(2)–(4); as indicated there, the High Court dealt explicitly with issues 2 and 3 and, as characterised by Professor Butt, ‘sidestepped’ the continued applicability of *Joyner*.¹²³

By way of overview, the bulk of the judgment is concerned with dissecting *Tabcorp*’s submission that ‘the appropriate measure of damages was the diminution in value of the reversion’.¹²⁴ The Court commenced by characterising that submission as being based upon an assumption ‘dignified as “the doctrine of efficient breach”’¹²⁵ — that is, ‘anyone who enters into a contract is at complete liberty to break it provided damages adequate to compensate the innocent party are paid.’¹²⁶ The Court criticised this assumption primarily on the basis that it ‘takes no account of the existence of equitable remedies, like decrees of specific performance and injunction, which ensure or encourage the performance of contracts rather than the payment of damages for breach.’¹²⁷

The balance of the main part of the judgment, proceeding from the statement that *Tabcorp*’s submission ‘misunderstands the common law in relation to damages for breach of contract’,¹²⁸ essentially serves to bring *Bowen Investments*’s complaint within the fold of the *Bellgrove* test. The sequence of reasoning commences with the ‘ruling principle’; the Court then observes — referring to Oliver J’s emphasis in *Radford v De Froberville* (*Radford*) that Parke B’s reference to ‘the same situation’ did not necessarily mean ‘as good a financial position’¹²⁹ — that diminution in value damages will not satisfy that principle where (as here) ‘the contract is not for the sale of marketable commodities’.¹³⁰ The Court therefore identified *Bellgrove* as setting out the applicable principle.¹³¹ In turn, the Court concluded that:

¹²¹ See *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2008] HCATrans 396 (3 December 2008) 4024 (D M J Bennett QC).

¹²² See *ibid* 4039 (emphasis added).

¹²³ Butt, ‘Breach of Covenant against Alterations’, above n 1, 365.

¹²⁴ *Tabcorp* (2009) 236 CLR 272, 285 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

¹²⁵ *Ibid* 286. On efficient breach, see generally Paterson, Robertson and Duke, above n 9, 393–4, and for *Tabcorp*’s treatment of the subject, see Papamatheos, above n 1, 398–401.

¹²⁶ *Tabcorp* (2009) 236 CLR 272, 285 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

¹²⁷ *Ibid* 286.

¹²⁸ *Ibid*.

¹²⁹ *Ibid*, citing *Radford* [1978] 1 All ER 33, 44 (emphasis in original).

¹³⁰ *Tabcorp* (2009) 236 CLR 272, 286 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ). See also above Part II(B).

¹³¹ See *Tabcorp* (2009) 236 CLR 272, 287 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

here, the Landlord was contractually entitled to the preservation of the premises without alterations not consented to; its measure of damages is the loss sustained by the failure of the Tenant to perform that obligation; and that loss is the cost of restoring the premises to the condition in which they would have been if the obligation had not been breached.¹³²

The remainder of the judgment is concerned with explaining why *Bellgrove*'s dual qualification to the application of the rectification measure did not apply here¹³³ and dealing with certain other ancillary matters.¹³⁴

2 Application of *Bellgrove* to Lease Covenants

As noted above,¹³⁵ the High Court did not share the Full Court's conception that cl 2.13 was, in effect, synonymous with a repair covenant. In turn, the Court was able to avoid engagement with issues of the continued applicability of *Joyner* in jurisdictions where the common law has not been overtaken by statute.¹³⁶

Professor Butt has noted that *Tabcorp* therefore 'leaves open some tantalising issues about damages for breach of a covenant to *repair*.'¹³⁷ This is largely because the Court did not take up the exhortation of Mr Young QC, counsel for *Tabcorp*, to rule that, in the application of the common law to repair covenants, *Bellgrove* should supersede the rule in *Joyner*. The thrust of his submission was that *Joyner* was redundant and promoted injustice whereas *Bellgrove* 'is a flexible rule that allows the court to consider the best measure in the circumstances of the case to arrive at the true loss.'¹³⁸

Had he needed to do so in the context of the appeal, it would seem to have been justifiable for Mr Young QC to extend this critique of *Joyner* to *Turner v Lamb*.¹³⁹ This is the early Victorian-era case which provides the rationale for damages for breach of repair covenants during the lease being based upon the diminution in value of the reversion. As expressed by Finkelstein and Gordon JJ, the reason for this preference is that 'the landlord is not bound to

¹³² Ibid (citations omitted).

¹³³ See below Part IV(B)(4).

¹³⁴ These matters were: *Bowen Investments*'s case under s 38 of the *Supreme Court Act 1986* (Vic), which, ultimately, the Court decided was better not dealt with given that the Full Court's orders were upheld (*Tabcorp* (2009) 236 CLR 272, 290–1 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ)); the possibility that *Tabcorp* may have been entitled to a 'betterment discount' upon the damages payable in recognition that, if the building was restored at the end of the lease, *Bowen Investments* would then have a new foyer whereas, if the lease had not been breached, the foyer would have been subjected to wear and tear for 15 or 20 years (as *Tabcorp* had not argued this, however, the Court decided that 'nothing more need be said on the subject': at 291 — this aspect of *Tabcorp* has been referred to in *Great Wall Resources Pty Ltd v O'Sullivan* [2009] NSWCA 119 (Unreported, Giles, Ipp and Macfarlan JJA, 4 June 2009) [22] (Macfarlan JA)); and the date for assessment of damages (whilst the Court outlines certain of the applicable principles, the fact that *Tabcorp* did not seek to argue the point meant that it did not need to be considered: *Tabcorp* (2009) 236 CLR 272, 291–2).

¹³⁵ See above n 94.

¹³⁶ See above n 95 for the relevant statutory provisions.

¹³⁷ Butt, 'Breach of Covenant against Alterations', above n 1, 366 (emphasis in original).

¹³⁸ *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2008] HCATrans 395 (2 December 2008) 1468–9. See also *Tabcorp* (2009) 236 CLR 272, 277 (N J Young QC).

¹³⁹ (1845) 14 M & W 412; 153 ER 535.

expend any money recovered as damages in carrying out the repairs and whatever he recovers beyond his reversionary interest is regarded as excess compensation'.¹⁴⁰

It will be noted that this basis sits contrary to the view expressed in *Bellgrove* that the purpose to which the damages are put by the plaintiff is irrelevant to the quantum assessed. However, it does appear to reflect a view that the landlord's interest in the reversion is almost exclusively economic — hence, leading commentators speak of the potential for 'injustice' in the way in which the *Joyner* rule allows the landlord to 'recover the cost of repairs, even though the failure to repair may not have affected the value of the reversion'.¹⁴¹

As noted in the following section, the High Court rejected the wholesale application of 'economically rationalist' theories to the situation in *Tabcorp*.¹⁴² In light of the analysis being taken to that point, it may fairly be surmised that it is not only *Tabcorp* and its counsel who have cause to feel somewhat disappointed that the Court did not go on to engage directly with whether *Joyner* remains good law. That, however, was evidently regarded by at least one Justice as 'a second order sort of question'.¹⁴³

Nonetheless, *Tabcorp*'s confirmation that the breach of a lease covenant against unauthorised alteration falls within the bailiwick of *Bellgrove* may be expected to have a not insignificant practical impact — as Professor Butt has observed, in the states (New South Wales and Queensland) where the landlord's right of recovery is limited by statute in respect of repair covenants,

if the facts and the wording of the particular lease entitles the landlord to sue for breach of either covenant, it would be better for the landlord to seek damages for breach of a no-alterations provision than breach of a repair covenant.¹⁴⁴

3 *Aesthetic Aspects: Ruxley Distinguished*

Tabcorp sought to argue that Bowen Investments had not made a case that its interest in the building (and therefore the foyer) was in the building's particular aesthetic qualities as opposed to its investment potential;¹⁴⁵ by contrast, the trial

¹⁴⁰ *Bowen* (2009) 166 FCR 494, 499 (Finkelstein and Gordon JJ) (citations omitted); see also at 527 (Rares J).

¹⁴¹ Edgeworth et al, above n 95, 791–2. Rares J likewise speaks of the 'harshness of this principle on tenants': *ibid* 505.

¹⁴² As had Finkelstein and Gordon JJ in the Full Court: see above Part III(C)(2).

¹⁴³ *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2008] HCATrans 395 (2 December 2008) 1116 (Heydon J).

¹⁴⁴ Butt, 'Breach of Covenant against Alterations', above n 1, 366. This reflects the note by Papamatheos, above n 1, 399, that the statutory restrictions may 'work an injustice in an exceptional case such as [*Tabcorp*] where the landlord had particularly unique premises that were altered.'

¹⁴⁵ *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2008] HCATrans 395 (2 December 2008) 263–329 (Crennan J and N J Young QC).

judge had found that Bowen Investments *did* regard the construction and leasing of the building as a commercial concern.¹⁴⁶

The High Court did not engage directly with whether, in fact, Bowen Investments had established that its contractually reflected interests extended beyond the purely commercial. That the Court was satisfied as to such establishment does, however, seem clear from (for example) the preamble to the judgment, in which the Court notes that Mrs Bergamin was ‘shocked and dismayed’ by the demolition of the foyer.¹⁴⁷ It therefore gave short shrift to Tabcorp’s submission, quoting at some length a passage from *Radford* which included the following:

It may be that another person might say that what the plaintiff has stipulated for will not serve his commercial interests so well as some other scheme or course of action. And that may be quite right. But that, surely, must be for the plaintiff to judge. *Pacta sunt servanda*.¹⁴⁸

Tabcorp may, therefore, be seen as supporting a proposition that defective work which disappoints expectations lacking an easily reckoned monetary value will nonetheless be compensated by an award of rectification damages, so long as such expectations have been clearly expressed as anticipated outcomes within a binding contract. The proposition must be further qualified, however, by reference to *Bellgrove*’s dual proviso — especially that achieving the plaintiff’s aesthetic desires must not be unreasonable. Nonetheless, the Court has made clear that it is only matters akin to a plaintiff’s wish to replace new with second-hand bricks which might trigger this limb such that the plaintiff’s right to rectification damages might be denied.¹⁴⁹

A proposition that non-pecuniary damage may be protected in this way was by no means beyond doubt prior to *Tabcorp*. This was, primarily, due to the potential for *Ruxley* to be an obstacle to a claim by a disgruntled plaintiff where, as here, the circumstances substantially met those put forward by the House of Lords as justifying the refusal to award rectification damages.¹⁵⁰ Counsel for Tabcorp may, therefore, reasonably have considered themselves justified in

¹⁴⁶ *Bowen Investments* [2007] FCA 708 (Unreported, Tracey J, 18 May 2007) [102]. See also *Tabcorp* (2009) 236 CLR 272, 287 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

¹⁴⁷ *Tabcorp* (2009) 236 CLR 272, 282 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ). See also above n 71.

¹⁴⁸ *Tabcorp* (2009) 236 CLR 272, 288 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ) (emphasis added), quoting *Radford* [1978] 1 All ER 33, 42 (Oliver J) (*pacta sunt servanda* may be understood to mean ‘promises are to be kept’). The similarity of this statement to Rares J’s exhortation in the Full Court decision to ‘enforce bargains, good or bad, according to their terms’ (*Bowen* (2008) 166 FCR 494, 520) is striking: see above Part III(C)(2).

¹⁴⁹ For further discussion, see below Part IV(B)(4)(b).

¹⁵⁰ Namely, in terms of the factors identified by Lord Jauncey in *Ruxley* [1996] AC 344, 354–5: the foyer was serviceable despite the breach; the plaintiff’s pecuniary loss was nominal; rectification could not be achieved without demolition and rebuilding; and the cost of such rectification was (at least in purely economic terms) wholly disproportionate to the disadvantage. Having said that, the Law Lords also identified doubt as to whether Mr Forsyth intended to apply the damages to the rectification (see above n 67), a factor which — as was noted above in Part II(D)(2) — did not apply in *Tabcorp* given Mrs Bergamin’s adamant that the foyer be restored.

relying upon *Ruxley* in their submissions before the Court, and especially in their emphasis on the importance of proportionality.¹⁵¹

Assuming that *Ruxley* did indeed stand athwart the path to Bowen Investments's recovery of rectification damages, the High Court was, conceptually, faced with two options: to engage directly with the case and whether it represented good law in Australia, or to distinguish it. The Court took the latter approach. The Court observed that, whilst in *Ruxley* their Lordships had appeared to accept the principles laid down in *Radford* (which, as noted above, underpinned the High Court's own reasoning), the 'result at which their Lordships arrived is on one view inconsistent with those principles'.¹⁵² Nonetheless, the Court's view was that 'for present purposes it is sufficient to say that the facts of *Ruxley* ..., which their Lordships evidently saw as quite exceptional, are plainly distinguishable from those of the present appeal.'¹⁵³

It may fairly be regarded as something of a missed opportunity that the Court chose to distinguish *Ruxley* rather than confront it head-on. This is especially the case given that, as proposed above, the circumstances of *Tabcorp* may arguably be regarded as disclosing at least four of the five factors which Lord Jauncey identified¹⁵⁴ as justifying reversal of the Court of Appeal's award of rectification damages.

Having said that, such an incremental approach as was adopted by the High Court is consistent with the way in which the leading cases from Australia, England and elsewhere in the common law world may be regarded as parallel, and not uncoordinated, quests by the courts in each country in grappling with the appropriate general principle for the assessment of damages in defective building work cases.¹⁵⁵ Indeed, just as there is the apparent paradox that the Australian High Court took in *Bellgrove* a significant, independent step in the same year — 1954 — that Australia's attachment to the apron strings of the motherland was arguably at its zenith,¹⁵⁶ the Australian and English cases and commentaries have, almost invariably, taken due note of each other.¹⁵⁷

¹⁵¹ *Tabcorp* (2009) 236 CLR 272, 277 (N J Young QC). Moreover, inclusion of proportionality as having relevance within the reasonableness limb finds support in Australian judgments and commentaries pre-dating *Tabcorp*: see, eg, *Scott Carver Pty Ltd v SAS Trustee Corporation* [2005] NSWCA 462 (Unreported, Hodgson, Ipp and Bryson JJA, 21 December 2005) [120] (Ipp JA); Paterson, Robertson and Duke, above n 9, 383. As noted below in n 159, there are indications that, in NSW at least, it remains a relevant factor.

¹⁵² *Tabcorp* (2009) 236 CLR 272, 289 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

¹⁵³ *Ibid* (citations omitted).

¹⁵⁴ See above n 150.

¹⁵⁵ For example, the judgment of Cardozo J in *Jacob & Youngs Inc v Kent*, 130 NE 933 (NY, 1921) from the New York Court of Appeals was heavily influential in *Ruxley* [1996] AC 344, 357 (Lord Jauncey), 366–7 (Lord Lloyd). See also the list of cases from numerous jurisdictions cited in argument by counsel for Mr Forsyth: *Ruxley* [1996] AC 344, 347 (B McGuire and M Furmston).

¹⁵⁶ At the conclusion of Queen Elizabeth II and Prince Philip's tour, being the first visit to Australia by a reigning monarch, the Prime Minister, Robert Menzies, felt able to observe that 'the common devotion to the Throne is a part of the very cement of the whole social structure': quoted in Judith Brett, *Robert Menzies' Forgotten People* (2nd ed, 2007) 124.

¹⁵⁷ Most notably, the High Court in *Bellgrove* (1954) 90 CLR 613, 617–18 (Dixon CJ, Webb and Taylor JJ), based its core statement of principle upon the discussion and case analysis in Alfred A Hudson, *The Law of Building and Engineering Contracts: And of the Duties and Liabilities of*

Nonetheless, it is strongly arguable that — in Australia, at least — *Tabcorp* has marginalised the continued currency of *Ruxley* to the extent it represents a departure from the ‘ruling principle’.¹⁵⁸ In particular, as Graeme Clarke has observed, the High Court ‘in effect held that the disproportion was no answer to the importance of enforcing contractual performance’.¹⁵⁹

The practical impact of this is illustrated below in Part V(B)(3) by reference to the recent case of *Willshee*. There, a trial decision which relied heavily upon the approach in *Ruxley* was overturned by the Western Australian Court of Appeal. In the result, therefore, whereas prior to *Tabcorp* Mr Willshee was — like Mr Forsyth — required to ‘tolerate non-compliant performance’,¹⁶⁰ the damages award on appeal placed him — like Miss Eldridge — in a position to obtain the home which he had expected when entering into the contract.

4 Guidance on the Two Limbs of Bellgrove

(a) Necessity

The characterisation — apparently accepted by the Court¹⁶¹ — by counsel for Bowen Investments of *Tabcorp*’s submission in this regard was that the necessity limb required ‘that the work ... be necessary in the sense that it is essential that you do it.’¹⁶² The High Court regarded this as a misconstruction of the test. Instead, the work in question must be ‘apt to conform with the plans and

Architects, Engineers and Surveyors (7th ed, 1946) 343, and, in turn, Lords Jauncey and Lloyd referred, with apparent approval, to *Bellgrove* in their speeches in *Ruxley* [1996] AC 344, 357 (Lord Jauncey), 367–8 (Lord Lloyd). Coming full circle, certain of the leading Australian texts on contract law (albeit all written prior to *Tabcorp*) acknowledge the continued relevance of *Ruxley*: see, eg, Carter, Peden and Tolhurst, above n 9, 850. See also Paterson, Robertson and Duke, above n 9, 384.

¹⁵⁸ Conversely, the case may be expected to remain influential in relation to, for example, Lord Lloyd’s emphasis (*Ruxley* [1996] AC 344, 368) upon the ‘central importance of reasonableness’: see above Part II(D)(1).

¹⁵⁹ Clarke, above n 2, 14. Having said that, in *Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61 (Unreported, McColl, Basten and Macfarlan JJA, 1 April 2010), MacFarlan JA (with whom McColl and Basten JJA agreed: at [1]–[2]) indicated that proportionality remains a relevant consideration within the *Bellgrove/Tabcorp* test. His Honour noted, apparently by way of obiter dictum, that where the ‘proposed rectification is out of all proportion to the benefit to be obtained’ this might constitute an example of unreasonableness: at [81], quoting *South Parklands Hockey & Tennis Centre Inc v Brown Falconer Group Pty Ltd* (2004) 88 SASR 65, 85 (DeBelle J). If it is in fact the case that the ongoing influence of *Ruxley* is diminished by *Tabcorp*, it seems unlikely that this will be a matter for widespread regret. Indeed, during the High Court’s hearing of the appeal in *Tabcorp*, there were indications that at least one Justice took a somewhat dim view of *Ruxley*: Gummow J told counsel for *Tabcorp* that ‘[y]ou will not get anywhere by referring me to the House of Lords case about the swimming pool because they just talk about being reasonable. It is the “sound chap” principle’: *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2008] HCATrans 395 (2 December 2008) 1589–91. Likewise, the London-based Queen’s Counsel Adrian Williamson, above n 9, 46, has recently observed that ‘defendants in these sorts of cases often try to make too much of *Ruxley*. *Ruxley* was, on its facts, an exceptional case.’

¹⁶⁰ Rowan, above n 1, 278.

¹⁶¹ No recitation of *Tabcorp*’s submission is made in the relevant passage of the judgment: *Tabcorp* (2009) 236 CLR 272, 289–90 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

¹⁶² *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2008] HCATrans 396 (3 December 2008) 4028–9 (D M J Bennett QC).

specifications which had not been conformed with.¹⁶³ In other words, the requirement to achieve conformity is assumed within the essence of the contractual bargain and not to be reopened here as sought by Tabcorp; rather, the limb requires only that the work be ‘apt’ (which has connotations of being ‘suited to the purpose’)¹⁶⁴ to achieve such conformity. Thus, work which is not directed towards such conformity may not be ‘necessary’.

(b) *Reasonableness*

As noted above, Tabcorp argued that rectification would not be a ‘reasonable course to adopt’ to the extent that the cost of the rectification work exceeded the amount which would have been recoverable on the diminution in value test. In response, the Court simply noted that such a submission

rested on a loose principle of ‘reasonableness’ which would radically undercut the bargain which the innocent party had contracted for and make it very difficult to determine in any particular case on what basis damages would be assessed.¹⁶⁵

Whilst this concern based upon uncertainty is, with respect, undeniably well founded, there seems a more fundamental problem with Tabcorp’s submission. It should be borne in mind that, taken to its logical conclusion, the principle as argued would disallow the recovery of the prima facie measure of damages — rectification — to the extent that damages assessed via that measure exceed those available via the subsidiary measure of diminution in value. As was succinctly pointed out by counsel for Bowen Investments (and, apparently, substantially accepted by the Court),¹⁶⁶ the effect upon *Bellgrove* would be to allow ‘the exception [to] totally subsume the rule.’¹⁶⁷

Quite apart from this specific issue of the reasonableness of recovery of damages over and above the diminution measure, the Court provided some general guidance on the application of the limb. The Court characterised the test as one of ‘unreasonableness’ and noted that it ‘is only to be satisfied by fairly exceptional circumstances’, such as the second-hand bricks example given in *Bellgrove*.¹⁶⁸ The Court observed that that example ‘align[ed] closely’ with

¹⁶³ *Tabcorp* (2009) 236 CLR 272, 290 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

¹⁶⁴ Susan Butler (ed), *Macquarie Dictionary* (5th ed, 2009) 76.

¹⁶⁵ *Tabcorp* (2009) 236 CLR 272, 290 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

¹⁶⁶ The Court’s statement, as quoted in the text accompanying above n 165, appears to be consistent with this submission.

¹⁶⁷ *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2008] HCATrans 396 (3 December 2008) 4052–3 (D M J Bennett QC).

¹⁶⁸ *Tabcorp* (2009) 236 CLR 272, 288 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ). The example given in *Bellgrove* (1954) 90 CLR 613, 618 (Dixon CJ, Webb and Taylor JJ), was that, if a building contract specified that second-hand bricks would be used and the builder used new bricks, it would be unreasonable for the owner to claim the cost of demolishing the building and rebuilding it with second-hand bricks. The note that the circumstances be ‘fairly exceptional’ has been quoted by the NSW Consumer, Trader and Tenancy Tribunal in *Hrouda v Vermeulen* [2009] NSWCTTT 89 (Unreported, Member Hennings, 12 March 2009) 8 and by the Western Australian Court of Appeal in *Willshree* [2009] WASCA 87 (Unreported, Martin CJ, Buss JA and Newnes AJA, 18 May 2009) [72] (Martin CJ). The impact of the phrase upon the decision in that case is described below in Part V(B)(2).

Oliver J's statement in *Radford*: 'that is, that the diminution in value measure of damages will only apply where the innocent party is "merely using a technical breach to secure an uncovenanted profit".'¹⁶⁹

V ASSESSING THE IMPACT OF *TABCORP*

A Overview

It has been proposed above that *Tabcorp* may be expected to have a significant practical impact through its extension of the reach of the *Bellgrove* principle to breach of lease covenants against unauthorised alteration.¹⁷⁰ The Court's forthright dismissal of the doctrine of efficient breach is also noteworthy.¹⁷¹ Having said that, the aspect which may be expected to have the most substantial impact upon the quantification of damages for defective building work is the guidance provided in respect of, first, the manner in which aesthetic considerations may be upheld in a damages award (including the Court's distinguishing of *Ruxley*)¹⁷² and, secondly, the operation of the *Bellgrove* qualification.¹⁷³

The Western Australian Court of Appeal case of *Willshee*,¹⁷⁴ which provided the first detailed appellate-level consideration of *Tabcorp*, offers an opportunity to reflect upon this impact.

B Willshee

1 Background

Willshee concerned the limestone cladding of a house in the southern suburbs of Perth. The complaint by the plaintiff, Mr Willshee, was that the cladding had begun to crumble, leaving large holes in the limestone blocks, only three and a half years after construction was completed.¹⁷⁵ It was established at trial (before Templeman J) that approximately half of the limestone blocks used were 'seconds' of inferior quality and that the builder's use of them constituted a breach of an implied contractual obligation only to use high-quality limestone in the construction of the house.¹⁷⁶

¹⁶⁹ *Tabcorp* (2009) 236 CLR 272, 288 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ), quoting *Radford* [1978] 1 All ER 33, 42.

¹⁷⁰ See above Part IV(B)(2).

¹⁷¹ See above Part IV(B)(1).

¹⁷² See above Part IV(B)(3).

¹⁷³ See above Part IV(B)(4).

¹⁷⁴ For commentary, see Emily Griffiths, 'Calculation of Damages for Defective Building Work Reviewed by Court of Appeal' (2009) 21 *Australian Construction Law Bulletin* 42.

¹⁷⁵ *Willshee* [2009] WASCA 87 (Unreported, Martin CJ, Buss JA and Newnes AJA, 18 May 2009) [8] (Martin CJ).

¹⁷⁶ *Willshee v Westcourt Ltd* [2008] WASC 18 (Unreported, Templeman J, 22 February 2008) [314]–[316]; *ibid* [31]. The issue of whether the builder was, in fact, in breach was the subject of a cross-appeal before the Court of Appeal: at [39]–[58] (Martin CJ). The Court undertook a detailed analysis of the issue, ultimately concluding that the cross-appeal should be dismissed: at [58]. This aspect of the appeal hearing is, however, beyond the scope of this article.

Templeman J had also accepted that the cost of rectification work, requiring the removal of all the cladding and its replacement with high-quality blocks, amounted to \$257 977.91 and found that Mr Willshee would have needed to incur additional costs, such as those relating to accommodation and storage, during the reinstatement work.¹⁷⁷ However, his Honour declined to award such rectification (and consequential) costs, holding such rectification unreasonable as ‘the structural integrity of the house is not in doubt and ... the plaintiff’s complaint can now be based only on the aesthetic quality of the limestone, about which the contract was silent.’¹⁷⁸

The appeal hearing occurred on 19 February 2009, five days after *Tabcorp* was decided. The judgment, delivered by Martin CJ (with Buss JA and Newnes AJA concurring),¹⁷⁹ was handed down on 18 May 2009. The Court of Appeal reversed the trial decision, which had allowed the plaintiff damages of less than \$10 000,¹⁸⁰ finding that the plaintiff was entitled to damages exceeding \$300 000.¹⁸¹

2 Key Issues

In many ways, the facts in *Willshee* offered an ideal litmus test as to whether *Tabcorp* represents a shift in the law. The question before the Court of Appeal was, essentially, whether Mr Willshee was entitled to claim the default measure available under *Bellgrove* — rectification plus applicable consequential losses — despite the fact that the building was not rendered structurally unsound by the defective work.

Whilst this was by no means a simple question, the circumstances were such that the Court did not — or, at least, considered that it did not — need to deal with other matters which have caused significant controversy over recent decades, particularly that of the relevance of the plaintiff’s intention (or ability) to rectify the work.¹⁸² The Court accepted that, notwithstanding *Bellgrove*’s conception of intention to rebuild as being ‘quite immaterial’, the ‘more recent formulation of the test in *Tabcorp* [made it] conceivable that the subjective

¹⁷⁷ *Willshee v Westcourt Ltd* [2008] WASC 18 (Unreported, Templeman J, 22 February 2008) [317]. See also *Willshee* [2009] WASCA 87 (Unreported, Martin CJ, Buss JA and Newnes AJA, 18 May 2009) [32] (Martin CJ).

¹⁷⁸ *Willshee v Westcourt Ltd* [2008] WASC 18 (Unreported, Templeman J, 22 February 2008) [328], quoted in *Willshee* [2009] WASCA 87 (Unreported, Martin CJ, Buss JA and Newnes AJA, 18 May 2009) [34] (Martin CJ).

¹⁷⁹ *Willshee* [2009] WASCA 87 (Unreported, Martin CJ, Buss JA and Newnes AJA, 18 May 2009) [81]–[82].

¹⁸⁰ *Willshee v Westcourt Ltd* [2008] WASC 18 (Unreported, Templeman J, 22 February 2008) [354].

¹⁸¹ *Willshee* [2009] WASCA 87 (Unreported, Martin CJ, Buss JA and Newnes AJA, 18 May 2009) [80] (Martin CJ). The total awarded was \$295 216.91 plus interest, with the principal comprising the aggregate of the following: the cost of rectification as at the date of trial (\$257 977.91); the cost of rental accommodation during the rectification (\$16 900); removal and storage costs (\$20 339); the cost of cleaning, sealing and repainting already incurred (\$9290); and \$5000 by way of general damages for the ‘more nebulous matters’ of distress and inconvenience: at [77]–[80].

¹⁸² See generally above Part II(D)(2).

intention of a plaintiff may be relevant to the application of the qualification to the “ruling principle” of damages.¹⁸³

The Court emphasised, however, the High Court’s conception of the circumstances in which the qualification might apply as being ‘fairly exceptional’ and that the defendant bore the onus of proving that Mr Willshee’s intention was relevant to the triggering of that qualification — here, not only had Westcourt not put to Mr Willshee in cross-examination that he did not intend to use the damages for rectification, there were indications from Mr Willshee’s evidence that he did in fact intend to undertake the rectification.¹⁸⁴

3 *Aesthetic Considerations: The ‘Ruling Principle’ Shrinks Ruxley’s Pool of Influence*

(a) *Trial (Pre-Tabcorp)*

Templeman J at trial had regarded the situation with the defective limestone as being ‘in many ways similar’ to that in *Ruxley*.¹⁸⁵ In particular, his Honour regarded as ‘analogous’ to the present situation the example (and proposed solution in damages), cited by Lord Jauncey, where a builder uses yellow rather than blue bricks for a lower part of the building. In his Lordship’s view (as quoted by Templeman J):

It would clearly be unreasonable to award to the owner the cost of reconstructing because his loss was not the necessary cost of reconstruction of his house, which was entirely adequate for its design purpose, but merely the lack of aesthetic pleasure which he might have derived from the sight of blue bricks.¹⁸⁶

Hence, in Templeman J’s opinion, as the deterioration had now been halted by the sealing work (the reasonable cost of which formed the basis for the damages award made by his Honour),¹⁸⁷ ‘the plaintiff’s concern can only be “the lack of

¹⁸³ *Willshee* [2009] WASCA 87 (Unreported, Martin CJ, Buss JA and Newnes AJA, 18 May 2009) [72] (Martin CJ).

¹⁸⁴ *Ibid* [71]–[72].

¹⁸⁵ *Willshee v Westcourt Ltd* [2008] WASC 18 (Unreported, Templeman J, 22 February 2008) [330]. Whilst there may have been several ways in which the situations were similar, his Honour did not note the apparent discordance between the fact that in *Ruxley* there was an express requirement that the pool be 7 feet 6 inches deep (as Templeman J acknowledged at [330]) whereas there was no such express provision in Mr Willshee’s contract.

¹⁸⁶ *Ruxley* [1996] AC 344, 358, quoted in *Willshee v Westcourt Ltd* [2008] WASC 18 (Unreported, Templeman J, 22 February 2008) [335].

¹⁸⁷ Templeman J awarded \$5000 for the cleaning and sealing work which had been undertaken: *Willshee v Westcourt Ltd* [2008] WASC 18 (Unreported, Templeman J, 22 February 2008) [338]–[339]. The relevant tradesperson had rendered an account for \$12 716, which was apparently paid by Mr Willshee (this is not clear from the trial judgment but the amount is listed in Mr Willshee’s particulars of loss and damage: at [317]). However, his Honour awarded the lesser amount, closer to the tradesperson’s initial estimate of \$4000 (but taking into account inflation since the estimate was given), on the basis that much of the work undertaken was ineffective or time-consuming: at [324], [337]–[338]. Whilst it was noted by the Court of Appeal in *Willshee* [2009] WASCA 87 (Unreported, Martin CJ, Buss JA and Newnes AJA, 18 May 2009) [36] (Martin CJ) that Mr Willshee did not challenge such awarding of an amount lower than that which was incurred, the basis on which such a discount may be justified is, with respect, not immediately apparent from the trial judgment (there may, for example, have been arguments as to remoteness of damage or mitigation). The trial decision therefore provides an example, alongside *Ruxley*, of how damages awards made on a basis other than reinstatement (or

aesthetic pleasure” which he might have derived from the sight of limestone in pristine condition’,¹⁸⁸ and it was unreasonable ‘to spend some \$258 000 in rectifying defects in a house worth \$1.7 million.’¹⁸⁹ In other words, as characterised by the Court of Appeal, the trial approach was founded upon whether it was reasonable for Mr Willshee to ask for damages on the rectification measure ‘having regard to the relativity between that amount and the value of the house.’¹⁹⁰

(b) *Appeal (Post-Tabcorp)*

The Court of Appeal’s analysis of the quantum of damages proceeded from a different premise. Said to be as ‘elucidated by the decision of the High Court of Australia in *Tabcorp*’,¹⁹¹ it was that:

under the terms of the contract for the construction of the house, Mr Willshee was entitled to a house constructed using limestone which was all of high quality. That is not what he got. Under the ‘ruling principle’, he was entitled to damages in the amount required to put him in that position — namely, by demolishing the existing external wall and replacing it with limestone which was all of high quality.¹⁹²

Having emphasised that *Bellgrove* ‘stands firmly against the proposition that diminution in value is the ordinary measure of damages awarded against a builder as a result of departure from a building contract’,¹⁹³ the Court engaged with whether its qualification to the prima facie application of the reinstatement measure applied. Here, two specific aspects of the High Court’s dicta in *Tabcorp* were of considerable assistance to Mr Willshee in seeking to overturn the trial decision.

The Court first noted the trial judge’s reliance upon the fact that there was no objective guidance available (whether in the contract or externally via a consensus of opinion) about the aesthetic desirability of the limestone in his Honour’s decision that rectification was unreasonable. This reasoning was said, in light of *Tabcorp*, to be ‘erroneous’; in other words, much like Mrs Bergamin,

Mr Willshee entered into a contract which he considered served his interests, and he is entitled to the performance of that contract quite irrespective of the

its alternative, as anticipated by *Bellgrove*, diminution in value) tend to reflect their nominal nature by appearing somewhat arbitrary.

¹⁸⁸ *Willshee v Westcourt Ltd* [2008] WASC 18 (Unreported, Templeman J, 22 February 2008) [336], quoted in *Willshee* [2009] WASCA 87 (Unreported, Martin CJ, Buss JA and Newnes AJA, 18 May 2009) [35] (Martin CJ).

¹⁸⁹ *Willshee v Westcourt Ltd* [2008] WASC 18 (Unreported, Templeman J, 22 February 2008) [328], quoted in *Willshee* [2009] WASCA 87 (Unreported, Martin CJ, Buss JA and Newnes AJA, 18 May 2009) [34] (Martin CJ).

¹⁹⁰ *Willshee* [2009] WASCA 87 (Unreported, Martin CJ, Buss JA and Newnes AJA, 18 May 2009) [60] (Martin CJ).

¹⁹¹ *Ibid* [61].

¹⁹² *Ibid* [63].

¹⁹³ *Ibid* [65].

views which other people might form in relation to the advancement of those interests, such as views relating to the aesthetic appearance of the house.¹⁹⁴

A second aspect of *Tabcorp* which strengthened the plaintiff's case for full rectification damages was the High Court's statement that the 'diminution in value measure of damages will only apply where the innocent party is "merely using a technical breach to secure an uncovenanted profit".'¹⁹⁵ Here, the Court found that neither limb of the *Radford* qualification applied. The breach relied upon was not 'in any sense "technical"'; it was 'serious and significant' in its impact upon the rate at which the cladding weathered and deteriorated and upon the appearance of the house.¹⁹⁶ Moreover, the fact that evidence of Mr Willshee's displeasure was 'plausible and reasonable' was sufficient for the Court to find that he was not pursuing a profit to which he was not entitled under the contract.¹⁹⁷

As *Willshee* illustrates, it may reasonably be supposed that the High Court's clarification that the (un)reasonableness qualification *only* applies in these limited circumstances may be expected to result in the prima facie measure being applied in many more instances than is presently the case.¹⁹⁸ Moreover, although this was not in issue in *Willshee*, it may be expected that interpretations of the two limbs of the *Bellgrove* qualification which deviate outside of the strict boundaries redefined by the Court in *Tabcorp* will in future be given short shrift by Australian courts.¹⁹⁹

¹⁹⁴ *Ibid* [68].

¹⁹⁵ (2009) 236 CLR 272, 288 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ), referencing the second-hand bricks example in *Bellgrove* and incorporating a passage from Oliver J's dicta in *Radford* [1978] 1 All ER 33, 42.

¹⁹⁶ *Willshee* [2009] WASCA 87 (Unreported, Martin CJ, Buss JA and Newnes AJA, 18 May 2009) [70] (Martin CJ).

¹⁹⁷ *Ibid* [71].

¹⁹⁸ By way of recent example of a case which may have been decided differently if heard following *Tabcorp*, see *Corbett Court Pty Ltd v Quasar Constructions (NSW) Pty Ltd* (2009) 25 BCL 29, 40, in which Hammerschlag J held that *Bellgrove* does not stand for the proposition that 'the defendant bears the onus of establishing that the case is not reasonable.' As an example of the approach post-*Tabcorp*, see *Building Insurers' Guarantee Corporation v Owners, Strata Plan No 57504* [2010] NSWCA 23 (Unreported, Tobias, Campbell JJA and Handley AJA, 15 March 2010) in which the Court of Appeal dismissed an appeal against a finding that the plaintiff was entitled to the cost of demolition and reinstatement. There, Handley AJA (with whom Tobias and Campbell JA agreed: at [1]–[2]) held (at [83]) that such action was 'the only way ... that the risk of water penetration could be eliminated [so it] was reasonable for the owners' corporation to undertake that work'.

¹⁹⁹ Those boundaries are, as discussed above in Part IV(B)(4), respectively, a concept of 'necessity' meaning 'apt to conform with the plans and specifications' and 'unreasonableness': *Tabcorp* (2009) 236 CLR 272, 288, 289–90 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ). An example of a conception proposed prior to *Tabcorp* which might, in the light of the High Court's restatement, no longer find favour, is to be found in *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158. There, Williams JA conceived of the two limbs as requiring that the cost be 'reasonable' and the reinstatement 'possible': at 169. His Honour was thus giving illumination to an aspect of *Bellgrove* which has not received a great deal of attention — the note by the joint judges that the building owner is, prima facie, 'entitled to the reasonable cost of rectifying the departure or defect so far as that is possible': *Bellgrove* (1954) 90 CLR 613, 617 (Dixon CJ, Webb and Taylor JJ) (emphasis added). This was cited (without emphasis) by Williams JA in *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158, 168. Whilst Williams JA cited at 169 the passage in *Bellgrove* (1954) 90 CLR 613,

VI CONCLUSION: THE EXPECTATION MEASURE TRIUMPHANT?

In presenting *Tabcorp*'s application for special leave before the High Court, Mr Young QC invited the Court to substitute, for *Joyner*, 'the general common law rule that applies to reinstatement covenants and, likewise, to all contractual provisions.'²⁰⁰ Ultimately, as has been seen, the Court did not endorse such a revolution in the common law relating to repair covenants; rather, it contributed to its evolution by effecting an incremental, yet nonetheless significant, change through extending the reach of the *Bellgrove* principle to breaches of covenants against unauthorised alterations to premises.²⁰¹

In doing so, *Tabcorp* has tightened the scope within which the qualification in *Bellgrove* operates. In particular, the High Court has made it clear that, absent exceptional circumstances where the plaintiff is 'merely using a technical breach to secure an uncovenanted profit',²⁰² it is unlikely to be regarded as 'unreasonable' that a plaintiff would wish to rectify defective work which has disappointed their aesthetic expectations.²⁰³

The reiteration, underpinning the High Court's approach, of the central importance of enforcement of promises to perform in the sphere of defective building work is not remarkable of itself; as noted above in Part II(B), the expectation measure has been entrenched as the default means of calculating damages in this area for more than 150 years. Nonetheless, given the opportunity presented by *Tabcorp* to provide general guidance on contract law damages, the Court's silence on one particular matter may — like Sherlock Holmes' 'curious incident of the dog in the night-time'²⁰⁴ — itself be worthy of note.

Here, the dog that did not bark in the night, as it were, was that the Court did not engage with the ongoing debate as to whether expectation ought to be the appropriate foundation of damages assessment generally within contract law. The debate was given impetus in 1936 with the publication of 'The Reliance Interest in Contract Damages'.²⁰⁵ In that article, Fuller and Perdue provided a detailed critique of the rationale for the centrality of the expectation measure, proposing that, on 'ordinary standards of justice', expectation represented the weakest case for protection among the available measures.²⁰⁶ Instead, they submitted that the

618, where Dixon CJ, Webb and Taylor JJ state the two qualifications of necessity to achieve conformity and rectification being a reasonable course to adopt, he did not provide any justification for the apparent discrepancy between necessity and possibility except to note that the facts of *Bellgrove* meant that the High Court did not need to consider the issue of possibility further. The feasibility of such a focus on 'possibility' seems reduced in view of the *Tabcorp* restatement of 'necessity' as being synonymous with 'apt' (which, in turn, has connotations of suitability rather than mere possibility).

²⁰⁰ *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2008] HCATrans 266 (1 August 2008) 78–80.

²⁰¹ See generally the discussion above in Part IV(B)(2).

²⁰² *Tabcorp* (2009) 236 CLR 272, 288 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ), quoting *Radford* [1978] 1 All ER 33, 42 (Oliver J).

²⁰³ See generally above Part IV(B)(4)(b).

²⁰⁴ 'Silver Blaze' in A Conan Doyle, *Memoirs of Sherlock Holmes* (1894) 1, 22.

²⁰⁵ Fuller and Perdue, above n 13. See generally Paterson, Robertson and Duke, above n 9, 392–3.

²⁰⁶ Fuller and Perdue, above n 13, 56.

‘restitution interest’ — that which is to be protected by ‘requiring a defendant to disgorge any value conferred by the plaintiff on the defendant in reliance on the contract being performed’²⁰⁷ — through its ‘involving a combination of unjust impoverishment with unjust gain, present[ed] the strongest case for relief.’²⁰⁸

A number of commentators have engaged with the possibility of a restitutionary basis for assessing loss in defective building cases.²⁰⁹ Perhaps the most prominent example of this occurred in 1985, when Professor Allan Farnsworth considered the issue in the context of defective building work and put forward a case for extension of the restitutionary measure in limited circumstances.²¹⁰ The example he used was of a contract to construct a building for a lump sum of \$150 000 where the builder — undiscovered by the plaintiff until after completion of the work — substitutes materials of lower quality than those specified and thereby makes a saving in its own costs (and, therefore, an increase to its profit) of \$25 000. In this scenario, the lower quality of the materials does not affect the integrity of the building, but it does reduce its resale value by \$10 000 while the cost of remedying the defects would be \$60 000, due to the cost to demolish and rebuild the building.²¹¹

Professor Farnsworth’s concern in these circumstances was that, assuming they would only be able to recover the \$10 000 diminution in value by way of damages, the plaintiff ran the risk of under-compensation through such ‘abuse’²¹² by the builder;²¹³ instead, he advocated that the builder be required to disgorge the \$25 000 as the most appropriate measure in the circumstances.²¹⁴

Such recourse to disgorgement may, at first blush, seem attractive in serving the interests of justice in these limited circumstances. However, as Professor Davis has pointed out, it is unlikely under Australian law that the plaintiff would in fact be limited to the diminution in value measure — rather, the plaintiff could reasonably expect to recover the \$60 000 in these circumstances.²¹⁵ In other words, ‘if the cost of remedying the defects is the correct measure in all but an extreme case, the whole issue of recovery of profits from breach falls to the ground.’²¹⁶

Consistent with this analysis, it may be that the reason why the expectation measure has eclipsed all others in defective work damages is that construction

²⁰⁷ Paterson, Robertson and Duke, above n 9, 392.

²⁰⁸ Fuller and Perdue, above n 13, 56.

²⁰⁹ See, eg, Chandler, above n 10, 275; Jones, above n 9, 49.

²¹⁰ E Allan Farnsworth, ‘Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract’ (1985) 94 *Yale Law Journal* 1339, 1382–92.

²¹¹ *Ibid* 1382.

²¹² *Ibid* 1384.

²¹³ *Ibid* 1386.

²¹⁴ *Ibid* 1390.

²¹⁵ Davis, above n 9, 212.

²¹⁶ *Ibid*. The inclusion of ‘if’ in this statement is important: Professor Davis was writing in 1987, before *Ruxley* and other recent cases which made it more likely than had been the case then that arguments could be raised against the plaintiff’s claim to rectification damages. Nonetheless, in the light of *Tabcorp*, it may be argued that Davis’s 1987 conception represents, once again, an accurate reflection of the current state of the law in Australia.

projects represent an intensely practical field of law where parties — whether undertaking home renovations or building hotels for an international chain — expect to ‘get what they paid for’. Therefore, the dominance of expectation as the protected measure (which has now been further expounded by *Tabcorp*) may be ascribed to a reason given by Fuller and Perdue themselves in their reflection upon the attractiveness of the expectation measure. This is that expectation ‘furnishes a more easily administered measure of recovery than the reliance interest’ and, in turn, ‘will in practice offer a more effective sanction against contract breach.’²¹⁷

Seen in this light, it is unsurprising that *Tabcorp* has already been welcomed in commentary

for providing wider protection of the performance interest. In awarding the promisee the funds necessary to secure actual performance, the court gave great weight to the interest of the promisee in obtaining the bargained-for performance. ... It ... recognises that contracting parties usually enter into agreements to obtain performance and reinforces the security of transactions.²¹⁸

Tabcorp represents, therefore, an important step in the continuing evolution of the *Bellgrove* principle. The principle has always been capable of flexible application, allowing justice to be done in the myriad difficult situations that remain before the courts after the various filtration systems of construction dispute resolution procedures have been applied to the dispute. In this context, *Tabcorp* demonstrates that the *Bellgrove* principle is able to render efficiently a result which reflects the contractually expressed expectation of the building owner in seeking to protect interests which were not capable of ready expression in purely economic terms.²¹⁹

In other words, and with apologies for mangling the famous dictum attributed to Oliver Wendell Holmes,²²⁰ *Bellgrove* makes a good law for hard cases. Moreover, as a significant recent milestone in the common law’s ongoing project to strike the right balance between certainty and justice in contract damages, it may be expected that *Tabcorp* and its aftermath will be of real interest to contract lawyers around the world.

²¹⁷ Fuller and Perdue, above n 13, 61.

²¹⁸ Rowan, above n 1, 278. The ‘performance’ interest referred to here is synonymous with the ‘expectation’ interest: see *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, 546 (Lord Goff). In the Australian High Court, Gaudron J has likewise made explicit the link between expectation and performance, noting that ‘the term “expectation” loss does not indicate that damages are payable simply for thwarted expectations. Rather, damages are payable for the loss involved in non-performance of the contract’: *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 502 (citations omitted).

²¹⁹ The meandering route of the lower courts in seeking to find a just result based on the principle in *Joyner* (see above Part III) may be regarded by way of contrast.

²²⁰ See *Northern Securities Co v United States*, 193 US 197, 400 (Holmes J for Fuller CJ, White, Peckham and Holmes JJ) (1904).