IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 14136/2010

In the matter between:

LYNETTE ETHEL ALLEN Plaintiff

and

HANS PIETER WOLFGANG SCHEIBERT Defendant

JUDGMENT DELIVERED ON FRIDAY 20 MARCH 2015

BLIGNAULT J:

Introduction

[1] Plaintiff, Ms Lynette Allen, instituted this action against defendant, Mr Hans Scheibert, for the payment of damages pursuant to a breach by him of a warranty contained in a written agreement of sale.

[2] Plaintiff and defendant concluded the agreement of sale on 29 July 2009. In terms thereof defendant sold the immovable property described as Erf 2054 Oranjezicht, Cape Town, situated at 6 Bridle Road, Cape Town, to plaintiff for a purchase price of R7 375 000,00.

[3] On 29 July 2009 the parties concluded a written addendum to the agreement of sale. It reads as follows:

'The seller warrants that all alterations, additions and improvements to the Property have been approved by the Local Authority and that all plans which are required have been submitted to and approved by such Local Authority.'

[4] Plaintiff made the following allegations in her particulars of claim:

'8. Defendant breached the aforesaid warranty in that the fitted kitchen in the guest suite in the ground floor space of the property, being an alternation, addition or improvement to the property, had not been approved by such local authority

9. The title deed in respect of the property provides that only one dwelling, together with such outbuildings as are ordinarily required to be used therewith, may be erected on the erf.'

[5] She alleged further that she suffered damage as follows:

'12.1 R7 827,24 representing the costs to Plaintiff of having to amend designs in respect of the property and the resubmission of plans to the local authority pursuant to the discovery that the property did not comply with local authority approvals;

12.2 R35 000,00 in respect of the costs incurred in the removal of the second kitchen;

12.3 R350 000,00 in respect of the diminution in value of the property as a result of the second kitchen having to be removed and Plaintiff being unable to use the guests suite as a separate self-catering unit.'

[6] Defendant did not dispute any of the material elements of plaintiff's claim but denied her allegations in regard to the damage suffered by her. He pleaded in the alternative that plaintiff could have and ought to have mitigated her damage inasmuch as plans could have been submitted for a subsequent approval, or the equipment that allegedly constituted a kitchen could have been removed.

Evidence on behalf of plaintiff

[7] Plaintiff testified that she and her husband had been staying in Milnerton before purchasing the house at 6 Bridle Road. They decided to look for a new house in the City Bowl area as their two sons were studying at the Cape Town University of Technology and their daughter was going to the University of Cape Town. She and her husband looked at about 12 to 15 properties over a period of some 5 months. An attraction of the house at 6 Bridle Road was that it contained a separate flatlet that would allow their sons to stay there with some independent space. They inspected the property a couple of times and also discussed some of it features with defendant. It was of importance to her that all aspects of the house had been properly authorised by the City Council. For that reason she required that the addendum be added to the agreement.

[8] After moving into the property plaintiff and her husband employed an architect, a builder and an engineer in order to alter certain features of the house. The flatlet was on a lower level. It contained a separate kitchen and a few rooms. They planned to modernise and reconfigure the flatlet as a separate dwelling. Their architect prepared plans for these changes but he informed them in due course that he could not get the plans approved by the City Council. The presence of a second kitchen rendered the entire property a double residential unit and as such it contravened the provisions of the zoning scheme and the title deed of the property.

[9] Plaintiff's architect advised her that she could either rectify the situation by obtaining the necessary approvals or cause the flatlet area to be redesigned. In his letter dated 9 December 2009 he formulated these proposals as follows:

'The process involved to rectify this matter is as follows:

1. *An application needs to be submitted for the removal of the title deed restriction, this process can take between 6 – 24 months, if successful.*
2. *Extensive public participation (neighbours consent) will be required,*
3. *Advertising by Council is required,*
4. *A town planner would need to be consulted,*
5. *As built plans will then have to be submitted to update Council records.*

Outline anticipated costs Excl. VAT are as follows:

1.	*Town Planner*	:	*R 20 000.00 – R 30 000.00*
2.	*Application fees*	:	*R 4 500.00*
3.	*Plan walking fees*	:	*R 3 000.00*
4.	*Plan scrutiny fees*	:	*R 1 250.00*
	Total	:	*R 28 750.00 – R 38 750.00*

Once submitted, there is no guarantee that the application will be successful, in that a neighbour may object and take it to the appeal's process in which the entire process becomes drawn out and more costly.

To date, we have had to proceed in redesigning the area down stairs to reflect planning and usage that is of "single dwelling" classification in order to ensure that your planning approval for the alterations can move forward without delay and without the removal of the restriction process as outlined above. This however does present a down scale in the usage of the dwelling and will present a loss in market value in that it cannot be utilised legally as a second dwelling unit as originally anticipated when purchased. I am sure that the resident estate agents will be able to verify this and accordingly determine a potential reduction in the value of the property value.

Our costs thus Excl. VAT to redesign and resubmit the plans is as follows:

1.	*Redesign of ground floor*	*: 1h30 @ R 1 200.00 /h*	*= R1800.00*
2.	*Redrawing of plans and elevations*	*: 8h15 @ R 600.00 /h*	*= R4 950.00*
3.	*2 x A1 Plots*	*: 2 x R 18.00 each*	*= R 36.00*
4.	*8 x A1 Prints*	*: 8 x R 10.00 each*	*= R 80.00*
		Total	*= R6 866.00'*

[10] Plaintiff testified that she decided to cause the kitchen in the flatlet to be removed and to proceed with the alterations to the main house so that they could move in. She was influenced by the fact that there was no guarantee that the application for the approval of the plans for a separate flatlet would succeed. She confirmed that she had made the payments set forth in sub-paras 12.1 and 12.2 of her particulars of claim, referred to above.

[11] Plaintiff testified that the existence of the flatlet was of importance to her. She said, *inter alia*, the following:

> *'Well we specifically wanted that area for our sons to have some independence, we did not want to go the route of putting them into any kind of apartment or anything like that, that was closer to the university and we were looking at a house down the road from this one which had two apartments and a separate kitchen, and we might, I mean at that stage this might have been the tipping scale, we might have gone with the other.'*

[12] Plaintiff's architect, Mr Marchand Osche, confirmed that plaintiff had paid for his services. He said that the application for the approval of the building plans for the flatlet was refused because it contravened the provisions of the zoning scheme and the property's title deed. The reconfiguration of the area would not only have entailed the omission of the kitchen. It also required a change to the front entrance of the property to alleviate separate access by a third party.

[13] Plaintiff called Mr John van der Spuy as an expert witness. He has considerable expertise and experience in the field of property valuation. He is a registered professional valuer and the managing director of Steer and Co. He obtained the National Diploma in Property Valuation in 1976 and he is a member of, *inter alia*, the Institute of Estate Agents and the Institute of Valuers.

[14] Mr Van der Spuy's professional career commenced as a property valuer for the city of Cape Town and other municipalities. In May 1975 he joined the Property Management Division of Steer and Company. He was responsible for the management of all the properties in the company's portfolio and he handled the valuation of properties entrusted to it. He headed the valuation division of Steer and Company for a number of years whilst maintaining control over the various other divisions in which the company operated. His valuation activities included municipal valuations and handling objections in this regard. He valued residential and commercial properties for litigation purposes and for deceased estates. He also prepared valuations for purposes of investments in property.

[15] Mr Van der Spuy and Ms Marlene Tighy, defendant's expert, met before the trial in an attempt to curtail the issues. Their meeting achieved very little. They only agreed on one material point, namely that the order of desirability of neighbourhoods in the city bowl area is: (1) Higgovale; (2) Oranjezicht; (3) Tamboerskloof / Gardens; (4) Devil's Peak; and (5) Vredehoek.

[16] Mr Van der Spuy provided a general description of the property and the dwelling in a report submitted by him.

'2.2 The subject property is 6 Bridle Road, Oranjezicht, a large, single residential home situated on the lower slopes of Table Mountain in a prestigious residential area of the Cape Town City Bowl, which has been firmly established since the 1940's. This home is part of a row of properties forming the top most residences in the City Bowl. Bridle Road, along with Rugby Road, is the top most road in this area, traversing the upper reaches of Oranjezicht. All of the surrounding properties include substantial, freestanding dwellings many of which date from the 1940's and 50's and some of which have been total renovated or replaced in some cases with more modern homes.

2.3 Bridle Road, at its southern end, is situated a "cul-de-sac" and thus a sought after area with easy access to the Cape Town CBD, some 3kms below. All the surrounding roads are tarred with easy access to all modern amenities, such as schools, shopping centres and public transport. Views over the City Bowl suburbs, CBD and Table Bay are panoramic.

……

4. IMPROVEMENTS

At the date of sale (and date of valuation), the steeply sloping property with various terraces, including a freestanding substantial dwelling typical of many of its neighbouring buildings with large and spacious accommodation. This included a steep driveway off Bridle Road, up to a secure parking area for three cars.

A flight of stairs leads inside to the main entrance, off which on the lower level, was a flatlet of some 70m^2 approximately, with a separate entrance and accommodation including two bedrooms, a shower, toilet and wash hand basin (x 2), an open plan kitchen and a living room opening onto the adjacent parking terrace. There was a large storeroom under the staircase.

The entrance hall also leads to the upper level where the main part of the dwelling included a hallway opening into a large lounge/dining room with the original separate dining room then used as a TV room. The upper level of the building is L-shaped and the reception area includes a large kitchen with a study leading therefrom. All the floors in this area were surfaced with ceramic tiles. The other "leg" of the "L" led to four bedrooms with the main having an en-suite bathroom. There were a further two bathrooms and a guest cloakroom. The dwelling has an external laundry and staff quarters, as well as a swimming pool with entertainment poolroom below the bedroom wing. Next to it was a lockable storeroom below the staircase. The pool is thus well away from the living area.

Although the dwelling was largely in its original structural condition, certain renovations had been carried out, apparently in the early 1990's, to the kitchen and bathroom areas, thus providing reasonably modern accommodation.'

[17] Mr Van der Spuy valued the subject property as a single residential unit i.e. without the flatlet being regarded as a separate residential unit. He arrived at a value of R7 million. The basis of his determination was the comparable sales' method. He examined the prices of recent comparable sales in the same part of Oranjezicht, namely:

8 Bridle Road,	13 February 2008,	R9,8 million;
2 Bridle Road,	15 December 2009,	R5,1 million;
2 Rugby Road,	22 February 2009,	R7,3 million;
5 Rugby Road,	30 August 2008,	R6,25 million; and
10 Bridle Road,	18 January 2008,	R7 million.

[18] According to Mr Van der Spuy the subject property was sold at a premium of R375 000,00, probably due to the parties' assumption that the flatlet could be used as a separate residential unit. He summarised his opinion as follows:

> *'In order to assess the derogation of value occasioned by such a change, the valuer has taken into account firstly, the different selling prices of the various homes listed above but has also taken into account comparable residential rentals of apartments in Oranjezicht which were found to be approximately R4 000 per month for a two bedroomed, 70m^2 unit with a lounge , kitchenette and bathroom facilities. It is axiomatic that the lack of a kitchen does not totally remove the "flatlet" from the overall dimensions of the building but for the reasons listed above , it would simply form part of the main dwelling and could not be let as a separate unit. A further factor brought to bear, is that a 70m^2 flat would sell independently for approximately R1 200 000 in this sought after area.'*

[19] Mr van der Spuy concluded that taking all the relevant factors into account, he was of the opinion that the adjusted valuation of the overall property would reduce by approximately R350 000,00 ie to just over R7 000 000,00. He calculated the potential rental loss by assuming a net rental of R31 500,00 per annum, capitalised at 8,5% per annum.

Evidence on behalf of defendant

[20] Defendant gave evidence in person. He is an attorney, formerly practising in Cape Town. He bought the property at 6 Bridle Road in 1995. In July/August 2008 he opened a satellite office in Berlin but he continued practising in Cape Town. During the period 2008 to 2009 he spent about one-third of his time in the Cape

Town practice and the rest in Berlin. He decided to move permanently to Berlin and to sell the subject property.

[21] In July/August 2008 he made contact with estate agents and asked them to market the property. It was initially advertised at a price in the region of R10 million to R11 million but as the market dropped he gradually reduced the asking price to R8,9 million. The house next door at 8 Bridle Road was sold twice in the relevant period, first at R8,9 million and subsequently at R11 million. He marketed the property from mid-2008 until August 2009 but he himself did not act proactively. When he left for Berlin his daughter, Katrina, dealt with the estate agents. His perception at the time was that the property market was dead.

[22] On 26 June 2009 he received an offer for R5 million for the property. He rejected it out of hand. On 27 July 2009 he received an offer for R7 million from plaintiff. He rejected this offer. Under cross-examination defendant confirmed that he had altogether mandated five estate agents to market the property, including the leading estate agents in Cape Town. He ultimately sold the subject property for R7 375 000,00 because the estate agent told him he would not get a better price.

[23] Defendant called Ms Marlene Tighy to give evidence as an expert. She is employed by Rhode and Associates. She holds the following degrees: BSc (Wits) (Mathematics & Mathematical Statistics) (1977); BSc Hons (Operational Research) (Rand Afrikaans University) (1979); MBL (SA) (1985); and Pr Sci Nat – Professional Natural Scientist (Mathematics) (1994). She also has the following qualifications: Registered Professional Valuer; Member of the SA Institute of Valuers; Member of

RICS; Advanced Diploma in Project and Programme Management, Old Mutual Business School; and PRINCE2 Registered Practitioner (2006). Her professional experience commenced in 1978. She worked for a number of employers in the fields of, *inter alia*, mathematical statistics, marketing research, property management, business systems analysis, property valuation, and information technology business analysis.

[24] Ms Tighy determined the value of the subject property as at 4 August 2009. She obtained details of the building at the time of the sale from defendant to plaintiff and she looked at approved plans. The house is situated on two levels. The flatlet which forms the subject of the dispute consists of a study with an adjacent cloakroom, a guest room with an adjacent bathroom and an area marked *'existing garage guest extension'*. The latter area was fitted out as a kitchen at the time of the sale. She estimated this area as 109m^2.

[25] Ms Tighy stated that the object of her valuation was to determine the market value of the subject property as at the date of the sale. She applied the following definition of market value which, she said, is internationally accepted:

> *'Market value is the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction, after proper marketing wherein the parties had each acted knowledgably, prudently, and without compulsion.'*

[26] In a report which served as a summary of her evidence, she described her method of valuation as follows:

'To determine the market value of the subject property, we used as our primary approach the sales details of 42 historical sales in the area as input to multiple-regression models to try to explain prices achieved in the area. This is a quantitative and rather robust method that is far superior to the "soft" conventional method of using "comparative" sales that are vaguely comparable but without the evidence to support the comparability …. In addition, we also consulted estate agents.'

[27] Her method consisted of the application of a multiple regression analysis with respect to sales details of 42 properties in Oranjezicht, Higgovale and Vredehoek over the period from January 2008 to December 2009. These prices were inflation adjusted to August 2009. She then tried a list of 15 value-forming attributes to explain in a model the prices achieved for the 42 sales.

[28] Using these data Ms Tighy constructed two regression equations. The first yields a market value of the subject property of R9190,976. The model produced a correlation coefficient, ie one measure of the goodness of the fit, of 0,57 which means that the model explains 57% of the variations of the evaluation in market value. The second equation yielded a market value of R10 868 000,00 and a coefficient factor of 0,59 which means that it explains 59% of the variation.

[29] Ms Tighy's conclusions, as summarised in her report, read as follows:

'…we conclude (t)hat the market value of the subject property as at 4 August 2009 was R9 million or higher (excluding costs of sale and VAT). This value estimate typically reflects the price of single-unit dwellings, but adjust for, inter alia, different sizes. (In our models, size of the floor area is catered for in proxy variables like number of bathrooms and number of studies; the 5½ bathrooms and 2 studies evidently push up the market value of the subject property.)

The "most likely" buyer determines market values in a given neighbourhood, and this imaginary person would most likely have ignored the possibility of letting the lower-level suite. Hence the price this person would have been prepared to pay would have ignored this possibility but would have considered the number of bathrooms and studies (proxies for floor size). In fact, by throwing out the kitchen on the lower level, the Plaintiff implicitly confirms this train of thought (viz. she was a "most likely" buyer). This is so because the probability is very high that she would have been able to get consent use at little cost, albeit only after one to two years.'

[30] Under cross-examination Ms Tighy's valuation was tested against the prices at which eight properties in the close vicinity, including the subject property, had been sold during the period January 2008 to December 2009. This exercise is dealt with more fully hereunder. That concluded the evidence in the matter.

The method of calculating plaintiff's damage

[31] In the course of argument the legal question arose as to the proper method of calculating the damages to be awarded to plaintiff. Counsel initially argued that the diminution in value of the property was the relevant yardstick which had to be determined with reference to the opposing valuations of the property as a whole. Counsel for defendant submitted that the market value of the property exceeded the price paid for it by plaintiff and that plaintiff for that reason did not suffer any damage at all. Counsel for plaintiff argued that the price paid by plaintiff exceeded the market value by at least R350 000,00, being the use value of the flatlet as such.

[32] At my request counsel submitted supplementary written argument on the question whether a claim for damages as a surrogate for specific performance is not available to plaintiff in the circumstances of this case. The essential character of such a claim is that a party to a contract (A) who is entitled to claim specific performance by the opposite party (B) by reason of a breach of the contract by it, may claim damages from B as a surrogate for such specific performance. The damages in such a case would be the amount required by A to complete or rectify the defective performance by B.

[33] In his supplementary argument plaintiff's counsel contended that her claim is indeed one for damages as a surrogate for specific performance. Counsel argued that she was entitled to an order that defendant completes his prestation. Her claim is intended to compensate her for his failure to do so. Counsel for defendant, on the other hand, submitted that a claim for damages as a surrogate for specific performance does not exist in our law. On the facts of this case, he argued, plaintiff's claim as pleaded is intended to compensate her for the difference between a house with a flatlet that can be used legally as a separate residential unit and a house without such a flatlet. I have considered plaintiff's particulars of claim but I am of the view that her allegations are wide enough to accommodate the arguments of her counsel.

[34] The main contentions for and against the recognition of a claim for damages as a surrogate for specific performance in our law are set forth in Van der Merwe et al *Contract General Principles* 4th edition at 328-329:

'The argument in favour of recognising damages as a surrogate for performance as an independent remedy is that a contractant, who has performed in full and who would have been entitled to claim specific performance had it been possible, should have the right to claim full monetary value of the counter-performance to enable him to effect or complete the counter-performance to which he was entitled. After all, if he had not yet performed and was sued for performance he would have been entitled to withhold his performance until the plaintiff either performed in full or complemented the shortcomings in his performance. On the other hand, it may be contended that since a claim for specific performance is finally based on the exact content of the contract, damages as a surrogate for performance should only be available if there is an appropriate term in the contract. Moreover, it should be taken into account that the remedies for breach of contract are not intended to penalise the party in breach.'

[35] Although many writers are in favour of the recognition of such a remedy, uncertainty was created by the decision of the Appellate Division of the Supreme Court in *ISEP Structural Engineering & Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A). Three separate judgments were delivered. Jansen JA and Hoexter AJA (Viljoen JA concurring) held that the remedy does not exist in our law. Van Winsen AJA (Kotze JA concurring) opined that it does. The *ISEP* judgment has been widely criticised. In *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) at 186E-G the Supreme Court of Appeal (per Smalberger ADCJ) took note of the criticism and expressed the view that its correctness is open to doubt. Reconsideration of the majority decision, the learned judge said, is called for but the case at hand was not the appropriate matter in which to do so.

[36] It seems to me that the nature of appellant's claim must be considered within the wider context of the principles underlying the assessment of damages in our law.

It is clear from the judgment of Jansen JA in the *ISEP* case that the concept of damages in this context should not be regarded as a separate or distinct kind of damages. He refers inter alia with approval to a statement in De Wet and Van Wyk *Kontraktereg* 4th edition 200 which is to the effect that the fact that damages are claimed as a surrogate for specific performance does not alter the basic principles that apply to the calculation and award of contractual damages.

[37] The nature of a claim for damages is discussed at some length in Visser and Potgieter's *Law of Damages* 2nd edition 64-73. The general principle is settled law. It was established more than hundred years ago. See the judgment of the Appellate Division of the Supreme Court in *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22:

> *'… we must apply the general principles which govern the investigation of that most difficult question of fact - the assessment of compensation for breach of contract. The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party.'*

[38] In the practical application of this principle, however, there are two main approaches to the assessment of damages. The first is described as the sum-formula method, the second as the concrete approach. The sum-formula method has traditionally been applied in South Africa. Visser and Potgieter op cit 65 describe it, with reference to an article by CFC van der Walt in (1980) 43 *THRHR* 1 at 4, as the negative difference between a person's current patrimonial position, after

the occurrence of the damage-causing event, and his hypothetical patrimonial position which would have existed currently if the damage-causing event had not taken place.

[39] The sum-formula has been criticised by a number of writers. They favour the application of the concrete approach. Visser and Potgieter op cit 71 state that the latter approach focuses on the withdrawal or deterioration of a particular part of someone's patrimony. According to Reinecke 1988 *De Jure* 226 the concrete approach regards damage as a factual loss or deterioration of a specific asset or a liability which is incurred or increased. Van der Merwe et al op cit 358-359 provides a fuller description of the concrete approach:

> *"In actual fact, the courts do not always make use of a comparison between a hypothetical and an actual total patrimony in order to assess damage. Much rather, they follow a concrete approach to the question of damage by focussing on the particular elements of the estate that are affected. According to the concrete approach, damage occurs whenever, as a consequence of an uncertain or unplanned event, the use of an asset is forfeited; a particular asset is lost or reduced in value; a liability (that is, a debt) is incurred or increased, or expenditure becomes useless. It has even been recognised that the loss of management time of an organisation may constitute damage. Assets are patrimonial rights and also expectancies that have a monetary value, provided that the particular expectancies are recognised by the law. Liabilities or debts are not only liabilities that have already resulted from the uncertain event complained of but also liabilities or*
> *expenses that will inevitably result from the event and which can be regarded as both necessary and reasonable."*

[40] The merits of the concrete approach, as opposed to the sum-formula method, are well illustrated by two judgments. The first is that of Findlay AJ in *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D). The defendant in that case instituted a counterclaim for damages suffered by him as a result of the defective construction of a dam wall by the plaintiff. He claimed the cost of repairing the dam wall as damages. Counsel for the plaintiff relied on the *ISEP* judgment. He submitted, inter alia, that the true measure of the defendant's damage was the difference between the value of the dam wall had it been properly constructed and its value in its defective and actual state. In the absence of evidence by the defendant as to the monetary value of the latter measure, counsel submitted, the claim should fail.

[41] In the course of his judgment Findlay AJ he analysed the three judgments in *ISEP* case fully and said the following, at 218G-219A:

> *'From the above analysis it seems to me to follow, with respect, that the majority decided the matter on the basis that the claim as pleaded was not one for damages consequent upon an election by the aggrieved party to claim damages instead of pursuing a remedy for specific performance but was a misconceived cause of action seeking to claim monetary compensation in lieu of specific performance.*
>
> *… … It seems to me, therefore, that the further exposition as to the proper yardstick applicable in the assessment of damages for breach of an obligation arising from contract as discussed and formulated by Jansen JA is not a ratio of the Court that binds me. I do not say that for the purpose of examining the specific type of contract a court may not investigate and pronounce upon a general rule of contract applicable to all contracts and thereby formulate a ratio which would be binding but rather that, upon my analysis of the judgments, I do not find that the majority of the Court either decided the*

question or found it necessary to address it for the purposes of deciding the appeal.'

[42] Findlay AJ rejected the plaintiff's submissions and gave judgment for the defendant. His reasoning appears inter alia from the following passage:

> *'Such an approach supports application of the existing rule inasmuch as the principle is to ensure that the innocent party obtains what he bargained for (albeit that this may be translated into a monetary equivalent as damages). The fact that the costs of remedial work might exceed the diminution in value or even the whole value may well be due to increase in costs occasioned by the passage of time (resulting from escalation in cost or the eroding of the real value of money). This does not necessarily, in my view, do violence thereto because a contract such as the present involves the erection and creation of a substantial immovable structure which, if defective, cannot simply be replaced by a readily obtainable substitute in the open market. That this must be so is because it is, by nature, unique and custom built and secondly because it is not something movable. It must therefore be contrasted totally with other commodities, such as the example of the second-hand motor vehicle as is cited in the English cases. In the present case and since the component of the contract other than hire charges has not been quantified, I cannot say more than the costs of remedial work may exceed by far what the plaintiff received by way of hire charges but I am unable to relate it to the overall value of the whole contract. Such a result is not necessarily inequitable as, for example, the nature and costs of remedial work carried out in the Holmdene Brick case supra.'*

[43] I agree with respect with the reasoning of Findlay AJ in the *Pedrelli* judgment. I am of the view that it supports the concrete approach to the assessment of damages. The successful claim focused on the damage to a concrete object,

namely the broken dam wall. The learned judge declined to apply the sum-formula method.

[44] The second judgment that illustrates the application of the concrete approach is that of Trollip JA in *Ranger v Wykerd and Another* 1977(2) SA 976 (AD). Although this case concerned a claim following a fraudulent misrepresentation in a contractual context, the learned judge made it clear, at 994H-995B, that on the facts of that case the assessment of delictual damages was similar to the assessment of contractual damages. The facts were that the seller of a residential property fraudulently represented to the purchaser that a swimming pool on the premises was structurally sound. After taking transfer of the property the purchaser found that that the pool was leaking. The purchaser repaired the pool and claimed the costs of repair as damages from the seller. The seller's contention was summarised by Trollip JA as follows at 992GH:

> *'The main argument for differentiating between the two kinds of delicts rests on the applicability of the swings and roundabouts principle previously mentioned. In effect the contention is that, in contradistinction to the hypothetical delict of wrongfully causing physical damage, the delict of fraud was committed in the course of and as an integral part of appellant's acquiring the property; the fraud and its immediate effect must therefore be considered, not in isolation, but in the context of the whole of that transaction; hence, whatever loss appellant sustained (on the swings) through the cost of repairs is compensable by the net gain in patrimony he derived (on the roundabouts) through acquiring the property, such net gain being the excess in value of the property over what he paid for it; and in the absence of proof that there was no such excess, appellant failed to prove that he had suffered any patrimonial loss…….'*

[45] The learned judge rejected plaintiff's contention and granted the amount of the reasonable and necessary cost of remedying the defects of the swimming bath as damages to the purchaser. This, he said, constituted the patrimonial loss that the purchaser suffered through the seller's fraud. The reasoning of Trollip JA appears inter alia from the following passage, at 994F-H:

> *'That such* [repair] *cost, as in the case of the supposed delict of wrongful physical damage to the swimming bath, was directly and causally connected with respondent's fraud is manifest. For they knew, when committing the fraud, the appellant and his family were intent on using the swimming bath if they acquired the property, and that, because of its defects, he would probably have to repair it before long for it to function properly and enable them to use it. Indeed, the present is a fortiori the kind of case in which the reasonable cost of repairs ought to be awarded as representing appellant's patrimonial loss directly flowing from the fraud, for the respondents must have foreseen it as an inevitable consequence of their fraud.'*

[46] It is also useful to have regard to the concept of an *'expectation loss'* in common law jurisdictions. The law relating to the assessment of damages for breach of contract was influenced by an article written by Fuller and Perdue in 46 *Yale Law Review* (1936). It has variously been described as *'seminal'*, *'famous'* and *'immensely influential*'. (Cf *Mainline Carriers (Pty) Ltd v Jaad Investments CC and Another* 1998 (2) SA 468 (C) at para [17]). The authors distinguished between three main purposes that may be pursued in awarding damages for breach of contract. They summarised these purposes as follows:

> *'First, the plaintiff has in reliance on the promise of the defendant conferred some value on the defendant. The defendant fails to perform his promise. The court may force the defendant to disgorge the value he received from the plaintiff. The object here may be termed the prevention of gain by the*

defaulting promisor at the expense of the promisee; more briefly, the prevention of unjust enrichment. The interest protected may be called the restitution interest… … …

Secondly, the plaintiff has in reliance on the promise of the defendant changed his position. For example, the buyer under a contract for the sale of land has incurred expense in the investigation of the seller's title, or has neglected the opportunity to enter other contracts. We may award damages to the plaintiff for the purpose of undoing the harm which his reliance on the defendant's promise has caused him. Our object is to put him in as good a position as he was in before the promise was made. The interest protected in this case may be called the reliance interest.

Thirdly, without insisting on reliance by the promisee or enrichment of the promisor, we may seek to give the promisee the value of the expectancy which the promise created. We may in a suit for specific performance actually compel the defendant to render the promised performance to the plaintiff, or, in a suit for damages, we may make the defendant pay the money value of this performance. Here our object is to put the plaintiff in as good a position as he would have occupied had the defendant performed his promise. The interest protected in this case we may call the expectation interest.'

[47] Fuller and Perdue's third class of damage, ie expectation loss, is relevant to the present case. The concept is known and applied in common law jurisdictions. See, for example, *Omak Maritime Ltd v Mamola Challenger Shipping Co & Ors* [2010] EWHC 2026 (Comm) (4 August 2010), quoting from the judgment of the High Court of Australia in *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; (1992) 174 CLR 64 (12 December 1991) paras 23 and 24:

'23. The general rule at common law, as stated by Parke B. in Robinson v. Harman (1848)1 Exch 850 , is "that where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same

situation, with respect to damages, as if the contract had been performed". This statement of principle has been accepted and applied in Australia.

24. The award of damages for breach of contract protects a plaintiff's expectation of receiving the defendant's performance. That expectation arises out of or is created by the contract. Hence, damages for breach of contract are often described as "expectation damages". The onus of proving damages sustained lies on a plaintiff and the amount of damages awarded will be commensurate with the plaintiff's expectation, objectively determined, rather than subjectively ascertained. That is to say, a plaintiff must prove, on the balance of probabilities, that his or her expectation of a certain outcome, as a result of performance of the contract, had a likelihood of attainment rather than being mere expectation.'

[48] See also *Popov v Moldova No 1* [2006] ECHR 45 (17 January 2006), a judgment of the European Court of Human Rights, which refers to the law of the United States of America in the following terms:

'A similar rule is to be found in the book "Introduction to the law and legal system of the United States" [by William Burnham] *under the sub-title 'Remedies for Breaches of Contracts'. I quote:*

"...The most common kind of relief that is awarded in a suit for breach of contract is "compensatory damages". This type of damages is also referred to as "expectation damages" since such damages seek to repair the expectations of a party by awarding an amount of money that will put the aggrieved party in the same position he would have been if the contract had been performed..."

[49] The concept of *'expectation damage*' is relevant for purposes of this judgment. On the facts of this case it is in my view similar to the concrete approach in South African law. Both approaches focus on the concrete asset or assets which

the innocent party expected to receive in terms of the contract but did not receive as a result of the guilty party's breach of contract. He is entitled to be compensated for such loss.

[50] I revert to the facts of the present case. In my view the concrete approach should be followed in assessing plaintiff's damage. The breach of the warranty by defendant adversely affected only one of her assets, namely her use of the flatlet area. It had no effect at all on any other element of her patrimony. It would therefore be illogical and impractical to involve any other asset in the process of assessing the amount of her damage.

[51] The same result would follow if the expectation test were to be applied. Plaintiff expected to receive a flatlet that could be used as a separate residential unit. She did not receive it as a result of defendant's breach of contract. She is therefore entitled to claim damages to compensate her for defendant's incomplete performance

[52] I return to the question posed at the outset of this part of the judgment, namely can plaintiff claim damages from defendant as a surrogate for specific performance. In my view she can. It seems to me that the answer to this question follows from my analysis of the concrete approach and the expectation test. The purpose of a claim for specific performance would have been to compel defendant to rectify his defective performance ie to provide plaintiff with the asset which he undertook to supply to her. She elected to claim damages and her election as such has not been challenged. She is now entitled to claim damages from defendant in

an amount that would put her in the position that she would have been if defendant had not breached his warranty.

[53] On this basis I am accordingly of the view that plaintiff is entitled to claim damages from defendant. The outstanding issues are first the defence that plaintiff should have mitigated her loss and secondly the quantum of the loss.

Evaluation of the experts' evidence

[54] Although it is not necessary I have considered the question whether plaintiff would have suffered any damage if the submission of counsel for defendant were correct, namely that the current value of the property as a whole exceeds the purchase price. To that end I proceed to discuss the question whether the valuation of Mr van der Spuy or that of Ms Tighy is to be preferred.

[55] I consider Mr Van der Spuy's valuation first. He was subjected to lengthy cross-examination and various aspects of his evidence were criticised in argument. There are in my view, however, two weighty factors which support his valuation of the property. The first is the fact that his valuation is similar to the price agreed upon in the actual sale between plaintiff and defendant. In *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) at 956D-F the importance of a bona fide sale for purposes of valuation was emphasised:

> *'When a sale of comparable property has been proved, the Court should, in the absence of any evidence or indication to the contrary, assume that it was*

a bona fide transaction, concluded between reasonably intelligent and well-informed people who were not acting under any abnormal pressure, or subject to any delusions or misapprehensions about the property which was being bought and sold. If there were any abnormal features of the transaction, it is for the party who wishes the Court to disregard the price reflected therein to prove those features.'

[56] A second factor in favour of Van der Spuy's valuation is that he has considerable expertise and experience in the valuation of properties. See *City of Johannesburg v Chairman, Valuation Appeal Board and Another* 2014 (4) SA 10 (SCA) paras [22] – [24]:

'[23] … …In order to determine the market value of property, valuers should have regard to various factors in order to determine what a notional willing buyer would probably pay to a willing seller in the open market. These include comparable sales of similar properties in the open market; the extent to which the parties to previous transactions acted voluntarily and negotiated on equal terms or acted under compulsion; the motivation of the respective parties in previous transactions to buy and sell; restrictions on the use of the property and the possibility of their removal; the improvements on the land and the depreciation of those improvements; the potential uses to which the land may be put; and the income that may be derived from the property (this list is not meant to be exhaustive). As was said more than a century ago in a passage regularly approved by this court thereafter:

> *'It may not be always possible to fix the market value by reference to concrete examples. There may be cases where, owing to the nature of the property, or to the absence of transactions suitable for comparison, the valuator's difficulties are much increased. His duty then would be to take into consideration every circumstance likely to influence the mind of a purchaser,*

> *the present cost of erecting the property, the uses to which it is capable of being put, its business facilities as affording an opportunity for profit, its situation and surroundings, and so on. There being no concrete illustration ready to hand of the operation of all these considerations upon the mind of an actual buyer, he would have to employ his skill and experience in deciding what a purchaser, if one were to appear, would be likely to give. And in that way he would to the best of his ability be fixing the exchange value of the property.' [Per Innes J in Pietermaritzburg Corporation v South African Breweries Ltd 1911 AD 501 at 516.]*

[23] This remains as true today as it did then. As was more recently commented, correctly in my view:

> *'The valuation process consequently calls for skill and experience, without which a valuer would find it difficult to arrive at a logical deduction from the facts . . . . A valuer's awareness of existing market conditions and trends, together with his knowledge of the circumstances and the facts relating to the property concerned, enable him to understand how the buying and selling public think, and through his skill and experience he should be able to recognise the elements most likely to influence intending purchasers.'*

[24] Valuation is accordingly not an exact science. The market value of a property can only be estimated and not precisely determined, [See eg Lornadawn Investments (Pty) Ltd v Minister van Landbou 1980 (2) SA 1 (A) at 8B – C and 19A – B.] and a valuer is called on to exercise professional skill and expertise in a specialised field by expressing an opinion on the market value in monetary terms.' [Footnotes omitted]

[57] I consider Ms Tighy's valuation next. In my view it is defective in three respects. The first is that she practically ignored the actual price at which the subject property was sold by defendant to plaintiff. On the face of it, the selling price of the property was a cogent indicator of the market value. Ms Tighy did not show that any one of the attributes of market value, as defined by her in her own report, namely

that the parties acted knowledgably, prudently and without compulsion, was not present. In evidence counsel for defendant submitted that defendant acted under financial compulsion in that he required the funds urgently. In my view there is no merit in the latter argument. The property was on the market for a long time and defendant was advised by an estate agent that he would not get a better price. There is no reason for doubting the value of this advice.

[58] The second point of criticism is that there is no evidence to show that the 24 properties on which Ms Tighy's regression analysis was based, were comparable to the subject property. The evidence was that those properties came from various suburbs whilst the subject property was situated in a unique and tranquil environment against the mountain and with beautiful views. Using properties from other suburbs for comparative purposes seems wrong in principle.

[59] The third defect in Ms Tighy's valuation is that it produced wide differences between the market values, as calculated by her, of some of properties in the vicinity of the subject property and the actual selling prices of these properties. In cross-examination counsel for plaintiff illustrated that the *market value* of a number of properties in the neighbourhood, calculated according to Ms Tighy's first and second equations, differ in some cases substantially from the actual selling prices of these properties. The results of this exercise are reproduced in the following two tables, named Table A and Table B.

[60] Table A shows in columns:

(1) The address of the property;

(2) the inflation adjusted price;

(3) the market value calculated according to Ms Tighy's first equation;

(4) the market value calculated according to Ms Tighy's second equation.

TABLE A			
PROPERTY	INFLATION ADJUSTED SALES PRICE	MARKET VALUE IN TERMS OF EQUATION 1	MARKET VALUE IN TERMS OF EQUATION 2
6 Bridle Rd (Subject)	7 375 000.00	9 190 967.07	10 867 726.63
13 Chesterfield Rd	5 391 660.00	4 935 439.99	4 256 768.13
20 Marmion Rd	7 678 620.00	6 862 052.90	7 120 962.89
28 Sidmouth Ave	5 230 727.00	5 204 777.91	5 137 013.97
2 Garfield Rd	4 969 151.00	6 731 650.32	6 372 544.39
73 Belmont Ave	7 108 251.00	8 144 487.29	7 540 675.87
12 Mountain Close	6 437 376.00	5 430 704.65	4 964 319.89
28 Rosemead Ave	7 500 000.00	6 312 976.19	5 992 067.89

[61] Table B shows in columns:

(1) the difference between the market value calculated according to Ms Tighy's first equation and the adjusted sales price; and

(2) the difference between the market value calculated according to Ms Tighy's second equation and the adjusted sales price.

TABLE B	DIFFERENCE I.T O FIRST EQUATION (PERCENTAGE)	DIFFERENCE I.T.O. SECOND EQUATION (PERCENTAGE)
ADDRESS		
6 Bridle Rd (Subject)	1 815 967.07 (24.6%)	3 492 726.63 (47.4)
13 Chesterfield Rd	456 220.01 (8.5%)	1 134 891.87 (21.0)
20 Marmion Rd	816 567.10 (10.6%)	557 657.11 (7.3)
28 Sidmouth Ave	25 949.09 (0.5%)	93 713.03 (1.8)
2 Garfield Rd	1 762 499.32 (35.5%)	1 403 393.39 (28.2)
73 Belmont Ave	1 036 236.29 (14.6%)	432 424.87 (6.1)
12 Mountain Close	1 006 671.35 (15.6%)	1 473 056.11 (22.9)
28 Rosemead Ave	1 187 023.81 (15.8%)	1 507 932.11 (20.1)

[62] The difference (in some cases substantial) between Ms Tighy's figures and actual selling prices speak for themselves. It is also significant that the results yielded by Ms Tighy's first and second equations differ in some cases substantially from each other, in five cases by more than a R1 million. This raises the question whether it is of much use in cases (such as the present one) where an exact figure is required.

[63] I have little hesitation in preferring Mr Van Der Spuy's valuation to that of Ms Tighy. This means in effect that plaintiff did not purchase the property for a price that was less than the market value thereof. The value of the flat as a separate residential unit must therefore be determined.

Mitigation of plaintiff's loss

[64] Counsel for defendant submitted that plaintiff should have mitigated her damage by applying to the relevant authorities for the necessary departures from or removal of the provisions in question that would have legalised the use of the flatlet as a second residential unit.

[65] It is trite law that the onus is on a defendant to prove that the plaintiff failed to take reasonable steps to mitigate her loss. See the following passage in *Everett and Another v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C) at 201G-202B:

> *'Generally, the burden of proof rests upon the party who asserts that a claimant for damages failed to take reasonable steps to mitigate his loss (Hazis v Transvaal and Delagoa Bay Investment Co. Ltd, 1939 AD 372). Similarly, in my view, the onus of proof would also rest upon the party who asserts that the mode of mitigation employed by the claimant was not a reasonable one in that an alternative mode, less expensive or burdensome, was available (cf. Shrog v Valentine, 1949 (3) SA 1228 (T) at p. 1237). In this regard the Court should not be too astute to hold that this onus has been discharged. As Lord MCMILLAN put it in the well-known case of Banco de Portugal v Waterlow and Sons Ltd, 1932 A.C. 452 at p. 506 –*
>
> > *"Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment, the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has*

> *passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."*

[66] The evidence in regard to plaintiff's duty to mitigate her loss is vague. Plaintiff's architect advised her in regard to the likely costs and delays of the application in his letter of 9 December 2009. He described the processes involved. It would have entailed the following:

> *'1. An application needs to be submitted for the removal of the title deed restriction, this process can take between 6 – 24 months, if successful.*
> *2. Extensive public participation (neighbours consent) will be required,*
> *3. Advertising by Council is required,*
> *4. A town planner would need to be consulted,*
> *5. As built plans will then have to be submitted to update Council records.'*

The total costs, according to the architect, could amount to R 28 750,00 – R 38 750,00 and there is no guarantee that the application will be successful. Objections and appeals might cause the process to become drawn out and more costly.

[67] Hearsay evidence of a town planner, referred to in Ms Tighy's report, also describes uncertainties and potential delays. Two applications were required. The first would have been to the Minister of Environmental Affairs and Development

Planning for the amendment or removal of the restrictive title deed condition. This application could have taken up to 24 months if there were objections. There was no appeal against the Minister's decision. The second application would have been directed to the town planning department of the City Council for a departure from the relevant zoning provisions. This application would have had to be advertised and objections by neighbours could have caused substantial delays. The objectors had a right of appeal to the Provincial Council. The entire process could have taken a very long time but the prospects of success would have been good as the relevant authorities were keen to support densification.

[68] I revert to the question whether plaintiff acted unreasonably by failing to take steps to legalise the use of the flatlet as a second residential unit. In my view she did not. It is clear that there were many uncertainties and potential delays. There was no guarantee of success. Pending the processing of the two applications plaintiff would not have been able to use the flatlet as originally intended. It would have been unlawful. The inhabitants of the prestigious and tranquil neighbourhood might well have taken a dim view of the possibility a flat in their midst occupied by students. During the period in question, plaintiff would not have been able to use the flatlet as it would have been unlawful.

[69] In all the circumstances I am of the view that defendant did not discharge the onus of proving that plaintiff failed to mitigate her damage.

The quantum of plaintiff's damage

[70] The final issue concerns the quantification of plaintiff's damage. Mr Van der Spuy calculated it in the amount of R350 000,00. He capitalised the annual rental that could have been obtained at a rate of 8% per annum. Counsel for defendant did not challenge the correctness of these figures but submitted that Mr Van der Spuy ignored the value of the flatlet area as part of the dwelling as a single residential unit.

[71] It seems to me that the argument of counsel for defendant is valid. There is, however, no clear evidence from which the value of the use of the flatlet as a second residential unit can be calculated with any precision.

[72] There are, however, decisions to the effect that a court may in such a situation base its assessment on an *'informed guess'* (*Griffiths v Mutual & Federal Insurance Co Ltd* 1994 (1) SA 535 (A) at 546G) or a *'rough estimate'* (*Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 546G).

[73] I propose to approach the assessment of plaintiff's damage on that basis. In my view it would be reasonable and fair to both parties if the value of the use of the flatlet as part of a single residential unit is regarded as equal to one half of its use as a second residential unit.

[74] Plaintiff is accordingly entitled to damages in the amount of R175 000,00 for the loss of the flatlet as a second residential unit. To this must be added the amounts of R7 827,24 and R35 000,00 set forth in sub-paragraphs 12.1 and 12.2 of plaintiff's particulars of claim which have not been challenged by defendant. Plaintiff's damages thus amount to a total sum of R217 827,24.

[75] The running of interest is governed by the Prescribed Rate of Interest Act 55 of 1975 ('the Act'). The relevant sections thereof read as follows:

> *'1 Interest on a debt to be calculated at a prescribed rate in certain circumstances*
>
> *(1) If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed under subsection (2) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.*
> *(2) The Minister of Justice may from time to time prescribe a rate of interest for the purposes of subsection (1) by notice in the Gazette.*
>
> *2 Interest on a judgment debt*
> *(1) Every judgment debt which, but for the provisions of this subsection, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest from the day on which such judgment debt is payable, unless that judgment or order provides otherwise.*
> *……..*
> *2A Interest on unliquidated debts*
> *(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1.*
> *(2) (a) Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 (Act 34 of 2005) the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.*

……

(5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.'

[76] The debt which plaintiff enforces in this matter is unliquidated. In terms of sub-sec 2A(5) of the Act the court has a wide discretion to make an order which appears just to it. See *Adel Builders (Pty) Ltd v Thompson* 2000 (4) SA 1027 (SCA) at 1032 H-J:

'Acting in terms of ss (5), it was open to the Court, in fixing the date from which interest was to run, to give effect to its own view of what was just in all the circumstances. No question of onus was raised then or in the notice of appeal. Nor could it have been. The discretion afforded by s 2A(5) was of the nature referred to in a long line of cases in this Court from Ex parte Neethling and Others 1951 (4) SA 331 (A) onwards. Plainly, if parties wish certain facts and circumstances to be weighed in the exercise of such a discretion they must establish them. But there are no facta probanda. No enquiry arises as to whether a necessary fact has been successfully proved. Similarly, absence of proof does not result in failure on any issue. Indeed, there are no evidential issues to attract any onus.'

[77] In the present case it seems to me that the following orders would be just and fair to both parties. Interest should commence running from 7 July 2010, being the date on which the summons was served on defendant. The rate of interest, in my view, should follow the statutorily prescribed rate, namely 15,5% from 7 July 2010 to

31 July 2014 and 9% per annum from 1 August 2014. Interest on the judgment debt should also run at the rate of 9% per annum.

[78] In the result, I grant the following orders:

1. **Defendant is ordered to pay damages to plaintiff in the amount of R217 827,24.**
2. **Defendant is ordered to pay interest to plaintiff on the amount of R217 827,24, calculated at the rate of 15,5% per annum from 7 July 2010 to 31 July 2014 and 9% per annum from 1 August 2014.**
3. **Defendant is ordered to pay plaintiff's costs including the qualifying fees and expenses of Mr John van der Spuy.**

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A P BLIGNAULT