

## ***STONE V CHAPPEL* (2017) 128 SASR 165 IS THE DOCTRINE OF ECONOMIC WASTE A WASTE OF TIME?**

### I INTRODUCTION

In 2009, the plaintiffs, Mr and Mrs Stone, entered into a contract with the defendants, Mr Chappel and Mr Smallacombe, to construct the shell and framework for an apartment in a retirement village. The contract specified that the ceiling height was to be 2,700 mm above floor level. However, upon construction, the height of the ceiling ranged from 32 mm to 57 mm below the specified height. The plaintiffs claimed approximately \$330,000 in rectification damages to remedy the breach of contract.<sup>1</sup>

Whilst this case features a range of issues,<sup>2</sup> this case note will focus on rectification damages and the Full Court's analysis of whether the trial judge erred in denying rectification damages to compensate the plaintiffs for the cost of remedying the ceiling height. This case note will specifically analyse Kourakis CJ's application of the doctrine of economic waste as a consideration in the question of reasonableness. It will be argued that his Honour's application is unconventional in light of explicit and implicit High Court authority to the contrary and the inherent inconsistencies in the doctrine.

### II THE *BELLSGROVE* PRINCIPLE

This case presented the Full Court with an opportunity to clarify the application of the *Bellgrove* principle.<sup>3</sup> In cases of defective construction, the High Court in *Bellgrove* established the general rule, which provides that 'the prima facie measure of damages is the cost of rectifying the work so that it conforms with the contract'.<sup>4</sup>

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<sup>1</sup> *Stone v Chappel* (2017) 128 SASR 165, 191 [97]–[103], 200 [160] ('*Stone*').

<sup>2</sup> For example, the Full Court of the South Australian Supreme Court also had to consider misleading and deceptive conduct, damages for loss of amenity, and damages for loss of use of money paid prematurely.

<sup>3</sup> *Bellgrove v Eldridge* (1954) 90 CLR 613 ('*Bellgrove*'). In this case, the appellant entered into a contract to build the respondent a house. However, the appellant used defective concrete and mortar, resulting in unstable foundations. The High Court held that it was both necessary and reasonable to demolish and rebuild the house in order to produce conformity with the contract, and upheld the award of rectification damages.

<sup>4</sup> *Stone* (n 1) 205 [194] (Doyle J), citing *ibid* 617.

In doing so, the High Court rejected the approach of assessing damages as the difference between the value of the goods at the present time and the value they would have had if there was conformity with the contract.<sup>5</sup> However, the High Court held that rectification damages are subject to two qualifications: the rectification work must be ‘necessary to produce conformity’ with the contract, and must be a ‘reasonable course to adopt’.<sup>6</sup>

### III TRIAL JUDGE

Whilst finding a breach of contract, the trial judge rejected the plaintiffs’ claim for rectification damages on three bases. Firstly, the trial judge held that the plaintiffs had elected to abandon their right to rectification, as their occupation of the apartment was inconsistent with their claim.<sup>7</sup> Secondly, the trial judge did not apply the *Bellgrove* principle as the ceiling was still ‘substantially in accordance with the contract’.<sup>8</sup> Thirdly, even if the principle was to apply, the trial judge concluded that this case fell within the qualification to the rule, as it would be unreasonable to undertake the necessary work to raise the ceiling.<sup>9</sup> Rather than rectification damages, the trial judge awarded \$30,000 for disappointment and loss of amenity.<sup>10</sup> The plaintiffs appealed the decision and challenged the trial judge’s three bases of reasoning.

### IV THE DECISION

In this instance, all three judges were in agreement that the trial judge erred on the first and second bases. The Full Court rejected the finding that the plaintiffs elected to forgo rectification damages by moving into the apartment.<sup>11</sup> In addition, the Full Court rejected the trial judge’s interpretation by finding that there is no precondition to the *Bellgrove* principle. Substantial performance of the contract will not preclude rectification damages.<sup>12</sup> Overall, each judge takes a different approach to the inquiry of reasonableness and adds their own interpretation to the *Bellgrove* principle.

#### A Chief Justice Kourakis

Chief Justice Kourakis applies the *Bellgrove* principle by considering whether rectification is a reasonable course to adopt, and the overarching question, whether there is

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<sup>5</sup> *Bellgrove* (n 3) 617.

<sup>6</sup> *Ibid* 618.

<sup>7</sup> *Stone v Chappel* [2016] SASC 32, [147] (Stanley J).

<sup>8</sup> *Ibid* [160].

<sup>9</sup> *Ibid* [167].

<sup>10</sup> *Ibid* [169].

<sup>11</sup> *Stone* (n 1) 183 [64] (Kourakis CJ), 203–5 [185]–[190] (Doyle J), 257 [443] (Hinton J).

<sup>12</sup> *Ibid* 171 [10] (Kourakis CJ), 221–2 [267]–[269] (Doyle J), 248–9 [420] (Hinton J).

good reason to depart from the prima facie award of rectification damages.<sup>13</sup> In determining whether there is a good reason to depart, his Honour lists a series of factors to take into account.<sup>14</sup> Interestingly, Kourakis CJ lists ‘public interest in reducing economic waste’ as a relevant factor.<sup>15</sup> His Honour goes on to acknowledge that if the relevant considerations were limited to the degree of departure from the contract,<sup>16</sup> the reasons for the contractual term,<sup>17</sup> and the nature of the defendant’s fault,<sup>18</sup> he would have awarded rectification damages.<sup>19</sup> However, due to the risk of damage to neighbouring properties and of collateral litigation from the potential rectification works,<sup>20</sup> as well as the public interest against economic waste, awarding damages ‘on the basis of such a fraught undertaking’ would appear ‘particularly artificial, and unjust’.<sup>21</sup> Chief Justice Kourakis also observes that ‘[t]he public interest against economic waste and against the promotion of unconstructive litigation is relatively strong in this case.’<sup>22</sup> His Honour concludes that rectification is not a reasonable course to adopt and therefore falls within the *Bellgrove* qualification.<sup>23</sup>

### B *Justice Doyle*

Justice Doyle notes that ‘[t]he general availability of rectification damages reflects the importance that the law of contract attaches to the plaintiff’s performance interest’,<sup>24</sup> even if that interest represents some ‘subjective aesthetic’ or ‘eccentric benefit’.<sup>25</sup> His Honour goes on to provide a comprehensive summary of defective building work cases following *Bellgrove*.<sup>26</sup>

Justice Doyle observes that in *Tabcorp* the High Court recently endorsed the *Bellgrove* general rule and qualification.<sup>27</sup> In doing so, the High Court reaffirmed the ‘primacy’ of the plaintiff’s performance interest, whilst noting that ‘unreasonableness’ will only be satisfied in ‘exceptional circumstances’.<sup>28</sup> However, his Honour

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<sup>13</sup> Ibid 181 [54], 185 [75].

<sup>14</sup> Ibid 182 [55].

<sup>15</sup> Ibid.

<sup>16</sup> Ibid 183 [64].

<sup>17</sup> Ibid 183 [65].

<sup>18</sup> Ibid 183–4 [66].

<sup>19</sup> Ibid 185 [72].

<sup>20</sup> Ibid 185 [72].

<sup>21</sup> Ibid 185 [74].

<sup>22</sup> Ibid.

<sup>23</sup> Ibid 185 [75].

<sup>24</sup> Ibid 206 [200].

<sup>25</sup> Ibid.

<sup>26</sup> Ibid 207–21 [203]–[265].

<sup>27</sup> *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 (*‘Tabcorp’*).

<sup>28</sup> *Stone* (n 1) 218 [249]–[250].

notes that the High Court provides ‘little guidance’ regarding the application of this qualification.<sup>29</sup>

His Honour continues that ‘unreasonableness’ is a limit representing how far the law is prepared to go to give effect to the plaintiff’s interest in the performance of the contract.<sup>30</sup> Despite no express authority on the policy underpinning this qualification,<sup>31</sup> Doyle J approves Alexander FH Loke’s interpretation that the qualification is a way of balancing the plaintiff’s performance interest against the fairness of the burden imposed on the defaulting party.<sup>32</sup> Thus it is relevant to consider proportionality, the triviality of the defendant’s departure from the contractual objective, and the nature and quality of the defendant’s breach.<sup>33</sup>

Justice Doyle agrees with the trial judge that it is appropriate that some weight be attached to the following factors — the impact on others,<sup>34</sup> the fact that the defendants may be in breach of their contractual obligations to others,<sup>35</sup> and fire safety.<sup>36</sup> Nevertheless, Doyle J concludes that the most relevant matters are: the nature of the contractual objective, the extent of the departure from achieving the contractual objective, and the proportionality of the rectification work and costs.<sup>37</sup> His Honour notes that in this instance the ‘functional objective was achieved, and the amenity or aesthetic objective was substantially achieved’.<sup>38</sup> Justice Doyle ultimately concludes that the cost of rectification damages is disproportionate to the likely benefit, given the limited extent of departure from the contractual objective, and the limited aesthetic benefit likely to be achieved.<sup>39</sup> Therefore, there was no error in the trial judge’s conclusion.<sup>40</sup>

### C Justice Hinton

Justice Hinton notes that whilst *Bellgrove* is explicit that the second limb of the qualification, reasonableness, requires the court to consider two questions — ‘whether the proposed work method is reasonable’, and ‘whether it is reasonable to

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<sup>29</sup> Ibid 218 [250].

<sup>30</sup> Ibid 218 [252].

<sup>31</sup> Ibid 219 [254].

<sup>32</sup> Ibid 218–19 [253], citing Alexander FH Loke, ‘Cost of Cure or Difference in Market Value? Toward a Sound Choice in the Basis for Quantifying Expectation Damages’ (1996) 10(3) *Journal of Contract Law* 189, 198.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid 224 [281].

<sup>35</sup> Ibid 224 [282].

<sup>36</sup> Ibid 224 [283].

<sup>37</sup> Ibid 224–5 [284].

<sup>38</sup> Ibid 225 [286].

<sup>39</sup> Ibid 225–6 [288].

<sup>40</sup> Ibid 226 [289].

award damages’ — there is little assistance regarding the latter question.<sup>41</sup> However, in contrast to Kourakis CJ, Hinton J considers it ‘important to observe’ the High Court’s rejection of the qualification encompassing consideration of economic waste in *Bellgrove*.<sup>42</sup>

Justice Hinton goes on to evaluate the trial judge’s application of the *Bellgrove* principle. His Honour agrees with Doyle J that it is irrelevant that the court is placed in the undesirable position of supervising the rectification work.<sup>43</sup> Justice Hinton also agrees that the plaintiff’s performance interest was both aesthetic and functional. However, in regards to functionality, there was compliance with the contract.<sup>44</sup> Given the extent to which the performance benefit was met, and the minimal benefit gained for the money required, Hinton J distinguishes this case from contemporary authorities.<sup>45</sup> Thus the trial judge was right to conclude that the cost would be disproportionate to the benefit and ‘not a reasonable method’ to adopt.<sup>46</sup>

## V COMMENT

### A *Flying in the Face of Seriously Considered Dicta*

Interestingly, Kourakis CJ applies the doctrine of economic waste,<sup>47</sup> despite the High Court in *Bellgrove* explicitly rejecting this test as going ‘too far’.<sup>48</sup>

In *Farah Constructions*, the High Court criticised appellate courts for changing the first limb of the test from *Barnes v Addy*.<sup>49</sup> The High Court condemned the Court of Appeal’s amendments, as they were ‘unsupported by authority and flew in the face of seriously considered dicta uttered by a majority of this Court’.<sup>50</sup> *Farah Constructions* serves as a warning to appellate courts, not to stray away from ‘seriously considered’ reasoning of the High Court.

In *Bellgrove*, the unanimous High Court explicitly rejected ‘economic waste’ and reasoned that to apply this factor

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<sup>41</sup> Ibid 251 [427].

<sup>42</sup> Ibid 251–2 [428].

<sup>43</sup> Ibid 257 [446].

<sup>44</sup> Ibid 258 [448].

<sup>45</sup> Ibid 258 [452], citing *Bellgrove* (n 3); *Tabcorp* (n 27); *Willshee v Westcourt Ltd* [2009] WASCA 87; *Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61; *Unique Building Pty Ltd v Brown* [2010] SASC 106.

<sup>46</sup> *Stone* (n 1) 258–9 [453]–[454].

<sup>47</sup> Ibid 182 [55].

<sup>48</sup> *Bellgrove* (n 3) 619.

<sup>49</sup> (1874) LR 9 Ch App 244.

<sup>50</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 159 [158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) (*‘Farah Constructions’*).

would deny to a building owner the right to demolish a structure which, though satisfactory as a structure of a particular type, is quite different in character from that called for by the contract.<sup>51</sup>

The High Court went on to state that the only qualifications to the general rule are ‘to be found in the expressions “necessary” and “reasonable”, for the expression “economic waste” appears ... to go too far’.<sup>52</sup> Yet in spite of this, Kourakis CJ applies the economic waste doctrine. His Honour acknowledges that the doctrine was rejected in *Bellgrove*. However, rather than applying it as a qualification to the general rule, his Honour argues that the qualification of reasonableness incorporates the consideration of the doctrine of economic waste.<sup>53</sup> Nevertheless, this still defies the High Court’s criticism of economic waste as inconsistent with achieving the contractual objectives, and the principle behind rectification damages. Overall, Kourakis CJ’s recent application raises the question of whether economic waste should be considered as a factor in the inquiry of reasonableness.

### B *Defining the Doctrine of Economic Waste*

*Jacobs & Young* is often cited as the origin of the economic waste doctrine.<sup>54</sup> In this case, the contract provided that all pipes used in construction must be manufactured by Reading. However, the contractor utilised pipes made by other manufacturers, which were then encased into the wall. The pipes were in fact indistinguishable, except in regards to the name of the manufacturer. The majority held that

[t]he owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained.<sup>55</sup>

Whilst not expressly using the term, this case has been interpreted as invoking the economic waste doctrine.<sup>56</sup>

<sup>51</sup> *Bellgrove* (n 3) 618–19 (Dixon CJ, Webb and Taylor JJ).

<sup>52</sup> *Ibid.*

<sup>53</sup> *Stone* (n 1) 183 [63].

<sup>54</sup> *Jacobs & Young Inc v Kent*, 129 NE 889 (NY, 1921) (*‘Jacobs & Young’*); Juanda Lowder Daniel and Kevin Scott Marshall ‘Avoiding Economic Waste in Contract Damages: Myths, Misunderstanding, and Malcontent’ (2007) 85 *Nebraska Law Review* 875, 880; Hal J Perloff ‘The Economic-Waste Doctrine in Government Contract Litigation’ (1993) 43(1) *DePaul Law Review* 185, 188; Christopher S Dunn, Ryan K Cochran and Ryan J Klein, ‘Owners’ Damages Arising from Defective Construction’ in Roland Nikles et al (eds), *Construction Defects* (American Bar Association, 2012) 173, 181.

<sup>55</sup> *Jacobs & Young* (n 54) 891 (Cardozo J). Notably, this statement of law is quoted by both Kourakis CJ and Doyle J: *Stone* (n 1) 170–1 [8], 209 [214].

<sup>56</sup> Daniel and Marshall (n 54) 881.

In *Bellgrove*, the High Court referred to economic waste as a ‘term current in the United States’ and cited the *Restatement (First) of Contracts*.<sup>57</sup> Section 346 provides that, in cases of defective construction, the party is entitled to reasonable costs of rectification or the difference in value if it does not involve unreasonable economic waste. The drafters also include a comment explaining that

[s]ometimes defects in a completed structure cannot be physically remedied without tearing down and rebuilding, at a cost that would be imprudent and unreasonable. The law does not require damages to be measured by a method requiring such economic waste.<sup>58</sup>

The comment is reflected in both the facts of *Jacobs & Young* and *Stone*. In the latter, the ceiling would have to be demolished, and the existing steel beams cut and reinforced, in order to rectify the ceiling height.<sup>59</sup> Notably, this statement is in stark contrast to the aforementioned reasoning of the High Court, which would allow demolition of a satisfactory structure if it was of a different character than that contracted for.<sup>60</sup>

### C *The Rationale*

Chief Justice Kourakis argues for economic waste as a factor given the very ‘concept of reasonableness inevitably incorporates a consideration of the public interest in avoiding economic waste’.<sup>61</sup> Moreover, his Honour argues that this factor takes into account the public interest in ‘minimising transactional costs in the building industry which may be increased if insurance is taken against damages based on rectification costs’.<sup>62</sup> His Honour, at the beginning of his judgment, suggests this notion as a ‘countervailing legal policy consideration’ against rectification damages.<sup>63</sup> Whilst acknowledging that this general observation is not in itself a ‘statement of legal rule’, Kourakis CJ suggests it informs the application of the reasonableness qualification.<sup>64</sup>

However, economic waste has been criticised as being inconsistent in operation as well as with the purpose of compensatory damages.<sup>65</sup> The purpose of damages is to put the plaintiff in the same position as if the contract had been performed.<sup>66</sup>

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<sup>57</sup> *Bellgrove* (n 3) 618, citing American Law Institute, *Restatement (First) of Contracts* (1932) § 346 (‘*Restatement (First) of Contracts*’).

<sup>58</sup> *Restatement (First) of Contracts* (n 57) § 346 cmt (b).

<sup>59</sup> *Stone* (n 1) 201 [166].

<sup>60</sup> *Bellgrove* (n 3) 619.

<sup>61</sup> *Stone* (n 1) 183 [63].

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid* 172 [13]–[14].

<sup>64</sup> *Ibid* 172 [15].

<sup>65</sup> *Loke* (n 32) 201.

<sup>66</sup> For the ‘ruling principle’ in assessing damages see *Robinson v Harman* (1848) 154 ER 363, 365; *Stone* (n 1) 205 [191].

In every case of rectification, by undoing work previously done, there would be economic waste.<sup>67</sup> For example, in *Bellgrove*, the High Court gives the example of erroneously painting rooms the wrong colour.<sup>68</sup> The High Court asserts that where a contractor paints a room in a different colour than specified, the owner is entitled to the reasonable cost of rectifying the departure from the contract.<sup>69</sup> However, to repaint freshly painted rooms would breach the economic waste doctrine, as it would disregard the labour and material spent on the original paint, which achieves the same practical function.

Moreover, economic waste operates on two inconsistent premises. Rectification damages are based on the subjective performance interest of entering into the contract, whereas economic waste relates to the objective economic value.<sup>70</sup> This is partially explored in *Stone*, where Doyle J notes that rectification damages facilitate the recovery of damages according to the plaintiff's subjective performance interest, rather than the loss of the objective financial or economic benefits of performance.<sup>71</sup> Therefore, 'it would make for difficult conceptualisation of the reasonableness restriction if economic waste were adopted'.<sup>72</sup>

Significantly, the *Restatement (Second) of Contracts* no longer refers to economic waste in section 346.<sup>73</sup> In the comments, the drafters state that economic waste was a 'misleading expression', as in some instances, the owner may be awarded rectification damages, but 'will not...usually' put that money towards rectifying the breach, thus resulting in no economic waste.<sup>74</sup> It should be noted that in Australian jurisprudence, it is not necessary for an award of rectification damages that the owner actually evince an intention to rectify the defect.<sup>75</sup>

#### D *Tabcorp on Economic Rationalism and Proportionality*

Chief Justice Kourakis' adoption of the economic waste doctrine is particularly unusual in light of the High Court's decision in *Tabcorp*. In *Tabcorp*, the High Court considered rectification damages in the context of negative covenants. The tenant had covenanted that substantial alterations or additions must not be made to the premises

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<sup>67</sup> Loke (n 32) 201.

<sup>68</sup> *Bellgrove* (n 3) 617.

<sup>69</sup> *Ibid* 617.

<sup>70</sup> Loke (n 32) 201.

<sup>71</sup> *Stone* (n 1) 206 [200].

<sup>72</sup> Loke (n 32) 201.

<sup>73</sup> American Law Institute, *Restatement (Second) of Contracts* (1981) § 346.

<sup>74</sup> *Ibid* § 348 cmt (c).

<sup>75</sup> *Stone* (n 1) 210–11 [215]–[218], 211–12 [222]–[224], citing *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28; *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253. However, this reasoning has been questioned, as even if economic waste does not actually eventuate, the court is still encouraging this activity: Loke (n 32) 201.



without written approval of the landlord. The foyer had been built less than six months earlier, and was made of special materials, including San Francisco Green granite and sequence-matched crown-cut American cherry. In ‘contumelious disregard’ for the contract,<sup>76</sup> the tenant destroyed the original foyer without permission, and rebuilt it in a different aesthetic style. The tenant argued that damages should be based on the diminution of value. However, the High Court applied the *Bellgrove* principle and upheld the Full Court’s award of \$1,380,000 in damages.<sup>77</sup>

If there were a case for the High Court to apply the doctrine of economic waste, this would have been it. Whilst differently furnished, the landlord still had a functional foyer, appropriate for a commercial building, which was of similar value to the original. To demolish and reinstate the former foyer would be disproportionate to the value obtained — it would result in another new foyer, of like value, just of a different aesthetic style. The High Court was highly critical of the tenant’s argument for damages to be assessed at diminutive value, and cited the landlord’s submission in describing it as an ‘attempt “arrogantly [to] impose a form of ‘economic rationalism”’.<sup>78</sup> The High Court’s unanimous rejection of ‘economic rationalism’ has been interpreted as the High Court once again ‘squash[ing]’ the doctrine of economic waste.<sup>79</sup>

Moreover, it is also interesting to consider the absence of a proportionality discussion in the High Court’s judgment. As can be seen in *Jacobs & Young*, economic waste is related to a proportionality inquiry. In *Tabcorp*, the closest the High Court gets to proportionality is by quoting *Ruxley*, where the House of Lords summarised the trial judge’s conclusion that the cost of reconstructing the pool would be ‘wholly disproportionate to the disadvantage of having a [6 ft deep] pool ... as opposed to 7 ft 6 inches’.<sup>80</sup> Following this quote, the High Court criticises the House of Lords for arriving at a view ‘inconsistent’ with the principles of *Bellgrove* and *Radford v De Froberville*.<sup>81</sup> Moreover, despite the landlord’s submissions directly raising the issue of proportionality, the High Court was silent on this point.<sup>82</sup> Like economic waste, ‘*Tabcorp* was a case where it would seem that proportionality should loom large’.<sup>83</sup> In light of the lack of a proportionality discussion and its criticism of *Ruxley*,

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<sup>76</sup> *Tabcorp* (n 27) 282 [4].

<sup>77</sup> *Ibid* 283 [5].

<sup>78</sup> *Tabcorp* (n 27) 286 [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

<sup>79</sup> Kelvin Keane, ‘Storm in a *Tabcorp*’ (2012) 28(1) *Building and Construction Law Journal* 4, 6.

<sup>80</sup> *Tabcorp* (n 27) 289 [18], quoting *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, 354–5 (*Ruxley*). In *Ruxley*, the House of Lords rejected a claim for rectification damages to remedy a pool, which was nine inches less in depth than the contract specified.

<sup>81</sup> *Tabcorp* (n 27) 289 [18], citing *Bellgrove* (n 3); *Radford v De Froberville* [1977] 1 WLR 1262.

<sup>82</sup> *Tabcorp* (n 27) 277 (NJ Young QC) (during argument).

<sup>83</sup> Jonathan Korman, ‘The Measure of Damages for Breach of a Construction Contract Where There is No Economic Loss: An Examination and Evaluation of the Law in England and Australia’ (2018) 34(3) *Building and Construction Law Journal* 159, 162.

commentators have suggested that the High Court signalled that proportionality is no longer relevant in the inquiry of reasonableness.<sup>84</sup> Given its close proximity to proportionality, this judgment undermines the doctrine of economic waste, and suggests that it is unlikely to gain approval by the High Court. Despite the reasoning of the High Court, Doyle J and Hinton J still consider proportionality in their respective judgments.<sup>85</sup> In fact, Doyle J notably criticises the High Court's reasoning in *Tabcorp* for not considering proportionality as a factor.<sup>86</sup> It will be curious to see whether other lower courts apply proportionality in light of this recent High Court authority.

## VI CONCLUSION

The doctrine of economic waste is problematic in the context of the High Court's strongly worded dictum in *Bellgrove* and the High Court's warning in *Farah Constructions*. Moreover, the inconsistencies inherent in the doctrine as well as the implicit rejection of proportionality by the High Court in *Tabcorp* render Kourakis CJ's application of economic waste questionable. It is unlikely to gain traction in Australian jurisprudence. Nevertheless, this discussion raises a broader question over Kourakis CJ, Doyle J and Hinton J's reliance on proportionality against the backdrop of *Tabcorp*'s implicit rejection of proportionality as a factor in the inquiry of reasonableness. However, the High Court rejected the plaintiffs' application for special leave,<sup>87</sup> leaving this question open until the next rectification case.

<sup>84</sup> Ibid 163; Matthew Bell, 'After *Tabcorp*, for Whom Does the Bellgrove Toll — Cementing the Expectation Measure as the Ruling Principle of Calculation of Contract Damages' (2009) 33(3) *Melbourne University Law Review* 684, 707, citing 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.

<sup>85</sup> *Stone* (n 1) 220 [260]–[261], 225–6 [288] (Doyle J), 258–9 [453] (Hinton J).

<sup>86</sup> Ibid 220 [260]. Justice Doyle states that he does 'not understand the High Court's reasoning ... to exclude consideration of any disproportion between the rectification work proposed and the benefit to be obtained'. Whilst acknowledging that the court must consider the contractual bargain between the parties, his Honour maintains that 'disproportion remains a relevant consideration'.

<sup>87</sup> *Stone v Chappel* [2017] HCASL 269.