



District Court
New South Wales

Case Name: The Owners Strata Plan No. 72250 v Letmin Pty Limited t/as Dubbo Powder Coating

Medium Neutral Citation: [2020] NSWDC 378

Hearing Date(s): 16, 17, 18, 19 and 20 March 2020, 14 April 2020

Date of Orders: 16 July 2020

Decision Date: 16 July 2020

Jurisdiction: Civil

Before: Hatzistergos DCJ

Decision: (1) Verdict and judgment for the Plaintiff in the sum of \$12,395.00
(2) The Defendants are to pay interest on the said sum from 17 November 2017 to date in accordance with s 100 of the Civil Procedure Act 2005 (NSW) and District Court Practice Note 15 clause 5
(3) I will hear from the parties as to costs.

Catchwords: TORTS– Negligence – Nuisance – Where Plaintiff Owners Corporation of Strata Plan claims First and Second Defendant caused damage to common property – Where First Defendant runs powder coating business out of Second Defendant’s Lot in Strata Complex – Whether garnet and powder was emitted during course of First Defendant’s business – Whether duty is owed by the Second Defendant to Plaintiff – Failure to take proper precautions in running of business – Whether the First Defendant’s business constituted nuisance

DAMAGES – Issue of causation – Common law and Civil Liability Act applied – Damage to roof – Whether residue caused further damage – Whether charges

could be claimed for cleaning and replacing fire detectors – Whether fire detection system needed to be replaced as result of Defendants negligence – False fire alarm charges

Legislation Cited:

Civil Liability Act 2002 (NSW), ss 5B, 5D, 5E
Strata Schemes Management Act 1996 (NSW), s 45
Strata Schemes Management Act 2015 (NSW), s 145

Cases Cited:

Adelaide City Corporation v Australasian Performing Rights Association [1928] HCA 10; (1928) 40 CLR 481
Aussie Traveller Pty Ltd v Marklea Pty Ltd [1998] 1 Qd R 1; [1997] Q ConvR 54-485
Benning v Wong (1969) 122 CLR 249
Burnie Port Authority v General Jones [1994] HCA 13; (1994) 179 CLR 520
Daily Telegraph v Stuart (1928) 28 SR (NSW) 291
West v Nicholas (1915) 17 WALR 49
Dimitrios Michos & Another v Council of the City of Botany Bay [2012] NSWSC 625
Don Brass Foundry Pty Ltd v Stead (1948) 48 SR (NSW) 482
Gales Holdings Pty Ltd v Tweed Shire Council [2011] NSWSC 1128
Hargrave v Goldman (1963) 110 CLR 40
Hilton v James Smith & Sons (Norwood) Ltd (1979) 251 EG 1063 (CA)
Hussain v Lancaster County Council [2000] QB1 (CA).
Hutton v Martin Lewis Shipwrights Pty Ltd (unreported, Supreme Court of NSW, Bryson J, 19 May 1987)
Kennaway v Thompson [1981] QB 88
Kraemers v A-G (Tas) [1966] Tas SR 113
March v Stramare (E & MH) [1991] HCA 12, (1991) 171 CLR 506
Murillo v SKM Services [2019] VSC 663 at [90].
Peden P/L & Ors v Bortolazzo [2006] QCA 350
Quick v Alpine Nurseries Sales Pty Ltd [2010] NSWSC 1248
Ross & Glendinning v Hancock & Co [1929] NZLR 204
Rylands v Fletcher [1868] UKHL 1; (1868) LR 3 HL 330
Sampson v Hodson Pressinger [1981] 3 All ER 710

(CA)
Sedleigh-Denfield v O'Callaghan [1940] AC 880
Stockwell v Victoria [2001] VSC 497
Sykes v Connolly [1895] 11 WN (NSW) 145
Torette House Pty Ltd v Berkman (1940) 62 CLR 637
Woodhouse v Fitzgerald and McCoy (No 2) [2020]
NSWSC 450

Texts Cited: Balkin & Davis, Law of Torts (LexisNexis Butterworths, 5th ed, 2013)
Sappideen, Carolyn and Prue Vines (eds), Fleming's The Law of Torts (Lawbook, 10th ed, 2011)
Villa, Dominic, Annotated Civil Liability Act 2002 (Thomson Reuters, 3rd ed, 2018)
Young, M, S Loughnan and A Coorey, Court Forms, Precedents & Pleadings NSW – Nuisance Commentary (18 April 2018)

Category: Principal judgment

Parties: The Owners Strata Plan No. 72250 (Plaintiff)
Letmin Pty Limited t/as Dubbo Powder Coating (First Defendant)
Yangura Pty Limited (Second Defendant)

Representation: Counsel:
Mr N. Simpson (Plaintiff)
Mr B. McManus (First and Second Defendant)

Solicitors:
Nelson Keane and Hemingway Solicitors (Plaintiff)
Wilson's Solicitors (First and Second Defendant)

File Number(s): 2017/348215

Publication Restriction: N/A

JUDGMENT

- 1 The Plaintiff brings proceedings against the Defendants in respect of a repair of damage to a roof of common property structure, repair of a fire alarm system and for the costs of what is to be asserted as a false fire alarm call-outs caused by the Defendants in amounts now set to table \$217,223.35¹ together with

¹ MFI E. It should be noted that this has been incorrectly calculated. See [248].

interests and costs. The claims brought against each Defendant were pleaded in negligence and nuisance. A prayer for an order pursuant to s 46 of the *District Court Act 1973* (NSW) was also pleaded but not pressed.² The Plaintiff further conceded that the Court does not have jurisdiction to grant relief in respect of various pleaded claims pursuant to the *Strata Schemes Management Act 2015* (NSW).³

Evidence

2 The Plaintiff in its case relied on the following materials:-

- (1) Affidavit of Mr Gene Claude Barrett dated 3 August 2018;⁴
- (2) Report of Mr Peter Thew, civil engineer from Geolyse, 15 June 2018;⁵
- (3) Reports of Mr Daniel Blair, chemical engineer and environmental auditor from Virotec, dated July 2018,⁶ 16 April 2019⁷ and February 2020;⁸
- (4) Report of Mr Graeme Walton Smith, quantity surveyor, dated 27 July 2018;⁹
- (5) Report of Dylan Hughes, an expert on automatic fire alarm and detection systems from Dragon Project Engineers Pty Limited, dated 27 July 2018;¹⁰ and
- (6) Reports of Dr Nicholas Ward, from Southern Cross University, dated 26 July 2018¹¹ and 11 February 2020.¹²

Messrs Barrett, Blair, Thew, Walton Smith and Hughes also gave oral evidence.

3 The Defendant relied on the affidavit of Steven Charles Davis dated 19 July 2019.¹³ Mr Davis was a powder coating operator and Director of the First Defendant. The Defendants also relied on an affidavit of Anthony David Nugent,¹⁴ Director of the Second Defendant who was the owner of Lots 5 and 6

² T 12.39-.40.

³ See T 12.40-.45. *Strata Schemes Management Act 2015* (NSW) will hereinafter be referred to as “the 2015 Act”.

⁴ Exhibit A1, Tab 6.

⁵ Exhibit A1, Tab 18.

⁶ Exhibit A1, Tab 19.

⁷ Exhibit A1, Tab 22 (incorrectly dated 16 April 2018, see T 247.17-.19).

⁸ Exhibit A1, Tab 23.

⁹ Exhibit A1, Tab 20.

¹⁰ Exhibit A1, Tab 21.

¹¹ Exhibit A1, Tab 19 at 1085 to 1103.

¹² Exhibit A1, Tab 24

¹³ Exhibit A1, Tab 11.

¹⁴ Exhibit A1, Tab 13.

of the Strata Plan. Both Messrs Davis and Nugent were also called to give oral evidence. The Defendants also relied on a report of Ms Nicola Power Occupational Hygienist dated 13 August 2019.¹⁵ Ms Power also gave oral evidence.

- 4 For reasons which appear in the transcript I declined to allow the Plaintiff to rely on a further affidavit of Mr Barrett dated 12 March 2020¹⁶ and the Defendants to rely on the further affidavit of Mr Davis dated 9 March 2020.¹⁷

Background

- 5 The proceedings concerned a property located at 55-59 Wheelers Lane, Dubbo.¹⁸ It makes up Strata Plan No. 72250.¹⁹ Prior to 2004, it was owned by Double Bay Newspapers, General Newspapers Pty Ltd and Brehemer Fairfax Pty Ltd. In or about 2002 or 2003, Hannan Print granted an option to Mannu Holdings Pty Ltd to purchase the Property. Mannu Holdings decided to subdivide the Property and create a strata scheme on the Property, to be divided into twelve lots.²⁰ The strata scheme was registered in 2004 and on 8 May 2004, each individual lot owner settled the purchase of each lot of the entire complex.²¹ According to Mr Barrett, the building of the Property commenced at some time in the 1980s and the roof to the various lots was built at that time.²²
- 6 Mr Davis started working in the blasting and powder coating industries in 1992 in Dubbo.²³ The First Defendant was established in 1993 and traded under the name of Dubbo Powder Coating.²⁴
- 7 Mr Gene Barrett became elected chairperson and secretary of the Plaintiff on 27 January 2015. Prior to that date, the Plaintiff did not have a chairperson, secretary or executive, but Mr Barrett stated that he was responsible for

¹⁵ Exhibit A1, Tab 25.

¹⁶ T 23.41-25.47.

¹⁷ T 2.44-8.39.

¹⁸ Hereinafter referred to as "the Property".

¹⁹ Hereinafter referred to as "the Strata Plan".

²⁰ Exhibit A1, Tab 6 at 37, [6].

²¹ Exhibit A1, Tab 6 at 39, [13].

²² T 53.33-.38.

²³ Exhibit A1, Tab 11 at 559, [5]-[6].

²⁴ Exhibit A1, Tab 11 at 559, [7]. Dubbo Powder Coating hereinafter referred to as "DPC".

organising maintenance of the common property of the Plaintiff.²⁵ It was not in issue that Mr Gene Barrett and the other entities he controlled, collectively owned Lots 7-12 of the Wheeler Lane complex. Lots 1, 2 and 3 were owned by Mr Gene Barrett's parents Geoffrey (also known as Geoff) and Chau Barrett via various entities.²⁶

8 In or about late 2003, Mr Nugent and his wife Christine Nugent managed to purchase part of the Wheeler Lane complex.²⁷ Lots 5 and 6 were purchased in the name of the Second Defendant, and Lot 4 was purchased in the name of Mr and Mrs Nugent.²⁸ That position continues at the present time.²⁹

9 Mr Nugent operated the business known as "Makin" Mattresses" in Lot 4 and part of Lot 5 of the Wheeler Lane complex in late 2004 to mid-2013.³⁰

10 Mr Nugent gave evidence that prior to 2004, a large magazine and printing business operated at the Property and that large commercial printing presses had been installed. He stated that he understood that the presses were huge, about the size of a locomotive, and they were situated in the part of the complex now Lots 5 and 6. Mr Nugent further stated that there were sections of the concrete floors in those areas that had extra thick reinforcing where presses appeared to have been located.³¹ Mr Gene Barrett conceded that there were printing presses there prior to 2004³² with the previous occupant of what was Lots 5 and 6 using them for its newspaper works.³³

11 Mr Nugent recalled inspecting the complex on a number of occasions in late 2003 and mid-2004 and observing black dust lying everywhere through the premises, on the floors, walls and up in the roofing areas where he looked up. He observed that the dust appeared to be quite thick in most areas, up to 20-30mm in depth.³⁴ He further recalled walking around the complex during his

²⁵ Exhibit A1, Tab 6 at 37, [1].

²⁶ Exhibit A1, Tab 6 at 38, [8].

²⁷ Exhibit A1, Tab 13 at 788, [6].

²⁸ Exhibit A1, Tab 6 at 38, [8].

²⁹ Exhibit A1, Tab 13 at [9].

³⁰ Exhibit A1, Tab 13 at 792, [35].

³¹ Exhibit A1, Tab 13 at 790 [19]-[22].

³² T 53.22-.31.

³³ T 70.50-71.01.

³⁴ Exhibit A1, Tab 13 at 790-1, [21]-[23].

inspections and observing that it was it was very dusty and dirty, with dust was swirling around as wind blew in the door.³⁵ Mr Gene Barrett stated that he was not aware of any black dust at the time he, his father and their companies became owners and denied that either Mr Nugent or Mr Davis informed him of this.³⁶

- 12 Mr Nugent further gave evidence that around the time he was arranging to purchase his interest in the Property, he was informed by Mr Davis that his business was growing and he needed a new set of premises to expand.³⁷ Mr Nugent stated that he advised Mr Davis that he was looking into purchasing at the Property. Thereafter, a number of discussions took place about Mr Davis leasing part of the Property that Mr Nugent would buy and relocating his powder coating business there.³⁸
- 13 On a date that he could not recall, but was on a date in late 2003 or early 2004, Mr Nugent had a conversation with Mr Geoff Barrett in which he informed him that he was looking at bringing Mr Davis in as a tenant when he bought his lots in the Property. Mr Nugent's evidence was that Mr Geoff Barrett sought to have Mr Davis take up tenancy in another part of the complex that he owned. Further, that he inspected Mr Davis' previous premises to look at its operations.³⁹
- 14 According to Mr Nugent, he had made observations of DPC's previous premises and observed that they were clean, did not appear to be overly noisy and Mr Davis' workers appeared to be happy. He stated that based on these observations he assumed that there would be a similar sort of operation at the Property.⁴⁰
- 15 On 2 June 2004, the Owners Corporation held what has been described as a First Annual General Meeting.⁴¹ The Minutes of that meeting largely comprise

³⁵ Exhibit A1, Tab 13 at 791, [25].

³⁶ T 71.04-.20.

³⁷ Exhibit A1, Tab 13 at 789, [11].

³⁸ Exhibit A1, Tab 13 at 789, [12].

³⁹ Exhibit A1, Tab 13 at 790, [15]-[17].

⁴⁰ Exhibit A1, Tab 13 at 791, [31].

⁴¹ Exhibit A1, Tab 6 at 39, [17]; Exhibit A1, Tab 13 at 791, [27].

of the passing of formal motions.⁴² In attendance were Mr Nugent, Mr Geoff Barrett and Mr Gene Barrett. Those Minutes appear to be signed by Mr Gene Barrett and record:-

Dubbo Powder Coating & Sandblasting would submit DA to Body Corporate at earliest possible notice.

Mr David Nugent (Leaser to tenant) has assured that the DA would be produced as soon as possible. Also, he has verbally assured the Body Corporate that there would be no implications from the tenant regarding noise levels and trade waste issues.⁴³

- 16 In cross-examination Mr Barrett stated that his recollection of the assurances given at the meeting of 2 June 2004 was limited to noise and trade waste issues.⁴⁴
- 17 According to Mr Nugent, during the meeting Mr Geoff Barrett asked “How much noise will Steve Davis’ powder coating business make? Will it be a problem?” to which Mr Nugent replied “I don’t think so. He seems to run a good show in Douglas Mawson Road.” Mr Nugent stated that he did not recall Mr Geoff Barrett discussing or raising with him either prior to or at the meeting of 2 June 2004, any issues about dust being generated by DPC’s business.⁴⁵ Nevertheless in cross-examination he conceded that Mr Geoff Barrett raised concerns with him about the powder coating business going into Lots 5 and 6. Beyond rejecting a number of suggestions as to the concerns raised, Mr Nugent did not identify what the concerns actually were.⁴⁶
- 18 Mr Gene Barrett stated that immediately after the first AGM, a further meeting was held in the nature of an extraordinary general meeting. Mr Gene Barrett stated that at that meeting his father, who at the time was the owner of Lot 1 and the managing director of Mannu Holdings which owned Lots 2 and 3, expressed reservations about the powder coating business’ exhaust and filtration.⁴⁷ The Minutes of that extraordinary general meeting record prepared by Mr Gene Barrett record:-

⁴² Exhibit A1, Tab 7 at 86; Exhibit A1, Tab 14 at 841-842.

⁴³ Exhibit A1, Tab 7 at 86.

⁴⁴ T 68.33-69.22

⁴⁵ Exhibit A1, Tab 13 at 791, [30] and [32].

⁴⁶ T 181.14-43

⁴⁷ Exhibit A1, Tab 6 at 39, [17].

New tenants Dubbo Powdercoating & Sandblasting would submit DA to Body Corporate at earliest possible notice

Motion Mr David Nugent (Leaser to tenant) has assured that the DA would be produced as soon as possible. Also, he has verbally assured the Body Corporate that there would be no implications from the tenant regarding noise levels and trade waste levels.⁴⁸

- 19 Following 2 June 2004, Mr Nugent stated that he was busy with his mattress business. He stated that he used Lot 4 as a show room and Lot 5 for the manufacturing area.⁴⁹ He gave evidence that he recalled during the second half of 2004, he regularly observed black dust on the floor and walls of Lots 4, 5 and 6. On occasions where he opened the doors to Lot 5 he observed dust being blown around by wind coming in the door.
- 20 Mr Nugent recalled that during the second half of 2004, he was repeatedly mopping and cleaning the floors in Lot 4 and 5 to remove the black dust. He continued to observe from time to time that when wind blew into the premises, it would dislodge more of the black dust from wherever it was lying and send it swirling out over the floor, and he would have to mop the floor again to remove it. For many years after 2004, he stated he regularly observed black dust lying around the premises which looked like the black dust he had previously observed in the premises when he first purchased them. However, he also observed that the amount of black dust lying around the premises diminished over time and at present the premises are relatively clean compared to when he first purchased them.⁵⁰ In cross-examination Mr Nugent admitted not having photographs of the black dust, stating that it was nevertheless his diligent clear recollection.⁵¹ He rejected the suggestion that there was no black dust on the premises.⁵²
- 21 A development application in relation to DPC was submitted to Dubbo Council dated 11 August 2004 with the Plaintiff's consent.⁵³ According to Mr Davis, the application was approved in late 2004. Mr Davis stated that he recalled between mid-2004 and end of 2004, he visited the premises on many

⁴⁸ Exhibit A1, Tab 7 at 86; Exhibit A1, Tab 14 at 841.

⁴⁹ Exhibit A1, Tab 13 at 792, [33]-[34].

⁵⁰ Exhibit A1, Tab 13 at 792, [36]-[38].

⁵¹ T 211.29-49.

⁵² T 212.24-44.

⁵³ Exhibit A1, Tab 12 at 653-4.

occasions before operating his business and observed that the premises were very dirty and dusty with lots of fine black dust on the floor and surfaces throughout.⁵⁴ He stated that when wind blew onto the premises, especially from the big door at the western end of Lot 6, he observed black dust would lift up and move around in the air.⁵⁵

- 22 Mr Davis stated that in late 2004 or early 2005, he installed and set up DPC's equipment in the workshop area and in or about early 2005, after the installation was complete, DPC began to operate from the Property.⁵⁶ Mr Gene Barrett indicated that although he could not recall precise dates, he believed it to be shortly after the first AGM and around mid-2004.⁵⁷
- 23 Initially there was no lease between the Defendants, but a five year lease was executed on 1 July 2014.⁵⁸
- 24 A partition wall had been installed across Lot 5 between the respective businesses around the end of 2004.⁵⁹ According to the evidence, that wall was moved twice. Mr Nugent wrote on Exhibit B the location of the partition at the present time,⁶⁰ and stated that the wall on Lot 5 was moved to 6.5 metres to the west in 2016.⁶¹ According to Mr Nugent, the partition wall did not seal off the two sections completely as there were gaps along the top, and he could hear DPC operating next door.⁶²
- 25 Mr Davis gave evidence that the workshop area was initially very dirty and required a lot of cleaning. He stated that he continued to observe black dust on the surfaces of the premises and in the cracks in the concrete floor. He stated that he believed this was the same black dust he had previously observed in the workshop area on other occasions before moving into the premises. During late 2004 and the early part of 2005, he stated that his employees spent a lot of time repeatedly sweeping and washing the floor over many weeks to remove

⁵⁴ Exhibit A1, Tab 11 at 600-1, [18]-[19].

⁵⁵ Exhibit A1, Tab 11 at 601, [20].

⁵⁶ Exhibit A1, Tab 11 at 601, [25]; Exhibit A1, Tab 13 at 792, [41].

⁵⁷ Exhibit A1, Tab 6 at 41, [27].

⁵⁸ Exhibit A1, Tab 13 at 793, [42]; Exhibit A1, Tab 14 at 843-61.

⁵⁹ Exhibit A1, Tab 11 at 601, [26]; Exhibit A1, Tab 13 at 793, [43].

⁶⁰ T 180.21-.34.

⁶¹ T 59.44-.49.

⁶² Exhibit A1, Tab 13 at [43].

the black dust. He estimated that for approximately six to twelve months after DPC moved in and began operating, he regularly observed more of the black dust continuing to appear and settle on the floor around the workshop area. He would clean the floor and then soon after he would observe more of the black dust. Sometimes he would wash the floor within a few days of the last wash. He repeatedly instructed his employees to sweep and mop this black dust but the floor washing didn't completely remove all of the dust out of the concrete. Occasionally he observed drifts of the black dust on the floor if there was wind blowing in from the western roller door. In the early part of 2005, he recalled having conversations with Mr Nugent where he informed him there was "black dust everywhere", and from time to time that he went into Mr Nugent's area in Lots 4 and 5 and observed black dust on the floor in that area similar to the dust he observed in his own workshop.⁶³

- 26 On or about 4 July 2018, Mr Nugent stated that he attended the premises to be present during an inspection by the Plaintiff's expert. He stated that he was introduced to Mr Blair and another gentleman's name he could not recall. During the inspection he stated that they went up in a scissor lift to inspect fire detectors in the ceiling at the rear of the premises about 10m away from the sandblaster. He observed that the roof purlins were covered with a layer of dust approximately 5 to 10 mm thick. He observed that the dust was black in colour, and it appeared to be the same black dust that he had observed in the premises in 2004 and regularly observed during subsequent years as he earlier referred to. He stated that he pointed out the dust on the purlins to the gentleman in the scissor lift.⁶⁴

DPC Business

Experience

- 27 According to Mr Davis, DPC's business involved two main processes; abrasive blasting and powder coating.⁶⁵ He stated that he did not have any formal qualifications in abrasive blasting or powder coating and he learnt his skills and

⁶³ Exhibit A1, Tab 11 at 602, [27]-[30].

⁶⁴ Exhibit A1, Tab 13 at 804, [110].

⁶⁵ Exhibit A1, Tab 11 at 602, [32].

knowledge during the twenty eight years he has been in the industry.⁶⁶ So far as he is aware, Mr Davis stated there is no formal training or certification process for getting qualifications in abrasive blasting and in his experience, abrasive blasting is a skill learned on the job working in an abrasive blasting business.⁶⁷ He acknowledged, however, that it was possible to get qualifications in spray painting and protective coating from TAFE.⁶⁸

- 28 Mr Davis stated that in the blasting industry there were two major suppliers in Australia: Abrasive Blasting Service & Supplies Pty Ltd⁶⁹ and Burwell Abrasive Blasting Equipment.⁷⁰ He stated he sourced most of his equipment from ABSS. This business had two representatives who he came to deal with on many occasions and that he knew quite well, being a Mr Joe Campagna and Mr John Bellato.⁷¹ Over the years, he stated that he relied heavily on Mr Campagna, Mr Bellato and Dulux sales representatives to give him information about the equipment and products used in DPC's business, including information about the safety aspects of the equipment and products. He described the representatives as his biggest source of safety knowledge and if advised there was a newer safety product that is better than one that DPC had previously used, it was his practice to make the switch.⁷² Mr Davis stated that he is not aware of any regulatory body responsible for overseeing the abrasive blasting industry, and there is no peak industry of representative organisation for the abrasive blasting industry.⁷³

Workshop layout

- 29 According to Mr Davis, the workshop he established was originally set up in accordance with 2004 floorplan.⁷⁴ However in or about 2015, he and Mr Nugent agreed for the partition wall across Lot 5 at the eastern end of his workshop to be moved about six metres to the west, and Mr Nugent arranged

⁶⁶ Exhibit A1, Tab 11 at 603, [36].

⁶⁷ Exhibit A1, Tab 11 at 603, [37].

⁶⁸ Exhibit A1, Tab 11 at 603, [38].

⁶⁹ Hereinafter 'ABSS'.

⁷⁰ Hereinafter "Burwell".

⁷¹ Exhibit A1, Tab 11 at 603, [41].

⁷² Exhibit A1, Tab 11 at 604, [44]-[45].

⁷³ Exhibit A1, Tab 11 at 603, [35].

⁷⁴ Exhibit A1, Tab 11 at 604, [49]; Exhibit A1, Tab 12 at 693-695.

for the wall to be moved. This reduced DPC's total workshop floor space by approximately 160 to 170 square metres.⁷⁵

- 30 In 2016, he decided to stop using the blast room in the south-western corner of the workshop and installed a new blast room in the north-eastern corner. He stated that the blast pot and dust extraction system located next to the new blast room were purchased from ABSS.⁷⁶ The new floorplan was said to be as

⁷⁵ Exhibit A1, Tab 11 at 604, [51].

⁷⁶ Exhibit A1, Tab 11 at 604-5, [52].

31 According to his description, the 2016 Floorplan shows:-

- (1) The partition wall between the two parts of Lot 5 moved about six metres to the west compared to the 2004 floorplan;
- (2) The main blast room being located where the old acid baths used to be in the north-eastern corner of the workshop;
- (3) The distance between the fire protected tunnel on the northern wall and north-western corner of the blast room is about two metres; and
- (4) Along the rear eastern wall and next to the blast room is the ABSS blast pot and dust extraction system.⁷⁸

The acid baths had been removed from the north-eastern corner of the workshop in 2007 or 2008.⁷⁹

32 Following the installation of the ABSS room in 2016, Mr Davis stated that they used the old room for about a week in late 2017 when DPC was busy, but otherwise it was hardly used. He stated that in or about 2017, DPC sold the old room to another business and it has sat in his workshop the whole time waiting to be collected by the new owner.⁸⁰

33 According to Mr Gene Barrett, as part of the First Defendant's fit out, it had three penetrations made in the roof sheeting for the exhaust systems of its sand blasting room, its powder coating room and its oven. There were issues with these penetrations in that they were not sealed properly and there were frequent problems with water leaking into the roof through the years. He stated that while the Owners Corporation did not consent to those penetrations being made, it did not raise them as an issue at the time as he and the others wanted to keep getting along with the Defendants and he believed they would address the issues given the assurance they had given.⁸¹

34 In 2016 when the First Defendant reconfigured the layout of its operations by adding a new blast room, Mr Gene Barrett stated that the First Defendant created new penetrations in the roof sheeting and installed a new exhaust from

⁷⁸ Exhibit A1, Tab 11 at 605, [54],

⁷⁹ Exhibit A1, Tab 11 at 604, [50].

⁸⁰ Exhibit A1, Tab 11 at 615, [133].

⁸¹ Exhibit A1, Tab 6 at 41, [30]-[31].

its blast room located essentially directly above the blast room underneath an evaporative air conditioning unit fixed to the roof.⁸²

- 35 Mr Davis conceded that in 2004 or 2005 when DPC installed its equipment, it was necessary to install vent penetrations from the dust extraction units and curing oven to the outside air. Further, in 2016 when ABSS installed the new room it was necessary to install a vent penetration from the dust extraction unit known as the Dustech Unit.⁸³ Mr Davis stated that the penetrations were sealed properly.⁸⁴

DPC's Processes

Abrasive blasting

- 36 According to Mr Davis, abrasive blasting is a process used to clean surfaces including the removal of rust and paint prior to them being used or, usually, being painted. Typically the items to be cleaned are made of steel or other metal.⁸⁵ The process involves using compressed air to blast an abrasive medium at high speed at the item being cleaned.⁸⁶ The abrasive medium or 'grit' is stored in a hopper called a 'blast pot', and compressed air sends the grit through a high pressure hose from the blast pot to a nozzle that is controlled by the operator.⁸⁷ The blasting process is then carried out by the operator in an enclosed room known as a blasting room or blast room.⁸⁸ The blasting is done by an operator working inside the blast room. The operator will point the blast nozzle at the item as if they are 'hosing it down' with the compressed air and grit, and they will continue to blast it until the metal surface is clear and clean, ready for powder coating.⁸⁹
- 37 Mr Davis stated that DPC used a garnet blast media known as almandite for the blasting process. This was described as a rough grit that is a deep reddish brown in colour and is purchased in one tonne bags from ABSS.⁹⁰ Mr Davis

⁸² Exhibit A1 Tab 6 at 45, [46]-[47]

⁸³ Exhibit A1, Tab 11 at 628, [232].

⁸⁴ Exhibit A1, Tab 11 at 632, [256(b)].

⁸⁵ Exhibit A1, Tab 11 at 605, [55].

⁸⁶ Exhibit A1, Tab 11 at 605, [57].

⁸⁷ Exhibit A1, Tab 11 at 605, [58].

⁸⁸ Exhibit A1, Tab 11 at 606, [59].

⁸⁹ Exhibit A1, Tab 11 at 606, [60].

⁹⁰ Exhibit A1, Tab 11 at 607, [64]-[65].

stated that on two or three occasions over the last ten years or so, DPC has purchased from Burwell a different garnet known as staurolite, which is similar to almandite but is slightly browner in colour. He stated that it had been three to four years since DPC had last purchased such a bag.⁹¹ Mr Davis described that over the years he had regularly observed that the roughness of the finish on an item that had been blasted corresponds with the coarseness of the grit used in the blasting process. In short, as the coarseness of the grit increases, the finish of the blasted item becomes rougher. To avoid this, he stated that they usually mix some of the finer recycled grit with the coarser new grit to achieve an optimal mix for a top quality finish. He stated that he observed that the best finish of a blasted item is achieved when the ratio of new to recycled garnet is about one part new garnet to four parts old garnet, and the unit he has it set up to achieve this mix ratio. Accordingly, approximately 20% of the garnet in a cycle is said to be new garnet and the remainder is recycled garnet.⁹² He stated that he has set the reclaimer (a reclaiming unit) so that approximately 80% of the garnet is to be recycled on each cycle with the remaining 20% breaking down into smaller particles and dust captured by the reclaimed waste.⁹³

- 38 Mr Davis stated that the current blast room was supplied and installed by ABSS in early 2016. The supply and installation included a special floor to the blast room, the blast pot and the dust extraction unit attached to the ABSS Room.
- 39 The room was connected by ducting from the blast pot and ducting to the Dustech Unit which houses a reclaimer unit. The ducting between the blast pot, the blast room and the reclaimer was about 200 mm in diameter and is made of heavy duty industrial pressure hose. During the blasting process, the doors are closed and the room is sealed. Once the blasting process starts, the garnet is propelled by compressed air through the incoming ducting from the blast pot connected to the blast room and then through a smaller hose and nozzle held by the operator. The operator wears a sealed mask or helmet supplying

⁹¹ Exhibit A1, Tab 11 at 607, [68].

⁹² Exhibit A1, Tab 11 at 611, [100]-[102].

⁹³ Exhibit A1, Tab 11 at 611, [103].

oxygen from outside the room, together with other suitable protective equipment.⁹⁴

- 40 The leftover garnet, dust and residue removed from the cleaned item is extracted by a fan driven exhaust system connected to an extraction system under the grid floor located in the floor of the room. This type of floor is known as a W Section Pneumatic Floor.⁹⁵ The exhaust system will then suck or draw the garnet, dust and residue down through the pneumatic floor, throughout the outgoing ducting and back to the reclaimer.⁹⁶ The reclaimer is described as performing three functions, being to firstly screen and separate or wash the dust, garnet and residue through a cyclonic air system. Secondly, after the reclaimed garnet is cleaned it is then delivered from the reclaimer back into the blast pot located to be reused, while the dust and residue is separated and delivered into a sealed waste drum, located beneath what is described as the Dustech Unit.⁹⁷ Finally, any airborne dust is trapped in the cartridge filters in the reclaimer. The filters are then cleaned by the unit using a reverse pulse compressed air system.⁹⁸
- 41 Mr Davis stated that once the doors to the blast room is shut, the blast pot is shut, the waste drum is sealed and the housing for the cartridge filler is shut, and there are no other parts of the blast room or Dustech Unit that are open to the surrounding air in the workshop except for the vent from the reclaimer through to the roof. He stated that he has not observed any other openings through which dust can escape to the air in the workshop.⁹⁹ When the doors to the blast room are shut and blasting is being done in the room, Mr Davis stated he has not observed any dust escaping from the blast room or Dustech Unit into the workshop.¹⁰⁰
- 42 Mr Davis stated that he regularly observed that the remaining garnet that is not reclaimed and recycled is broken down into smaller particles and dust,

⁹⁴ Exhibit A1, Tab 11 at 608, [76]-[78].

⁹⁵ Exhibit A1, Tab 11 at 608, [80].

⁹⁶ Exhibit A1, Tab 11 at 608, [81].

⁹⁷ Exhibit A1, Tab 11 at 609, [84]-[85].

⁹⁸ Exhibit A1, Tab 11 at 609, [86].

⁹⁹ Exhibit A1, Tab 11 at 609, [89].

¹⁰⁰ Exhibit A1, Tab 11 at 610, [91].

captured as waste or dust in the reclaimer and delivered to the waste drum.¹⁰¹ The dust residue and any waste such as paint, dirt and corrosion captured by the reclaimer including when the cartridge filters are automatically cleaned by the unit, is then deposited into a custom-made sealed forty-four gallon drum located below the unit.¹⁰² When the waste drum is full it is removed, and it is emptied into a container which is then sealed. This occurred in the blast room so that any excess dust is able to be removed through the extraction system.¹⁰³ Mr Davis outlined a detailed process for waste removal to ensure that the dust that has been captured by the reclaimer is contained at all times and is not released into the atmosphere in the workshop.¹⁰⁴

- 43 Mr Davis referred to one of the hydraulic hose fittings under the blast pot through which garnet is conveyed includes a small rubber 'O' ring which he observed wears out in as little as two weeks due to the garnet as it goes through the fitting at high pressure and speed. He observed that a small amount of garnet could trickle through the fitting and accumulate on the floor underneath and this consisted of course grit and not dust. Based on his observations he estimated that the amount of garnet trickling through the fitting to be less than a cup full in an hour. As the wearing out of the 'O' ring affects the pressure coming through the blast nozzle inside the room, the fitting is checked every two to three days to ensure that it has not worn out and replacement supplies are kept to this end.¹⁰⁵

Dust extraction

- 44 The dust extraction unit connected to the blast room is known as a reverse pulse dust collector (the Dulsech Unit).¹⁰⁶ According to the information sheet in relation to the machine:-

The *ABSS Dustech* Dust Collector is a reverse pulse style that uses a pulse-jet of compressed air to clean the cartridge filters.

¹⁰¹ Exhibit A1, Tab 11 at 611, [99].

¹⁰² Exhibit A1, Tab 11 at 611, [104].

¹⁰³ Exhibit A1, Tab 11 at 611-2, [106].

¹⁰⁴ Exhibit A1, Tab 11 at 611-3, [106], [108] and [115].

¹⁰⁵ Exhibit A1, Tab 11 at 612-3, [110]-[114]

¹⁰⁶ Exhibit A1, Tab 11 at 608, [73].

This allows for an extremely high dust collection efficiency and a longer life expectancy for the cartridge filters.¹⁰⁷

- 45 According to the report of Ms Nicola Power, occupational hygiene manager, the ABSS Dust Collector “captures the fine dust and foreign matter onto filters before the air is deducted to the exhaust on the roof of the premises.”¹⁰⁸ Ms Power also reports that the filters used in the reverse pulse dust collector are “Farr Gold Series Filters, which have 99.99% efficiency for particles of 0.5 micron and greater.”¹⁰⁹ The systems also have a reverse pulse dust collectors which automatically use compressed air to clear the air filters, such that they do not require regular manual cleaning.¹¹⁰

Burrell Unit

- 46 What was described as the old blast room in the south-western corner of the workshop was supplied by Burwell and installed in 2004. The dust extraction system was also supplied by Burwell and was referred to as the Burwell Unit. This also used a cartridge filter system similar to that used in the Dustech Unit.¹¹¹ Mr Davis stated that the process for operating the Burwell blast room and dust collector was essentially the same as that of the Dustech Unit.¹¹² This also appeared to have been confirmed by Ms Power in her report. She stated that the dust collector uses a frequent, automatic pulse jet of compressed air passed through educator tubes to ensure complete dust removal, regardless of the load of the filter, to clean the cartridge filters.¹¹³

Powder coating process

- 47 The powder coating process was described by Mr Davis in his affidavit. He stated that after cleaning an item by abrasive blasting, it is common to then powder coat the item, mainly to protect the metal surfaces from corrosion.¹¹⁴ It was a process which involved electrostatically applying a dry powder polymer to coat the object and then curing it under heat in a curing room to allow it to

¹⁰⁷ Exhibit A1, Tab 12 at 705.

¹⁰⁸ Exhibit A1, Tab 25 at 1374-1375, [85].

¹⁰⁹ Exhibit A1, Tab 25 at 1376, [87].

¹¹⁰ Exhibit A1, Tab 25 at 1381, [126(a)].

¹¹¹ Exhibit A1, Tab 11 at 613, [116]-[118].

¹¹² Exhibit A1, Tab 11 at 614, [119].

¹¹³ Exhibit A1, Tab 25 at 1378, [95].

¹¹⁴ Exhibit A1, Tab 11 at 615, [134].

form a protective coating or “skin” over the item. Mr Davis described the curing room as essentially a large industrial oven.¹¹⁵ The powder coating was done in the power coating bay, known as a spray booth. After coating, an item would be transferred to one or two ovens for the curing part of the process.¹¹⁶ The spray booth was described as a room with a very strong exhaust ventilation system. The operator stands inside the booth and uses a spray gun to spray the powder polymer over the item being coated. Any powder that comes into contact with the item sticks to the item due to the electrostatic charge on the powder. Any powder that doesn’t come into contact with the item being coated is extracted by the exhaust system.¹¹⁷ Mr Davis stated that he regularly observed over the years that the velocity of the air in the spray booth exhaust equipment is very strong and more than sufficient to ensure any excess powder is drawn towards the closed end of the booth and to prevent powder settling in the booth.¹¹⁸ The western end of the room is open and the exhaust system which is located outside the booth on the eastern side of the closed end of the booth. No items are sprayed outside the booth.¹¹⁹ The spray booth extractor is described as having a cartridge filtration system with an automatic reverse pulse cleaning system and it operates in a very similar manner to the reclaiming unit described in relation to the ABSS system.¹²⁰ The reverse pulse cleaning timer is set to blast air every fifteen seconds, when a pulse of air is sent back in to clean the cartridge filters in the unit.¹²¹

- 48 The surplus powder extracted from the spray booth is captured by the dust extractor attached to the spray booth. That powder is not recycled, but is deposited by the unit into a bag in the sealed waste bin underneath the unit and disposed of as waste.¹²² The product data sheet for the dust filter described a Gold Cone in the centre of the cartridge stating:-

¹¹⁵ Exhibit A1, Tab 11 at 615, [135].

¹¹⁶ Exhibit A1, Tab 11 at 616, [139].

¹¹⁷ Exhibit A1, Tab 11 at 616, [140]-[141].

¹¹⁸ Exhibit A1, Tab 11 at 617, [144].

¹¹⁹ Exhibit A1, Tab 11 at 616, [140].

¹²⁰ Exhibit A1, Tab 11 at 617, [147].

¹²¹ Exhibit A1, Tab 11 at 617, [148].

¹²² Exhibit A1, Tab 11 at 617, [149].

...cleaning is accomplished by pulse waves that emanate outward from this inner cone providing enhanced cleaning for more efficient operation, longer cartridge life and reduced service requirements.¹²³

- 49 The cartridge filters for the Dustech Unit, the Burwell Unit and the dust extraction unit connected to the spray booth were said to all use the same cartridge filters.¹²⁴
- 50 Mr Davis stated that he regularly observed the waste bin under the spray booth extractor required emptying once every 1 to 2 weeks depending upon the amount of coating that is done in that timeframe. He stated that he would check the bin at least once per week, and sometimes more frequently if a heavy volume of coating had been done, to see if it required emptying. If the process of emptying occurs, the unit requires switching off and the waste requires disposing of. Mr Davis could not recall any of the waste bags being broken or releasing dust into the atmosphere, though he had observed a waste bag being dropped on the floor and splitting, spilling powder on the floor but without causing dust to rise up into the air.¹²⁵

Filtration System Failure

Gene Barrett

- 51 Mr Gene Barrett provided evidence that since the First Defendant first started operating its powder coating operation in 2004, there had been issues with noise, as well as dust and paint residue drifting into neighbouring lots and onto the roof sheeting.¹²⁶ He recalled a fine, pinkish or grey and red sand like substance being present on the roof sheeting and guttering which was collecting in concentrated deposits where the sand blasting exhaust port was located.¹²⁷ From 2008 onwards, he also saw these substances being present in neighbouring lots, particularly Lots 2, 3, 5, 7 and 10 which were adjacent to DPC.¹²⁸ He stated that he first saw these substances on the roof and in neighbouring lots in or around 2008. From then onwards, what he described as “the Residue” continued to accumulate on the roof generally, but was

¹²³ Exhibit A1, Tab 12 at 739.

¹²⁴ Exhibit A1, Tab 11 at 620, [171].

¹²⁵ Exhibit A1, Tab 11 at 617-8, [150]-[152].

¹²⁶ Exhibit A1, Tab 6 at 41, [34].

¹²⁷ Exhibit A1, Tab 6 at 42, [38].

¹²⁸ Exhibit A1, Tab 6 at 42, [39].

concentrated in larger deposits near the respective exhaust ports in Lots 5 and 6. He stated that the Residue collected in deposits from the exhaust ports down the roof sheeting and into and down the gutter, but also drifted across a wider area of the roof structure. Mr Gene Barrett stated that it drifts from the new exhaust port from the new sand blasting room in the North Eastern Corner of the powder coaters' premises. He stated he also observed it constantly drifting and being present in neighbouring lots.¹²⁹

52 Mr Gene Barrett described that directly under the exhaust port for the original blast room, the roof sheeting had rusted, an observation he made about five years ago.¹³⁰

53 Mr Gene Barrett added that at various general meetings of the Plaintiff (discussed below) he raised the issue of the dust from the powder coating business drifting into neighbouring lots and onto the roof and causing damage with Mr Nugent, however, the problem persisted.¹³¹

54 Exhibited in an annexure to his affidavit were photographs of the Residue on the roof structure and other locations between 2 October 2013 and 14 May 2018.¹³²

55 Mr Gene Barnett stated that the Residue caused damage to three sections of box guttering above the boundary between Lots 6-3, 6-10 and 5-2 and 5-7 and over the last five years parts of the box gutters have rusted out and the Owners Corporation replaced them as required. This evidence was limited under s 136 of the *Evidence Act 1995* (NSW)¹³³ to his perception.¹³⁴ Mr Barrett stated that because of the residue the Owners Corporation had to have the roof and guttering cleaned more frequently than it otherwise would have. He further observed that the amount of Residue on the roof would reduce the further away you got from the exhausts.¹³⁵

¹²⁹ Exhibit A1, Tab 6 at 42, [40].

¹³⁰ Exhibit A1, Tab 6 at 42, [41].

¹³¹ Exhibit A1, Tab 6 at 42, [42].

¹³² Exhibit A1, Tab 6 at 43-4, [44].

¹³³ Hereinafter 'the 1995 Act'

¹³⁴ T 20.27-21.14.

¹³⁵ Exhibit A1, Tab 6 at 45, [45].

Steve Davis

- 56 On one occasion in 2014, Mr Davis conceded that he went and observed that dust and grit was coming through the blast nozzle into the blast room. He then shut down the system and began investigating the cause of the problem. Upon inspection of the Burwell Unit, he discovered that one of the cartridge filters had a hole in it and was damaged, and that dust had gone up into the vent that went to the roof. Thereafter, the room was not used until a replacement filter was installed one or two days after it was ordered. To the best of his recollection, Mr Davis stated that the failure of the cartridge filter on the Burwell Unit was the only occasion that it had been damaged and required replacement since DPC commenced operating at the Property. To the best of his recollection, Mr Davis stated that he did not believe that the Burwell Unit and the old room broke down at any other time after 2004 nor was dust allowed to escape into the atmosphere inside or outside the workshop. Since 2016 following the installation of the ABSS room, the old room was used for about a week in later 2017 when they were very busy but otherwise it was hardly used and in 2017 it was sold.¹³⁶
- 57 On a further date he could not recall approximately six to seven years ago, Mr Davis stated that there was a breakdown of the filter in the spray booth extraction unit. This resulted in a release of waste through the roof. He stated that he climbed on the roof, observed that in the area around the vent there was whitish powder about two inches deep spread out over an area measuring approximately three or four metres by three or four metres. He then arranged for his employees to help him clean it up and they were able to sweep most of the powder up and dispose of it. According to the best of his recollection, he believed that the spray booth extraction unit has not broken down at any other time since 2004 nor has powder been allowed to escape into the atmosphere inside or outside the workshop.¹³⁷
- 58 Mr Davis conceded that he had also been up on the roof of Lots 4, 5 and 6 on a number of occasions since the incident of 2013/14. He stated that during each of the inspections he observed:-

¹³⁶ Exhibit A1, Tab 11 at 614-5, [126]-[133].

¹³⁷ Exhibit A1, Tab 11 at 618, [152]-[157].

- (1) There was some residue on the roof in the same location that he cleaned up seven or eight years ago and which appears to be residual powder that was not removed at the time;
- (2) That powder residue was grey in colour and range from about 1 to 3 mm in thickness; and
- (3) The powder residue appeared to be powder coating that had been baked by the sun where it was lying.¹³⁸

59 Mr Davis stated that he observed that the powder residue was quite easy to remove and the roof line underneath had not corroded and appeared to be undamaged as a result of being covered with powder residue.¹³⁹

60 Mr Davis added that the powder coated items are finished in the curing ovens. The only by-product of the curing process is the release of surplus heat from the oven directly into the open atmosphere through a roof vent to the exterior of the building. Mr Davis stated that he has not observed any powder or dust being given off an item or generated through the curing process.¹⁴⁰

61 In cross-examination Mr Davis conceded that Gene and Geoff Barrett possibly raised with him the drifting of dust from DPC but didn't recall it being in relation to neighbouring lots. He denied that they raised with him damage to the roof above DPC and rusting because of run off from the dusting garnet.¹⁴¹

62 Mr Davis conceded that he didn't have any documents for procedures to prevent interaction of dust from powder coating and maintenance.¹⁴²

David Nugent

63 Mr Nugent recalled being informed by Mr Davis in or about 2013 or 2014 that one of the filters in his blasting room had broken and had been replaced but could not recall any further specific details of the incident.¹⁴³

64 He stated that on each of the two occasions when Mr Davis's equipment broke the equipment was on his belief promptly repaired or replaced. He was not

¹³⁸ Exhibit A1, Tab 11 at 629, [234]

¹³⁹ Exhibit A1, Tab 11 at 629, [235]

¹⁴⁰ Exhibit A1, Tab 11 at 619, [162].

¹⁴¹ T 157.30-.48.

¹⁴² T 163.19-.44.

¹⁴³ Exhibit A1, Tab 13 at 797, [72]

aware of any other incidents when the blasting or powder coating equipment has broken down since he commenced operating in the premises in 2004.¹⁴⁴

Fire Alarms

Gene Barrett

- 65 Apart from damage to the roof, Mr Gene Barrett stated that from the time the First Defendant started operating its powder coating business, the number of false alarm charges being triggered by detectors in Lot 6 and the portion of the business occupied in Lot 5 had been disproportionate to other lots. He also stated that there were fire alarms triggered by detectors in lots around the powder coating business that were near the boundary of the powder coater where there had been no activity in the lot in which the detector was located that would apparently cause the alarm. On each occasion that a false fire alarm occurred, Fire and Rescue NSW were said to have attended the premises and invoiced Romteck Grid, which in turn invoiced the Owners Corporation for the callouts.¹⁴⁵ These invoices from Romteck from 6 January 2011 were exhibited to Mr Barrett's affidavit.¹⁴⁶
- 66 According to Mr Gene Barrett, the main panel of the fire detector system provided for a log of previous fire alarm indications at a given date, however the history gets deleted and you could only capture so many at a given time. The fire detections manager, Orana Fire Protection, did not conduct monthly checks nor did it retain a record of history for that month. However, Mr Gene Barrett did exhibit to his affidavit a record from the main panel of the fire detection system showing the raw data of fire alarm triggers for the periods 5 November 2012 to 27 November 2012;¹⁴⁷ 23 March 2015 to 12 December 2016;¹⁴⁸ 20 February 2017 to 1 May 2017;¹⁴⁹ and from 9 May 2018 to 7 June 2018.¹⁵⁰ The detectors alarms contained in the history logs are then able to be matched against the fire system plan, with L being a reference to loop and D

¹⁴⁴ Exhibit A1, Tab 13 at 797, [73]

¹⁴⁵ Exhibit A1, Tab 6 at 46, [50]-[52].

¹⁴⁶ Exhibit A1, Tab 7 at 193-280.

¹⁴⁷ Exhibit A1, Tab 7 at 281-286, noting that there are sporadic references to dates outside of this period prior to 2012.

¹⁴⁸ Exhibit A1, Tab 7 at 287-292.

¹⁴⁹ Exhibit A1, Tab 7 at 293-321.

¹⁵⁰ Exhibit A1, Tab 7 at 322-325.

being a reference to the detector. The fire system plan was tendered as Exhibit B. Exhibited to Mr Gene Barrett's affidavit was a spreadsheet prepared by Romteck, which had been produced by them under subpoena based on data from Fire and Rescue NSW, which showed the fire alarms in the complex and charges from 2005 to 31 May 2018, enabling the detectors to be matched against the plan.¹⁵¹

- 67 Mr Gene Barrett was cross-examined in relation to each of the invoices forwarded by Romteck Grid attached to the Fire and Rescue NSW management system billing advice. Mr Gene Barrett accepted that there was nothing in the Fire and Rescue NSW invoices that identified the alarms going off in Lots 5 and 6.¹⁵²

Orana Fire Protection

- 68 Tendered in the Defendant's case was a letter from Michael Theris of Orana Fire Protection for the attention of Sean Josephs, dated 12 June 2010. This stated:-

The false alarms at 55 Wheelers Lane, Dubbo, are mainly due to the detectors being contaminated with paper and... ink dust. As this building was an old printing factory and the detectors are mainly smoke detectors. The owners of the building have spared no cost in trying to keep the false alarms down to a minimum. The detectors are checked and cleaned regularly by Orana Fire Protection. All offending detectors are replaced with new.

The detection system allows us to check each detector for contamination. Other than the dust issues detectors have been going into alarm when there are new tenants and the system changed to suit the new environment, for example Dubbo Powder Coaters had all their detectors removed and changed to thermal detectors and more detectors were needed to comply. We hope this may explain the false alarms on site and possibly allow for a refund for some of the call out fees.¹⁵³

- 69 In further correspondence to Mr Josephs dated 30 April 2012, Mr Theris stated:-

The false alarms at 55 Wheelers Lane, Dubbo, are mainly due to the units of the building having undergone a change of use, for example, units with trucks driving in and out causing false alarms. These detectors were changed immediately to thermals. 55 Wheelers Lane, Dubbo is an old building which was used as a printing factory for many many years and this use has left ink dust particles throughout the building contaminating the detectors and causing

¹⁵¹ Exhibit A1, Tab 7 at 326-332.

¹⁵² T 75.01-.04.

¹⁵³ Exhibit A1, Tab 14 at 862.

them to go into alarm. We now, each month, check the status of the detectors. There has also been water damage causing detectors to go into alarm. These leaks have been repaired and the detectors replaced. The owners of the building have spared no cost in trying to keep the false alarms down to a minimum. The detectors are checked and cleaned regularly by a Orana Fire Protection. All offending detectors are replaced with new.¹⁵⁴

70 There was evidence that Mr Sean Josephs worked for Romteck. The aforementioned letters reference to dust being present was said by Mr Nugent to accord with his own understanding of the presence of black dust through the premises as earlier referred to.¹⁵⁵

71 Also tendered in the Plaintiff's case was a document produced on subpoena by Orana Fire Protection addressed in respect of the Property dated 13 December 2016, although the author is not identified. The letter states:-

Upon inspection of the above site, I found that the fire alarm system is going into false alarm into different areas but mainly at the Powder Coaters and the old Latex Factory. The detectors in the powder coating area must be replaced. They have deteriorated to the point where they are not indicating on the detector bases. The other issues are that activities at the powder coaters are setting the detectors off and also detectors in the tenants next door to them. The walls must be extended so contaminants created by the powder coaters do not intrude into the areas next door and set them into alarm, as is happening at the moment.

We suggest that all of the detectors in the powder coaters be replaced with Acclamate type detectors which need both heat and smoke before they will go into alarm. These detectors have the ability to be split into two where the smoke alarm can activate a local alarm and smoke and heat can activate the brigade alarm. The other option is flame detectors. Due to the aggressive environment, the Acclamate detectors will deteriorate and may need to be replaced within five years to ensure that contamination does not effect the detectors...¹⁵⁶

72 In response to a request from Mr Nugent, Mr Michael Theris of Orana Fire Protection corresponded on 11 April 2017:-

Attention: David

In response to below.

Sensors were going into alarm and could not be identified as they had deteriorated and the indicator lights were no longer showing. The fire panel was showing powder coaters and the offending detector, however, no indicator lights were showing on the detector. The fire board replaced in the panel has nothing to do with monitoring but more with detection of alarms. The old board

¹⁵⁴ Exhibit A1, Tab 14 at 863.

¹⁵⁵ Exhibit A1, Tab 13 at [58] Restricted pursuant to s 136 of the 1995 Act to Mr Nugent's understanding

¹⁵⁶ Exhibit G.

still worked fine but was also deteriorating and we were having trouble connecting to the laptop.

The dirt from the old printing factory is an issue, however was not the issue with alarms going off in the powder coaters. At one stage it was each and every time that the oven doors were opened which is odd as the detectors have not been moved. Therefore it would indicate that the ovens have been moved though Steve tells me that they haven't. The detectors around the site, except for your areas, are cleaned on a regular basis as the panel indicates how contaminated the detectors are.

The brigade have never contacted us prior to attending site. When they get a call-out from a monitoring company whether you ring and tell them that it is a false alarm or not, they attend. We have not had a false alarm since the work was done. The detectors above the oven doors, which were causing the alarms, have been removed. There was one alarm caused by burning oil which I am led to believe was in pipework which caught alight and caused smoke when put in the oven. Steve tells me that this is a one off situation and that this has never happened before.

Most industrial settings would not effect detectors, however, detectors in aggressive areas would be affected. The powder coaters would be considered an aggressive environment. I did not witness any negligence or bad practice, it is just the environment associated with powder coating.¹⁵⁷

David Nugent

73 Mr Nugent stated, based on his observations of occupying the neighbouring lot, that throughout the period between 2004 and 2013 he recalled occasions when the fire alarm system in the complex was triggered, the alarms sounded loudly and everyone exited their premises to the outside of the complex. Mr Nugent estimated that during usual working hours he heard the alarms triggered at the complex on between approximately five to ten occasions in each year. He understood that the alarms were tested from time to time and that he believed that the majority of the alarms that he heard during the period from 2004 and 2013 were caused by routine testing.¹⁵⁸

74 In cross-examination, Mr Nugent rejected the suggestion that alarms were going off due to the dust contaminants in the alarms.¹⁵⁹ Mr Nugent rejected the suggestion that during the period between 2016 and 2017 the fire alarms were going off due to construction works being carried out in the premises.¹⁶⁰ He stated that he wouldn't classify the moving of the wall in Lot 5 as construction.

¹⁵⁷ Exhibit A1, Tab 7 at 349.

¹⁵⁸ Exhibit A1, Tab 13 at 812, [137].

¹⁵⁹ T 204.02-.04.

¹⁶⁰ T 205.15-.17.

He stated that the wall was already there and it just had to be slid along one bay.¹⁶¹ Mr Nugent agreed that the fire alarms increased significantly in 2016, but had no reason to understand why they were going off.¹⁶² Mr Nugent disagreed with the suggestion that the reason he paid Orana Fire Protection to replace the fire detectors in February 2017 was because construction was causing dust in the alarm system. He stated that the reason was that the alarms kept going off and he couldn't find out what was causing it so he therefore asked Orana Fire Protection to fix it and that he would pay for it.¹⁶³ He disagreed with the suggestion that the invoices for the maintenance work carried out by Orana Fire Protection was due to the presence of garnet and suggested that it was normal maintenance of the fire system which needed to be cleaned everywhere as part of the maintenance schedule.¹⁶⁴

Steve Davis

- 75 Mr Davis stated that he recalled that since 2004 and 2005, the fire alarms throughout the complex went off on regular occasions and he would hear sirens go off. He recalled that on some of those occasions that the fire brigade would attend the workshop to respond to an alarm, but they were false alarms as they had not had a fire in the workshop before.¹⁶⁵ He recalled that in early 2017, Mr Nugent informed him that Orana Fire Protection would be installing some new detectors in the workshop. After they had been replaced, he recalled that the fire alarm was triggered on two or three occasions and the fire brigade attended the workshop, but there wasn't any fire on those occasions and these alarms were false.¹⁶⁶
- 76 In the course of cross-examination, Mr Davis recanted from his claim that the fire alarms had been going off since 2004-2005 on a regular basis. He added that that was a mistake and that it would have been some date three to four years previously.¹⁶⁷ He specifically rejected that the fire alarms were triggered

¹⁶¹ T 204.14-.20.

¹⁶² T 204.44-.50.

¹⁶³ T 205.42-206.01.

¹⁶⁴ T 206.17-.29.

¹⁶⁵ Exhibit A1, Tab 11 at 631, [245].

¹⁶⁶ Exhibit A1, Tab 11 at 631-2, [247] and [250].

¹⁶⁷ T 168.34-.42.

due to the presence of garnet in the detectors,¹⁶⁸ and disagreed that the fire alarms not on his premises went off because of garnet in the neighbouring lots.¹⁶⁹

Meetings of the Lot Owners

77 On 2 October 2013, the Owners Strata held an extraordinary general meeting to discuss the issues including dust and damage to the roof of the Owners Strata.¹⁷⁰ In attendance were Mr Gene Barrett and Mr Nugent. The Minutes record:-

Item 5

Dubbo Powder Coating and Sandblasting Dust

The dust from Powder Coating is still a problem although not as bad as two years ago. At least 20 smoke detectors need replacing; the box gutter and roof has a layer up to 30mm thick in and around the Powder Coating walls and neighbouring floors also.

Motion: New filters be installed, maintenance and cleaning log be kept and that Body Corporate can inspect these logs.

Motion passed – unanimous. David Nugent will settle the dust with Steve Davis (Dubbo Powder Coating and Sandblasting)¹⁷¹

The Minutes further record:-

David requested the skylights over unit 6 be replaced. Gene stated the current skylights need to be cleaned of Powder Coating dust as well as the adjoining trim deck metal sheeting. The skylights would be replaced and quotes presented to the Body Corporate only after Powder coating dust problem (item 5) is resolved.¹⁷²

78 According to Mr Nugent, although the Minutes did generally accord to his recollection of the meeting, they did not accord with his recollection of the discussion about DPC recorded at item 5. Nor did he recall there being any motion voted or passed in relation to DPC and he did not recall any discussion about maintenance and cleaning logs. Instead he recalled a conversation to the following effect:-

Gene: Dubbo Powder Coating has released dust on the roof and it's everywhere

¹⁶⁸ T 168.44-.48.

¹⁶⁹ T 168.50-169.09.

¹⁷⁰ Exhibit A1, Tab 6 at 42, [42]; Exhibit A1, Tab 13 at 795, [65].

¹⁷¹ Exhibit A1, Tab 14 at 867.

¹⁷² Exhibit A1, Tab 7 at 156; Exhibit A1, Tab 14 at 868.

Me: I understand from Steve that one of the filters broke and it let some powder escape

Gene: Can you speak to Steve about it?

Me: He's told me that the filter is fixed and the powder has been swept up but I'll check with him straight after this.

Gene: Thanks David.¹⁷³

- 79 The version of the Minutes produced by Mr Gene Barrett shows that they had been signed as a true and correct record both by Mr Gene Barrett and Mr Nugent.¹⁷⁴ For an unknown reason the copy of the Minutes exhibited to Mr Gene Barrett's affidavit is missing the relevant page containing Item 5.¹⁷⁵ Mr Nugent was cross-examined about his signature appearing on the Minutes under "signed as a true and correct record". Whilst Mr Gene Barrett's copy had signatures,¹⁷⁶ Mr Nugent's copy did not.¹⁷⁷ Notwithstanding this, Mr Nugent maintained that in this respect the Minutes did not accord with his recollection.¹⁷⁸ In cross-examination Mr Nugent denied that he knew the dust and the powder coating at DPC was an issue at the time.¹⁷⁹
- 80 After the meeting of 2 October 2013, however, Mr Nugent did recall going to the factory area and not observing any dust or damage coming through the gap at the top of the partition wall. He stated that he spoke to Mr Davis and told him that Mr Gene Barrett had asked him to check that the filter was definitely fixed and the powder wasn't continuing to come to the roof. He said he was assured by Mr Davis that they had definitely replaced the filter and cleaned it.¹⁸⁰
- 81 Mr Gene Barrett referred to the First Defendant reconfiguring the layout of its operation in 2016. This was due to a new tenant in Lot 4 utilising more of Lot 5 than before. A copy of the reconfigured Lot was marked by Mr Gene Barrett.¹⁸¹
- 82 On 5 August 2016, the Owners Strata held an Annual General Meeting where issues of dust and damage to the roof of the Owners Strata were discussed. At

¹⁷³ Exhibit A1, Tab 13 at 796, [68].

¹⁷⁴ Exhibit A1, Tab 7 at 156.

¹⁷⁵ T 192.39-43.

¹⁷⁶ Exhibit A1, Tab 14 at 868.

¹⁷⁷ Exhibit A1, Tab 7 at 156.

¹⁷⁸ T 190.11-192.17.

¹⁷⁹ T 193.15-17.

¹⁸⁰ Exhibit A1, Tab 13 at 797, [70]-[72]

¹⁸¹ Exhibit A1, Tab 6 at 45, [47]; Exhibit A1, Tab 7 at 192.

that meeting, both Messrs Gene and Geoff Barrett and Mr Nugent were present. The Minutes record that there was a discussion about noise and dust complaints about DPC and there was a decision to bring this up at the upcoming EGM.¹⁸²

83 At the Extraordinary General Meeting held on 19 August 2016, the Minutes record a report from the Chairperson as follows:-

The on going repairs to the box gutter and roof, it was reported that the dust from the powder coater has corroded the box gutter and the roof in several places, The roof over lot 6 will need replacing because of the powder coating dust over a long time despite being the 2nd youngest roof in the scheme (approx. 20 years old trim deck.) sections of the box gutter have been replaced over the last week, and the box gutters have been cleaned also.

...

MOTION 1: RESOLVED THAT, the minutes of the last annual general meeting of the owner's corporation held on Friday 5 AUGUST 2016 AT 9am is confirmed.

David Nugent stated he believed that only an AGM can confirm an AGM and therefore this EGM cannot confirm the last meeting. Also he asked if his letter was in the AGM minutes. The chair stated he believed that this meeting could confirm the last, as it is a General Meeting but would confirm with legal. The chair also said that David Nugent's Letter was tabled in the minutes of the AGM.

...

GENERAL DISCUSSION:

...

2. Dust from powder coating, as reported in the chairs report the roof and box gutter over lots 5 and 6 was in bad shape. David Nugent said he would inspect the roof, and then thanked the owners for paying Nick Wilson's Cost in the local court matter the chair stated that the owners had a duty to comply with the law and was doing everything it could to do so. Nugent then asked why the levies only where balanced back six years [*sic*], the chair stated there was a limit on liability of six years as per legal advice. Nugent stated that Gene Barrett, "you got off lightly, The meeting become heated, at this accusation Geoff Barrett reminded Nugent its he who has benefited most because Gene Barrett has managed and maintained Nugent's Lots 4, 5 & 6 for 13years free of any management or maintenance fee. The accusation that Gene Barrett is dishonest and got off lightly was hard for him to take.

3. Nugent's left the meeting as the discussion became heated and personal. The remaining unit holders Geoff and Gene Barrett decided that the remaining general discussion items be put in the form of formal motions at the next EGM to be called next week.¹⁸³

¹⁸² Exhibit A1, Tab 6 at 42, [42]; Exhibit A1, Tab 7 at 171.

¹⁸³ Exhibit A1, Tab 7 at 172-4; Exhibit A1, Tab 14 at 887-8.

84 Mr Nugent confirmed that there was discussion about dust from DPC at the meeting of 12 August 2016.¹⁸⁴

85 On 7 September 2016, an Extraordinary General Meeting took place of the Owners Strata, where Messrs Gene and Geoff Barrett, and Mr and Mrs Nugent were present. The Minutes record that the Owners Corporation approved for the Chairperson to issue a breach notice to DPC.¹⁸⁵ The Minutes further record that a resolution was passed in the following terms:-

MOTION 8: RESOLVED THAT the owners corporation will pass on to the owners of Lots 4, 5 & 6 false alarm charges incurred over the last 6 months due to the construction works being undertaken totalling \$18,037.50 as attached in Annexure D.¹⁸⁶

The Minutes further record:-

GENERAL DISCUSSION: The Chairperson opened the meeting for general discussion and the following matters were discussed without resolution:

...

iii) Discussion round Motion 4 (in relation to the breach notices for Dubbo Powder Coating), the chair pointed out the explanatory note in the notice of meeting; Dubbo Powder Coating tenants part of lot 5 and lot 6. Dubbo Powder Coating, since their tenancy commenced in 2004 have had noise and dust problems. Currently, the main on going issue is the dust that has corroded out the roof and box gutter over time.¹⁸⁷

86 In cross-examination, Mr Nugent agreed that there was a discussion relating to the issue of a breach notice.¹⁸⁸ In relation to the false alarm charges, he rejected the suggestion that there was a peak of expulsion of dust from the powder coating business and or on construction work. He stated that he would need to see a log of the false alarms, when they happened over time and that he was never provided with that.¹⁸⁹

87 On 10 September 2016, the Owners Strata issued notices to comply with by-laws upon the Second Defendant.¹⁹⁰ The Notices contained statements under

¹⁸⁴ T 196.17-.49.

¹⁸⁵ See Motion 4: Exhibit A1, Tab 7 at 175; Exhibit A1, Tab 14 at 893.

¹⁸⁶ Exhibit A1, Tab 7 at 176; Exhibit A1, Tab 14 at 894.

¹⁸⁷ Exhibit A1, Tab 7 at 176.

¹⁸⁸ T 197.04-16.

¹⁸⁹ T 197.31-.46.

¹⁹⁰ Exhibit C.

s 45 of the *Strata Schemes Management Act 1996* (NSW).¹⁹¹ The notices recorded breaches of the by-laws as follows:

- (1) The first notice referred to actions believed to have been breaches of by-law 3, recording that:-

The owners corporation believes you have broken this by-law by: ...

Long term dust on Roof has lead to the Roof and Box Gutters on and around Powdering coating to rust out

You must comply with the by-law immediately by: ...

Stop the dust, seeking Building consultant Report on damage and Rectification of Roof

- (2) The second notice referred to actions believed to have been breaches of by-law 3 and recorded:-

The owners corporation believes you have broken this by-law by: ...

Damage to common property, exhaust Fan Ducting Installed In Lot 5 Roof Pouring Dust onto the Roof

You must comply with the by-law immediately by: ...

Ask for permission from the O.C. to Install the Duct work

- (3) The third notice referred to actions believed to have been breaches of by-law 11 and recorded:-

The owners corporation believes you have broken this by-law by: ...

excessive false alarms from Dust and Heat due to the powder coating process

You must comply with the by-law immediately by: ...

Install appropriate detectors

- (4) The fourth notice referred to actions believed to have been breaches of by-law 12 and recorded:-

The owners corporation believes you have broken this by-law by: ...

Noise and dust from Dubbo Powder Coating and sand Blasting

You must comply with the by-law immediately by: ...

i) An Acoustic Engineers Report required

ii) An Environmental Engineers Report required To report on rectification

88 On 27 October 2017, four further notices were issued under s 145 of the *2015 Act*,¹⁹² stating the Second Defendant had contradicted the by-laws as follows:-

¹⁹¹ Hereinafter referred to as "the 1996 Act".

¹⁹² Exhibit C.

- (1) The first notice referred to actions believed to have been breaches of by-law Part 2 sec 4(A,B) and recorded:-

The owners corporation believes you have broken this by-law by: ...

excusive noise and dust is not contained within the lots dust and noise is polluting the neighbouring lots (Lots 2,3,7&10) [sic]

You must comply with the by-law immediately by: ...

Better filtration of the dust and noise coming from the powder coating and sand blassting [sic] process

- (2) The second notice referred to actions believed to have been breaches of by-law Part 3 sec 14 (1,2) and recorded:-

The owners corporation believes you have broken this by-law by: ...

The dust, paint and Heat that is not sufficiently filtered [sic] is destroying the fire detection system. And since 24/4/15 to the 10/10/17 has caused 41 fire alarms

You must comply with the by-law immediately by: ...

Better filtration of the dust, paint and heat coming from the powder coating and sand blassting [sic] process

- (3) The third notice referred to actions believed to have been breaches of by-law Part 3 sec 12 (2) and recorded:-

The owners corporation believes you have broken this by-law by: ...

The dust, paint and Heat that is extracted on to the roof (Common Property) is destroying the roof and box gutters

You must comply with the by-law immediately by: ...

Better filtration of the dust, paint and heat coming from the powder coating and sand blassting [sic] process

- (4) The fourth notice referred to actions believed to have been breaches of by-law part 3 sec 15 and recorded:-

The owners corporation believes you have broken this by-law by: ...

The dust, paint and Heat that is extracted on to the roof (Common Property) has damaged the roof, box gutters, storm water systems and the fire alarm systems

You must comply with the by-law immediately by: ...

Better filtration and house keeping of the dust, paint and heat coming from the powder coating and sand blassting [sic] process.

89 Mr Nugent agreed that these notices had been issued.¹⁹³

90 On 21 February 2017, the Owners Strata held an Extraordinary General Meeting where issues associated with the dust and damage to the roof of the

¹⁹³ T 199.14-.200.03.

Owners Strata were discussed. At that meeting, Messrs Gene and Geoff Barrett were recorded as being present along with Mr Nugent. The Minutes recorded:-

MOTION 7: RESOLVED THAT the owners corporation engage Bugden Legal, in accordance with its fee proposal dated 3 February 2017 (a copy of which is Annexure D to the notice of meeting), to commence a NCAT proceeding against Dubbo Powder Coating for:

(a) The false alarm charges incurred as a result of their negligent actions; and

(b) Damage on the life cycle of the roof sheeting, flashing, guttering and downpipes to Lot 6 caused by the powder coating business,

In the sum of \$60,880.50, or such other amount as Bugden Legal may advise.

...

GENERAL DISCUSSION: The Chairperson opened the meeting for general discussion after the reports were presented.

The following matters were discussed without resolution:

1. Discussion of Motion 7: Mr. Nugent raised the prospect of the NCAT claim being successful. The chair pointed out that the claim was guided by Bugden Legal, experts in the field. Also, based on the findings in the Walton Smith Report (a copy of which was annexed to the notice of general meeting), the scope of damage caused by Dubbo Powder Coating was clear. Further, the chair indicated that it is also evident from the Orana Fire report that sand blasting dust, heat and the powder coating process damaged the smoke detectors.

2. Mr. Nugent repeatedly offended the chair, the chair showed frustration with Mr. Nugent who was not following the agenda. Mr. Nugent threatened to walk out on the meeting saying "*if you're going to raise your voice at me I am walking out of here.*"

3. Discussion around Motion 7 continued, and Mr. Geoff Barrett stated that this motion and documents have already been properly assessed by the owners corporations' solicitors, fire and building experts. This is in accordance with what Mr. Nugent had wanted where he stated several times in the past that he "*wanted the owners Corporations run properly*"

4. The chair was doing its job in the best interests of the owners corporation to investigate the issues caused by the operation of Dubbo Powder Coating and the motions proposed in the general meeting were doing just that, recovering the costs associated with the actions of Dubbo Powder Coating.

5. Mr. Nugent became narcissistic debating past legal matters beyond settlement, going over old ground and leaving the agenda.

6. Mr. Nugent stood up and attempted to physically intimidate [sic] Mr. Geoff Barrett sitting opposite.

7. Mr. Geoff Barrett stated "*you have come here for a fight not a meeting*" Mr. Nugent then walked out.

8. Meeting continued, motion 8 was resolved and the chairperson's report was tabled including a draft strata subdivision plan.

9. At the end of the general discussion, Mr. Nugent's original undertaking was produced and read from the minutes of the first EGM 2nd June 2004 that he would control all noise and trade waste from the tenancy Dubbo powder coating and sand blasting.¹⁹⁴

91 Mr Nugent agreed that the issues of dust and damage to the roof were probably discussed at the meeting of 21 February 2017.¹⁹⁵

92 On 21 April 2017, a further meeting was held of the Owners Strata, however only Mr Geoff Barrett and Mr Gene Barrett were in attendance. The Minutes record as debts owed to the owners for Lot 5, being the Second Defendants, as \$21,174.90 (less any payments made since 22 September 2016). For Lot 6, the debt owed to the owners, being the Second Defendants, was recorded as \$25,580.21 (less any payments made since 22 September 2016). Under the heading of "Reports", the Minutes record:-

...

5. Dubbo powder coating:

The recovery of false alarms, repairs to damaged smoke detectors and roof for lots 5 and 6 dew [sic] to long term damage from the powder coating activity, a claim will be issued to NCAT for the recovery of this damage based on Non compliance notices, Walton Smith report and orana fire protection advice.¹⁹⁶

93 The Minutes further recorded that debts would be recovered in the Local Court and that the costs for repairs for the roof, fire detection system and reimbursement of false alarms caused by DPC would be recovered by way of NCAT claim being prepared by Bugden Legal.¹⁹⁷ The Minutes further recorded that the chair was to forward an updated fire alarm schedule from the NSW Fire Brigade and forward it to Bugden Legal so that the Owners Corporation could be reimbursed.¹⁹⁸ Mr Nugent stated that he expected that he would have received a copy of these Minutes.¹⁹⁹

94 On 10 October 2017, the Annual General Meeting of the Owners Corporation was to take place. Mr Nugent gave evidence that in anticipation of that

¹⁹⁴ Exhibit A1, Tab 7 at 178-9; Exhibit A1, Tab 13 at 954-5.

¹⁹⁵ T 197.48-198.07.

¹⁹⁶ Exhibit A1, Tab 7 at 180.

¹⁹⁷ Exhibit A1, Tab 7 at 181-82.

¹⁹⁸ Exhibit A1, Tab 7 at 182.

¹⁹⁹ T 199.01-.02.

meeting, he prepared a note to address the points that were to come up. The note recorded:-

...

Regarding motions for upcoming AGM

Motion 2.

When NKH is engaged to act against Dubbo Powder Coaters, please get a written opinion as to the likely success of the NCAT procedure. Unfortunately the OC has a history of reckless action and litigation which has cost it dearly: about \$k200 after illegally remarking car spaces and \$2600 for an ill prepared claim against us for unpaid levies

I expect the OC litigation to be unsuccessful and wasteful because, mainly,

- Powder Coaters have not changed their operations since starting 2004 and operated without false alarms for over 10 years. The maintenance of the fire detection system is the responsibility of the OC and the continued efforts by its agent; Orana Fire Control, has been unable to stop the false alarms. Out of frustration of the OC's efforts I instructed OFC to do whatever it took to stop the false alarms and paid them about \$7000 to replace and try different sensors. False alarms are still occurring as Gene Barrett witnessed in this September when Steve Davis called him in to witness another false alarm with no observable cause. (Rather than suing DPC they have suggested they should sue the OC for not allowing there "quite enjoyment" of their premises and their loss of work time and disruption caused by constant false alarms and fire brigade visits).
- A reputable fire control company has inspected the system and has offered opinion that design and work on the current system is not appropriate. It is time to employ a more competent firm to fix the system.
- Walton Smith report is very poor quality and will not stand up to rigorous scrutiny. Most photos showing corrosion are clearly caused by evaporative coolers and old water leaks. They speculate, with no evidence that traffic damage is caused by DPC. There are many sky light panels, which have all been recently replaced and 14 roof penetrations above DPC, generating past or ongoing traffic, only 4 of which are attributable to DPC. WS's maths does not add up. The roof is already approximately 45 years old. They estimate a normal life of 50-60 years which has been shortened by 25%. So the "shortened" life of the roof has already, or nearly, expired. Clearly not case. So what is the basis of the amount of the claim?

Unless the OC can show clear advice that litigation will be likely to succeed I ask that lots 4, 5 and 6 be exempt from these litigation costs.

Motion 3.

1. When we purchased the building there were no skylights in lot 4 or 5. I had Col Honeysett, a very reputable plumber install many skylights with his usual high level of workmanship. I installed some, mainly over roof penetrations left open after Hannan Print removed their equipment

2. I have arranged with Cameron Porter to inspect and repair or remove any problem skylights and flashing that I believe are my responsibility. I expect this should alleviate any further need by the OC in this regard.

Motion 6.

1. Why is the storm damage not covered by insurance?
2. \$61,958.94 is a large sum. Can the OC provide a scope of proposed works and obtain a 2nd quote for the works?

Motion 8.

The motions says levies were sent on Sep 1st and due within 14 days with interest accruing after this date. We have not received these levies as of 6/10/17. Please send ASAP, without added interest.

Again, I request a proper accounting statement for each of our lots. The treatment of the legal levy has short changed the OC of \$50k. Again, I will attach an example of a simple, easily reconciled owners corporation statement, going back to when we had a zero balance. The OC will need to provide a clear statement, like this, if it proceeds with litigation. Why not provide it now? I am keen to resolve these levies but I cannot get my payments to reconcile with the various ad hoc communication received from the OC. I suggest the interest of the OC is best served by employing a skilled book keeper, using a standard account software package like MYOB. It will be far less stressful and cheaper and better!

I did not receive an email supposedly sent on 23/9/17 relating to the AGM. I am unable to attend due to prior engagements. In the future a simple, courteous enquiry of available/unavailable dates would be good OC practice. I will send a proxy representative to the meeting on Monday.

Regards.

David Nugent²⁰⁰

95 In the Minutes of the Annual General Meeting held on 10 October 2017, Mr Nugent was not recorded as present. However, under the heading of “Apologies” the attachment comprising of Mr Nugent’s talking points were noted. The Minutes record:-

REPORTS

...

2. Debts to the owners:

Lot 4 D & C NUGENT \$4,734.05 less any payments made since 10/10/17

Lot 5/6 (Yangura Pty Ltd) \$52,178.77 less any payments made since 10/10/17

A Statement of claim has been filed and served with Dubbo Local Court for the recovery of these debts. No defense [*sic*] has been filed with the court yet.

²⁰⁰ Exhibit A1, Tab 7 at 187-8.

...

4. Dubbo powdering coating

The recovery of false alarms, repairs to damaged smoke detectors smoke detectors and roof for lots 5 and 6 dew [sic] to long term damage from the powder coating activity, a claim will be heard for directions on 21st December 2017 at 11.45am NCAT for the recovery of this damage based on Non-compliance notices, Walton Smith report and Orana fire protection advice.

...

MOTION 2: RESOLVED THAT the committee of the owner's corporation be authorised to engage Nelson Kane and Hemingway to advise on and act in relation to the N Cat [sic] application for the recovery of extensive false alarms and damage to common property by works carried out by the occupier of lot 6 and part lot 5. (N-CAT application, Annexure A, NKH cost Disclosure Annexure B)

...

GENERAL DISCUSSION

...

2. Discussion of Motion 2: Mr. Barrett senior discussed with the chair the process of which the cost of repair of the damage to the roof, fire detection system and the reimbursement of false alarms all caused by Dubbo Powder coating and Sandblasting. The chair informed Mr. Barrett that a claim to NCAT as stated in the chairman's report the details of which are the contents of Annexure A. The correspondence from Mr. Nugent Attachment one regarding this Motion the first paragraph is misleading as the legal claims against the Owners corporation by MR Nugent where [sic] brought before the CTTT then Ncat and finally the supreme court of NSW all of which were unsuccessful.

Dubbo powder Coating where [sic] forced to reconfigure its operation when Mr. Nugent reduced their space and the indecent [sic] of False alarm has sky rocketed as the smoke and heat detectors where [sic] now in the wrong configuration, hence they were quickly destroyed. The ongoing Heat, Dust and Noise from the sandblasting and powder coating process is slowly destroying the building, this is plain to see from the photos Annexure A and D.

The last point of the motion from MR Nugent the Math's does add up the roof above powder coating is at the end of its life cycle because of the tenant's activity's and has age beyond its years due to the tenant's damage to the building.

3. Motion 3 Mr. Nugent takes responsibility for fixing the poorly installed flash above lots 4,5 & 6. See Attachment one.

4. Motion 6 of point 1 of Mr. Nugent's" [sic] correspondence, the Storm damage of approx. \$30,000.00 would be covered by insurance if the owner's corporation would be happy to pay the \$20,000.00 excess on the policy and leave it self-open to the already up would pressure [sic] on the current premium (see attached letter from the owner's corporation insurance broker Attachment two

5. The chair stated that Dubbo Powder Coating was making no attempt to clean up its pollution of noise, heat and dust,

NSWFB has been regularly called because of smoke coming from pipes that where [sic] placed in the oven which contained oil causing the oil to catch on fire. This has been going on for more than six months the first noted occasion was at 11.21 am on the 13/4/17.

6. The chair stated that NSWFB records show from 24/4/15 to 4/6/16 their where 18 false alarm 16 are where located in lots 4,5 & 6

7. The chair stated that NSWFB records show from 27/6/16 to 19/6/17 their where [sic] 23 false alarm 18 where [sic] set off by Dubbo Powder Coating.

8. The chair stated that NSWFB records show from 20/6/17 to today 10/10/17 their where [sic] 9 false alarm 7 where [sic] set off by Dubbo Powder Coating.

9. *In summary over the last 29 months Dubbo Powder coating has been reasonable for 41 False alarms out of a total of 50 clearly Dubbo powder coating and sand blasting has a heat and dust problem*²⁰¹

Issues

96 The questions for my consideration can be summarised as follows:-

- (1) Was garnet and powder coating emitted during the course of the First Defendant's activities?
- (2) Are the First and Second Defendant liable in negligence?
- (3) Are the First and Second Defendant liable in nuisance?
- (4) To what extent was any breach of duty and/or nuisance causative of the loss claimed by the Plaintiff?

97 I will deal with each of these questions in turn.

Was garnet and powder coating emitted during the course of the First Defendant's activities?

Plaintiff's Expert – Daniel Blair

98 Daniel Blair, General Manager of Virotec, is a chemical engineer qualified on behalf of the Plaintiff to prepare a report in relation to the First Defendant's operations. His first report dated 30 July 2018²⁰² indicates that he conducted a site visit on 4 July 2018, where he had unlimited access to the powder coating business and the surrounding businesses.²⁰³

Garnet

99 Mr Blair observed that the dust extractions systems for the primary blast room was considered to be industry standard in that they use both cyclone and

²⁰¹ Exhibit A1, Tab 7 at 183-86.

²⁰² Exhibit A1, Tab 19 at 1064-1103.

²⁰³ Exhibit A1, Tab 19 at 1066.

cartridge filtration. He added that the dust extraction system was working during the inspection and its size was appropriate for sand blasting operation.²⁰⁴ The dust extraction systems were noted to be not effective in controlling dust emissions. This was evident, he stated, by the large quantities of dust and garnet in and around the premises during the time of inspection. He noted that the maintenance of these systems and the basic procedures in operating the systems were not being followed, and in particular, that there were no maintenance records and there were no systems in place to ensure that the dust extractions system were working correctly.²⁰⁵

100 Mr Blair stated he took samples from five locations, which were later tested and found to contain garnet:-

- (1) From the roof gutter near the primary blast room under the exhaust: Mr Blair noted that there was a large amount of garnet on the roof and in the gutters in the immediate vicinity of the exhaust,²⁰⁶
- (2) From the roof and gutter above the powder room exhaust area: Mr Blair observed that there were large amounts of garnet present on the roof structure.²⁰⁷
- (3) From the gutter around the original exhaust from the sand blasting room: Mr Blair noted that there were large amounts of garnet present in the gutter around the exhaust.²⁰⁸
- (4) From the internal roof of DPC's premises: Mr Blair noticed that there were large amounts of dust and garnet on the internal roof structure.²⁰⁹
- (5) From a fire tunnel adjacent to the premises. Mr Blair noticed that the fire tunnel area had large amounts of garnet present on all flat surfaces.²¹⁰

101 In oral evidence, Mr Blair conceded that garnet could be a number of colours, and stated that grey is one of the colours used for processing. In his second report he stated that it could even be colourless.²¹¹ He acknowledged that garnet could also be slightly red in colour, and added that it is a mineral and its colour is variable depending on the type of crystalline product of the garnet. On the occasion of his visit Mr Blair indicated that the colour he saw being used

²⁰⁴ Exhibit A1, Tab 19 at 1070, [8].

²⁰⁵ Exhibit A1, Tab 19 at 1070, [9].

²⁰⁶ Exhibit A1, Tab 19 at 1071 (H2212/5).

²⁰⁷ Exhibit A1, Tab 19 at 1071 (H2212/2).

²⁰⁸ Exhibit A1, Tab 19 at 1072 (H2212/4).

²⁰⁹ Exhibit A1, Tab 19 at 1073 (H2212/6).

²¹⁰ Exhibit A1, Tab 19 at 1073 (H2212/3).

²¹¹ Exhibit A1, Tab 23 at 1301, [17].

was grey.²¹² He added that he took samples of the process that was in the blast room being used, and in his opinion it was grey.²¹³ Mr Blair notes that the colour of the process sample obtained from the bulk bag was identical to the roof samples and verified by both visual appearance and by an X-Ray Diffraction (XRD) analysis conducted by Dr Nick Ward Technical Officer (Research), Southern Cross Geoscience from Southern Cross University.²¹⁴

102 In re-examination Mr Blair referred to this as his sixth sample.²¹⁵

103 Annexed to Mr Blair's report was Dr Ward's 26 July 2018 report. Dr Ward noted that the XRD analysis showed that mineralogy of samples 1, 3, 4, 5 and 6 predominately consisted of Almandine (Garnet). Minor levels (30-5%) or trace levels (<5%) of Quartz (SiO₄) were also identified.²¹⁶

104 Mr Blair stated that the fact that non-crystalline material may have been present in the samples was irrelevant as these were in minor concentrations compared to the garnet as demonstrated by Dr Ward's report. The XRD analysis sought not to conduct an entire analysis of the sample but to prove that the majority was garnet. In Mr Blair's view to state that dust entering the premises from the outdoor is a significant component of the indoor settled dust is incorrect in the absence of any form of analysis.²¹⁷

105 A similar report analysing sample 2 found that an XRD analysis showed the mineralogy of the sample analysed predominately consisted of Almandine (Garnet). Minor levels (30-5%) of Rutile (Ti_{0.936}O₂) and Zinc, together with trace levels (<5%) of Barite (BaO₄) and Quartz (SiO₄), were also identified.²¹⁸

106 Mr Blair stated that when dust filtration systems are not working correctly or are not maintained correctly, it results in garnet being discharged from the exhaust. During inspection of the roof and the guttering of the premises, he found there were large amounts of garnet on both the roof and the gutters, demonstrating

²¹² T 248.38-.40.

²¹³ T 248.42-.47.

²¹⁴ Exhibit A1, Tab 23 at 1301, [17].

²¹⁵ T 266.47-267.13

²¹⁶ Exhibit A1, Tab 19 at 1085-6.

²¹⁷ Exhibit A1, Tab 23 at 1302-3, [29]-[30&31].

²¹⁸ Exhibit A1, Tab 19 at 1087-8.

to him that the dust filtration system was not working correctly. The effect was summarised as follows:-

Roof: Evidence of abrasion and corrosion caused by garnet was noticeable...When the garnet is discharged from the exhaust system, the abrasive nature of the substance results in the protective layer of the steel roof being damaged...He stated that after the steel roof had its protective coating removed, corrosion was inevitable and this was also evident.

Gutters: Evidence of large quantities of garnet in the gutter system were noted. Abrasion and corrosion effect were less than found on the roof, but still evident. Effect of garnet is the gutter system will cause blockages of the stormwater.²¹⁹

107 Mr Blair accepted that he was told by the operator of the First Defendant that there had been an incident at the premises some four years previous to his inspection, where there was a breakdown of a cartridge filter in the blast room.²²⁰ When it was suggested to him that the garnet that he saw on the roof in July 2018 was garnet which had been left from the incident four years previously, he stated:-

A. The garnet that I saw on the roof was a combination of what I - was some built-up garnet but there was also dry powder on the roof. Any powder that had come out four years ago would have certainly been washed away or at the very least consolidated in low points in the gutter and compacted over a period of time. Anything that is - that I saw that was powder, which meant no moisture content, that should have been washed away by rain so I'm suggesting that the material that I took was more recent than four years ago. On the basis - that basis it would wash away with rainfall...²²¹

108 Mr Blair acknowledged that there may have been some residue from the incident four years prior, but otherwise couldn't be absolutely sure.²²²

109 Mr Blair was asked to assume that the evaporative cooler positioned above the outlet for the blasting system had been there since 2004. He was asked if it could have brought about the abrasion and corrosion on the roof. He stated that the water itself does not cause abrasion but rather it does so in combination with garnet. He further stated that if could see exposed metal that had not been rusted this would indicate to him that the abrasion was recent. If it had happened years ago, he stated that these spots would be rusted.²²³ The

²¹⁹ Exhibit A1, Tab 19 at 1074, [12].

²²⁰ T 252.32-.37.

²²¹ T 253.05-.12.

²²² T 253.14.-20.

²²³ T 263.10-.28.

fact that there were areas of metal that were still not rusted would indicate a more recent event.²²⁴

110 According to Mr Blair the abrasion observed on the roof was only present near the outlet of the pollution control equipment and not in other areas of the roof, proving that the abrasion was caused from the discharge of material from the pollution control devices.²²⁵

111 Mr Blair stated that during the inspection, the overall level of housekeeping at the First Defendant's premises were poor. He noted that there was garnet and dust in all areas of the business premises, which would normally be confined to the blast room. Mr Blair concluded that the First Defendant was not correctly maintaining and operating the dust extraction system to ensure that drift to neighbouring premises was not occurring. He stated that the result of both of the above circumstances resulted in drift, garnet and dust into the neighbouring property. This was demonstrated by the presence of garnet in the neighbouring property fire tunnel.²²⁶

Powder Coating

112 With reference to powder coating Mr Blair stated in his initial report:-

Powder coating exhaust systems are designed to remove >99.9 of particulate matter when operated and maintained efficiently. Although systems are installed, it does not mean that they are performing correctly. *During the inspection of the roof and specifically the exhaust of the powder coating room, it was noted there was particulate matter that had recently been discharged.* This observation indicates the system is not working correctly.²²⁷ (emphasis added)

113 In cross-examination, Mr Blair conceded that he had undertaken no testing which showed powder coating paint or "anything like that", accepting that the focus of his inspection was on garnet and damage to the roof of DPC's premises.²²⁸

114 Mr Blair was not previously aware of a further failure said to have occurred around the same time with the filter to the powder coating system.²²⁹ He was

²²⁴ T 263.30-.37.

²²⁵ Exhibit A1, Tab 23 at 1305, [40-47].

²²⁶ Exhibit A1, Tab 19 at 1076, [14].

²²⁷ Exhibit A1, Tab 19 at 1078, [25].

²²⁸ T 264.35-265.02.

²²⁹ T 258.02-.04.

asked to assume that one had occurred and questioned as to whether the particular matter that he saw was the result of the 2013/14 discharge.²³⁰ Mr Blair indicated that what he observed was caked on dust and some dust in other forms. He acknowledged that the “caked-on stuff” may have been from historical deposits, but the free flowing dust up there was not a historic event. He added that the particular matter would wash away in that period of time especially if it were dust.²³¹

Presence of Black Soot or Garnet near Fire Detection Equipment

- 115 Mr Blair further indicated that it was common place in the powder coating industry to maintain dust filtration equipment and to apply high levels of housekeeping in order to prevent interaction of dust with fire detection systems. He stated that a sample of material was noted inside the fire detection system monitors and this had the visual appearance of garnet, however, there was not enough residue inside the monitors to send away for analysis. For this reason a sample was taken from the roof structure right next to a fire monitor, which was later confirmed to be garnet.²³²
- 116 Mr Blair acknowledged that he did not take any samples from the roofs of other lots.²³³ Nor did he take any samples from the fire detectors or the smoke detectors themselves.²³⁴ He stated that he used a scissor lift to inspect the internal roof structure. He rejected the suggestion that there were some black soot on the purlins.²³⁵ He accepted that Mr Davis went up with him on the scissor lift but could not recall Mr Nugent also on the scissor lift with him. He stated that it was possible but he could not recall. It was then put to him that Mr Nugent pointed out the black soot on the purlins. He stated that he looked at material that was built up in the purlins, and in his opinion, it was a similar colour deposit throughout. He stated that there wasn't one area of black soot, one area of grey garnet and any area of red garnet.²³⁶

²³⁰ T 265.04-.15.

²³¹ T 265.10-.24

²³² Exhibit A1, Tab 19 at 1078-9, [26]-[27].

²³³ T 265.01-.02.

²³⁴ T 260.06-.13.

²³⁵ T 260.35-.40.

²³⁶ T 260.45-161.17.

System of Maintenance

117 Mr Blair stated that when he attended the premises, he was not shown maintenance records and when he asked questions about the maintenance he received no positive responses with regards to maintenance records and any procedures in place at all to maintain the units. When it was put to him that Mr Davis stated that he inspected the filters on a weekly basis, Mr Blair responded that that was not something he was told.²³⁷ Whilst he accepted the fact that there were no records did not mean that it was not carried out, he stated that the system had garnet coming out of it and depositing it, such that the system was not being operated or maintained effectively.²³⁸ Mr Blair added that an inspection was the simplest level of maintenance and did not cover the pulses of air used to free the system or to clean the system effectively, nor did it look at what velocities were being generated in the system to ensure that there was effective gravity separation. These, he stated were two of a list of things that he could go on about which required an actual check to see if the system was working correctly. In his view, a visual inspection would not and did not comprise maintenance.²³⁹ Nor did Mr Blair accept that a visual inspection of the filters would determine whether there were any problems. He stated that the filters appeared dirty in any case and what was necessary was to try to determine the air pressure that was pulsating to conclude whether the air pressure was effective in unblocking the filters. In his opinion, inspection of the filter in this instance was not important; rather it was the other mechanical parameters of the system which were more important than a visual inspection.²⁴⁰

118 Mr Blair stated that having pollution control equipment installed as according the Abrasive Blasting Code of Practice in each blast room does not mean they perform and run efficiently. His visit showed no maintenance records and the equipment did not appear to have the filters replaced at regular intervals. As garnet was being discharged from the facilities pollution control devices and

²³⁷ T 253.45-254.19; T 255.15-.26.

²³⁸ T 255.28-.36.

²³⁹ T 255.46-.256.03.

²⁴⁰ T 257.43-.50.

accumulating in areas outside the premises causing abrasion damage to the roof and structure the pollution control devices were not working correctly.²⁴¹

119 The two areas where the business fell short of the requirements of best practice as per the Codes of Practice were a less than ideal housekeeping program and a poor equipment inspection and maintenance program for the dust extraction systems. These were the two areas that resulted in pollution control equipment not working properly and causing material damage.²⁴²

120 Mr Blair added that a visual inspection from the inspection panel would not be sufficient to determine if there was a rip in the filter, as the rip could be in the back of the filter bag. He stated that when there is a rip of the filter bag that was visible, that was likely to be a major failure. When there is a smaller rip that is not visible, this could let particles that are micron in size to go through. He stated that the only way to check these would be to do a pressure test before and after the filter to determine whether the filters were operating effectively.²⁴³

121 Mr Blair was asked about his capacity to enter the filters to check the whole system after opening up the filter door. His evidence was that to his recollection the area was confined, and he did not recollect a person being able to get in there and behind. He accepted that if it were possible to get inside the filter system then further observations would be able to be made.²⁴⁴

122 Mr Blair opined that the run to fail system was not best practice and not an industry standard because inevitably the system will fail using this system. He stated that the industry standard is now “preventative maintenance” so as to ensure that plant and equipment is maintained to ensure failure does not occur. The presence of garnet as found by him as well as the significant abrasions indicated that the maintenance procedure if used at all were ineffective.²⁴⁵

²⁴¹ Exhibit A1, Tab 23 at 1309.

²⁴² Exhibit A1, Tab 23 at 1309-10.

²⁴³ T 258.46-259.15.

²⁴⁴ T 266.27-.41.

²⁴⁵ Exhibit A1, Tab 23 at 1313, [175] and [180].

123 In a supplementary report dated 16 April 2018 [sic],²⁴⁶ Mr Blair stated properly maintaining and operating the dust extraction and filtration system could be performed by either the operator or a contracted service provider. He specifically identified the following procedures which should take place (at a minimum):-

Weekly Maintenance:

- Check Filters/bags and unblock as required
- Check for visible emissions
- Check for no/poor suction
- Check for irregular noise or constant vibration
- Check pulse valves working
- Check and record the differential pressure

Periodic (3-monthly) Maintenance:

- Measure duct velocities
- Measure particulate output whilst units are running²⁴⁷

124 Mr Blair further indicated that at a minimum the filtration system needed to be cleaned every week and periodic testing of the emissions from the systems should be carried out every 3 months. He stated that this would result in an increased workplace health and safety, optimisation of filter life, lower repair costs and compliance with statutory requirements (such as the Environmental Protection Authority, Work, Health and Safety, and Local Authorities). He further stated that the weekly maintenance activities could be performed in approximately 1 hour and the 3-monthly testing of the emissions would also take approximately 1 hour.²⁴⁸

125 In his supplementary report Mr Blair added:-

There are no specific qualifications, registrations or accreditations required for personnel carrying out maintenance systems. However, the personnel carrying out these activities need to be appropriately trained to perform the task. Training could be provided by the manufacturer or installer of the filtration systems.

Based on my experience dealing with maintenance contracts for pollution control equipment, an approximate cost to engage an outside contractor to perform the maintenance would be \$200 (for weekly maintenance) and \$1000

²⁴⁶ Exhibit A1, Tab 22 at 1289. This should be dated 16 April 2019: T 247.17-.18.

²⁴⁷ Exhibit A1, Tab 22 at 1289.

²⁴⁸ Exhibit A1, Tab 22 at 1289.

(for 3 monthly period testing). These costs assume there are suitably skilled companies available to perform this work from Dubbo (no travel costs included).

Enter into maintenance contract, which would involve the third party conducting regular visits. The third-party company would conduct the required maintenance, and report on any issues, flowed by record keeping demonstrating maintenance was being adequately performed.²⁴⁹

126 By reference to his report, Mr Blair reiterated that the First Defendant used a dust extraction filter system, which was designed to prevent dust particles existing via the exhaust system using two methods of separation; gravity to filter out large particles and a mechanical filter. He acknowledged that cyclonic and cartridge filters were present in the system used by the First Defendant.²⁵⁰ He acknowledged that the cartridges had a self-cleaning system which was designed to release the particles from the cartridges, accomplished by a pulse system whereby after a number of seconds air is pulsed back through in the reverse direction through the cartridges to clean out the filters.²⁵¹ He further acknowledged that using the pulse of air to clean cartridges is the industry standard system, but it was a question of how effective that pulsating air is of cleaning the cartridges.²⁵² He acknowledged that in circumstances where the First Defendant did not require an EPA license, there was no need to carry out the measurement of particulates on a periodic basis by reference to regulatory requirements.²⁵³

127 Mr Blair accepted that the First Defendant's dust extraction system recycled not just dust but also garnet in a unit called a reclaimer.²⁵⁴ He did not accept however, that the use of the reclaimer was a method by which a more consistent and better finish could be obtained on the item being blasted, and maintained that its use was as a cost saving measure. He added that once garnet is used several times, the sharp edges turn circular and they're not as effective as sandblasting. Ideally, he stated, the best sandblasting outcome involved the use of fresh garnet all the time.²⁵⁵ He accepted that reusing garnet

²⁴⁹ Exhibit A1, Tab 22 at 1289-90.

²⁵⁰ T 249.18-.23.

²⁵¹ T 249.09-.38.

²⁵² T 249.40-.47.

²⁵³ T 250.25-.28.

²⁵⁴ T 250.42-251.05.

²⁵⁵ T 251.13-.23.

that has only been used once or twice was what “everybody does”, but stood by his position that the re-use of second hand garnet was for commercial reasons.²⁵⁶

Defendant’s Expert – Nicola Power Maioh

128 The Defendant qualified Ms Nicola Power Maioh, occupational hygiene manager from Robson Environmental Pty Limited, to carry out an inspection and provide a report on its behalf. Ms Power, as she was referred to throughout the proceedings, carried out an inspection of the First Defendant’s premises on 17 April 2019, on a day where there was normal workplace activities and a normal quantity of work occurring, and there were normal dust control measures in place.²⁵⁷

129 Ms Power observed that the roof housed exhaust outlets for the air extraction systems from the new blast room, old blast room, spray room and curing oven. She also noted that there were a number of air conditioning units, which according to Mr Davis did not function, and other unidentified capped and uncapped outlets and ducts. She acknowledged that the exhaust outlet for the new blast room was located underneath one of the old air conditioning unit, which was not an “optimal location”.²⁵⁸ She observed no notable accumulation of dust evident in the area surrounding this exhaust.²⁵⁹

Garnett

130 Ms Power described the garnet that she observed at the Defendant’s premises was red in colour.²⁶⁰ She further referred to a description of garnet in the ABSS Safety Data Sheet (SDS) which describes the material as being a deep red to reddish brown. Ms Power indicated that the visible settled particles (comprising both dust and larger particles (greater than 75/100 µm) which do not meet the technical definition of dust) on surfaces within the First Defendant’s premises was predominately the grey colour. This was demonstrated by Figures 5 and 6 of her report.²⁶¹ Ms Power stated that within the grey coloured settled dust,

²⁵⁶ T 251.25-.45.

²⁵⁷ Exhibit A1, Tab 25 at 1355, [12(a)].

²⁵⁸ Exhibit A1, Tab 25 at 1365, [40]-[41].

²⁵⁹ Exhibit A1, Tab 25 at 1367, [42].

²⁶⁰ Exhibit A1, Tab 25 at 1358, [19].

²⁶¹ Exhibit A1, Tab 25 at 1360-1, Figures 5 and 6, [24].

some particulars appeared to have a vitreous lust (shiny like glass), which is a recognised physical property of minerals in the garnet group. These particles, she acknowledged, were probably garnet material, although they did not appear to be the dominant component of the settled dust.²⁶² Whilst acknowledging that a visual assessment of the quantity of settled dust was a subjective measure, she did not describe the settled dust loadings on surfaces within the First Defendant's premises as being abnormally high given the type of business and its location in an industrial estate.²⁶³ She went on to describe the settled dust loadings as being normal for the type of environment. Ms Power noted:-

- (1) The majority of the floor of the premises was not visibly 'dusty';
- (2) Areas where settled dust would be expected to accumulate over time, such as on stored items, had significantly greater dust loads than frequently accessed areas, suggesting that settled dust on surfaces does not build up particularly quickly; and
- (3) Within the fire tunnel, visible settled dust loads were low and the composition of the matter, which included leaves and large fragments of material, suggested that this matter was primarily coming from the outdoors, under the external door.²⁶⁴

131 Ms Power noted that upon inspection, the roller door on the west wall of the premises was open which she was informed was normal practice. On this basis, she stated it was likely that the dust entering the premises from the outdoors would be a significant component of the indoor settled dust. Beyond this, the First Defendant's premises were located in an industrial estate immediately adjacent to a freight transport company, which was likely to produce elevated localised concentrations of street dust and vehicle omissions.²⁶⁵ Ms Power stated that while she would expect that the grey settled dust throughout the premises would have come from both within the premises (including from the abrasive blasting and powder coating operations) and from outside the premises, she acknowledged that without undertaking analysis it was not possible to identify the relative proportions of each

²⁶² Exhibit A1, Tab 25 at 1361, [25].

²⁶³ Exhibit A1, Tab 25 at 1362, [26].

²⁶⁴ Exhibit A1, Tab 25 at 1362, [27].

²⁶⁵ Exhibit A1, Tab 25 at 1365, [32]-[33].

source.²⁶⁶ Based on her observations she stated that the much of the dust would not have had a crystalline structure and would not be identified using XRD. She stated that there was insufficient evidence to conclude that the analysis of this material, referring to both the material present on the roof and the material in fire tunnel, confirmed that it was “predominately garnet” as was asserted by Mr Blair in his 17 July 2018 report. She stated that the analysis was only conducted on the crystalline component of each dust sample, and the proportion of the crystalline component in each of the dust samples was not known.²⁶⁷ While she stated that some of the grey settled dust would have come from the garnet blasting material, there was insufficient information available to determine the amount.²⁶⁸ She also noted that the sampling method used for collection of the dust samples had not been included in Mr Blair’s Report, and it was not possible to reproduce the results from the report.²⁶⁹

132 Ms Power acknowledged, having described the dominant component of the settled dust in her report, her assessment was one of the naked eye and that she had not collected any samples of the settled dust or undertaken any chemical analysis.²⁷⁰ She acknowledged that her assessment to the settled dust loadings, referred to at [26] of her report, were subjective and she hadn’t provided any comparable businesses or industries in relation to her statement.²⁷¹ Ms Power’s attention was then drawn to paragraph 19 of Dr Ward’s report in reply where he stated:-

Robson Environmental (2019) mention in paragraph 32 that “it is likely that dust entering the Premises from the outdoor is a significant component of the indoor settled dust.’ Also in paragraph 31 Robson Environmental (2019) refer to the Fergusson *et al.* (1986) study that dust from outdoor locations ‘composition, was on average, 87% from soil, around 3% from tyre wear, and about 0.5% each from cement, car emissions and salt, with 9% presumed to be organic.” Soil is a material composed of five ingredients including minerals, soil organic matter, living organisms, gas, and water (Needelman, 2013). It is unlikely that there was such a large percentage of ‘soil’ (*e.g.* approximately 87%) in the dust collected from the 6 sites as no clay mineral peaks appeared on the diffractograms and only trace/minor concentrations of quartz were

²⁶⁶ Exhibit A1, Tab 25 at 1365, [34].

²⁶⁷ Exhibit A1, Tab 25 at 1365, [35]-[36].

²⁶⁸ Exhibit A1, Tab 25 at 1365, [37].

²⁶⁹ Exhibit A1, Tab 25 at 1365, [38].

²⁷⁰ T 107.31-43.

²⁷¹ T 107.45-108.08.

determined(<30%); although the soil organic matter content is currently unknown [sic].²⁷²

- 133 It was put to Ms Power that it would be unlikely that there was such a large percentage of soil in the dust collected from the six sites, and that no clay mineral peaks appeared on the diffractograms and only trace/minor concentrations of quartz. Ms Power indicated that she had no evidence one way or the other in this respect.²⁷³
- 134 In respect of the exhaust outlet from the old blast room, Ms Power observed that there was visible damage to the roof immediately below the outlet, which Mr Davis attributed to an isolated past event of uncontrolled release of abrasive blasting medium after failure of the dust extraction system.²⁷⁴
- 135 Ms Power noted that the powder coating oven was used for curing the coating and had extraction ducting to the roof to prevent the build-up of combustion and curing by products in the oven. At the time, Ms Power noted that the curing oven was releasing warm air.²⁷⁵
- 136 Beyond the two localised area of damage immediately adjacent to the outlet from the old blast room and the spray room, Ms Power noted that there were other widespread areas of discolouration on the roof, but that the pattern of distribution of these areas did not appear to be related to the location of any of the outlet ducts.²⁷⁶
- 137 In cross-examination, Ms Power conceded that it was possible that there was grey garnet used by the First Defendant, but stated that most garnet is red, adding this was the case for the garnet she saw on site.²⁷⁷
- 138 She acknowledged that the photographs taken by Mr Blair near the primary blast exhaust roof and the powder coat exhaust showed a large amount of build-up of garnet in the roofing area.²⁷⁸ However, she stated that it was difficult for her to comment on that because what those photos showed is very different

²⁷² Exhibit A1, Tab 24 at 1327, [19].

²⁷³ T 109.23-36.

²⁷⁴ Exhibit A1, Tab 25 at 1367, [43].

²⁷⁵ Exhibit A1, Tab 25 at 1370, [45]-[46].

²⁷⁶ Exhibit A1, Tab 25 at 1370, [47].

²⁷⁷ T 107.18-21.

²⁷⁸ T 110.09-17, with reference to Exhibit A1, Tab 19 at 1071-2.

to what she saw when she was on-site, and there was nothing that looked like that when she was there.²⁷⁹ She accepted that if one was just looking at and relying on the photos, it may be open to conclude that the dust extraction system wasn't working properly.²⁸⁰ Ms Power indicated that assuming the photos did show garnet, it could be true that the pollution controls were not effective. However, she indicated that that was not consistent with what she saw on-site.²⁸¹

Powder Coating

139 Around the exhaust outlet from the spray room, Ms Power noted that there was a visible accumulation of powder coat material surrounding the outlet and the gutter behind the outlet. In the descriptor for Figure 15 in her report Ms Power notes, "There is visible powder coat material surrounding the outlet." Figure 16 describes a "Closer view of the powder coat material on the roof surface."²⁸² In cross-examination Ms Power accepted that there was powder coating deposits on the roof, confirming this would mean the filtration system was not working properly at some point in time.²⁸³ She reiterated that she did not know the period of time or when that might have been.²⁸⁴ She stated in her report that she was advised that Mr Davis attributed this to an isolated past event of an uncontrolled release of powder coat after the failure of the dust extraction system.²⁸⁵ Ms Power indicated that she would expect that had it been ongoing, the area of damage would be more widespread. She acknowledged that was based purely on observation.²⁸⁶ She rejected the suggestion that the abrasion indicated that it was an accumulation over a lengthy period of time.²⁸⁷

²⁷⁹ T 110.19-.23.

²⁸⁰ T 110.25-.28.

²⁸¹ T 112.17-.29.

²⁸² Exhibit A1, Tab 25 at 1369, Figures 15 and 16.

²⁸³ T 115.20-.25.

²⁸⁴ T 115.27-.29.

²⁸⁵ Exhibit A1, Tab 25 at 1367, [44]; T 111.03-.05.

²⁸⁶ T 111.03-.17.

²⁸⁷ T 111.27-.34.

- 140 After being shown the photos which Mr Blair stated depicted garnet near the main blast exhaust and powder room exhaust,²⁸⁸ Ms Power stated that what was depicted looked more like powder coat.²⁸⁹
- 141 Ms Power did not visually inspect the filtration system used for the spray booth when onsite, stating it was difficult to access.²⁹⁰ She stated that the filtration system captured the excess powder onto the filters before the air is ducted to the exhaust on the roof of the premises. She assumed the system had a Reverse Pulse Dust Collector similar to the systems for the blast room but this could not be confirmed onsite. She was advised by Mr Davis there was no recovery of the powder from the system and all excess powder was disposed of to waste. The filters to the filtration system were said to have a 99% efficiency for particles which have particles of 0.5 microns and greater.²⁹¹
- 142 Ms Power maintained that there was no evidence of “widespread, high level or long lasting” release of dust from either blast rooms or the spray room dust extraction systems from the premises or to the environment outside of the premises.²⁹² While Ms Power accepted that those terms were subjective and their reliability was limited, she maintained that “you couldn’t give an opinion that wasn’t at least somewhat subjective” as collecting objective evidence was impossible. She rejected that such evidence had no value.²⁹³

System of Maintenance

- 143 Ms Power took issue with Mr Blair’s report where it asserted that upon inspection, the dust extraction system appeared not to be well maintained and that maintenance was non-existent. Ms Power did not agree that the units were in a neglected state or that they were poorly maintained. The only notable damage that she observed to the dust extraction system was to the exhaust outlet for the spray room on the roof of the premises which had torn metal as shown in Figure 15 of her report.²⁹⁴

²⁸⁸ Exhibit A1, Tab 19 at 1072.

²⁸⁹ T 110.36-.40.

²⁹⁰ Exhibit A1, Tab 25 at 1389, [165].

²⁹¹ Exhibit A1, Tab 25 at 1389, [167]-[168].

²⁹² Exhibit A1, Tab 25 at 1398, [202].

²⁹³ T 118.26-.34.

²⁹⁴ Exhibit A1, Tab 25 at 1392, [114]-[115].

144 Whilst she agreed that the business had little documentation and poor record keeping relating to inspection and maintenance, she did not accept that this meant that the processes did not occur. Moreover, whilst acknowledging it was “poor practice”, she described the lower level of record keeping and documentation as fairly common in these sorts of industries.²⁹⁵ For the respective maintenance of the dust extraction systems, Ms Power noted that it was important to ensure that the system met the required performance standard to remove dust from the work environment. She noted that the Abrasive Blasting Practice COP recommended:-

Regular inspection and maintenance is particularly important for abrasive blasting and equipment as the process is self-destructive by nature. Every blasting chamber, blasting cabinet, ventilating system duct, filtering or cleaning device and item of abrasive blasting equipment should be inspected by a competent person in accordance with the manufacturer’s instructions.

In addition, plant and equipment should be checked daily by the operator for wear and damage. You should keep log books and inspection reports containing a full history of services and repairs. Further guidance on Plant is available in the *Code of Practice: Managing risks of plant in the workplace*.²⁹⁶

145 Ms Power noted that in discussions with Mr Davis, it was clear to her that continuous inspection of the equipment was undertaken by DPC. In particular, a weekly process of inspection of all cartridge dust filters and filter drums were reported, which would be expected to identify any failures or imminent failures of the components. Whilst not documented, she described the business as running a maintenance program that was primarily reactive (a ‘Run to Failure’ system), but which also incorporated proactive elements commensurate to failure risks. The latter was evidenced by the business by the weekly replacement of the O-ring for the connection between the blast pot and the blast hose on the blast system for the blast room, as the potential outcome of a failure of this component was assessed as unacceptable.²⁹⁷

146 Ms Power stated it was not possible to know the air velocity through the spray room without measuring it. However, based on visual inspection only, the extraction ventilation in the spray room did seem to be effective in extracting particulates and preventing high concentrations of particulates from building up

²⁹⁵ Exhibit A1, Tab 25 at 1379-80, [116].

²⁹⁶ Exhibit A1, Tab 25 at 1380, [117].

²⁹⁷ Exhibit A1, Tab 25 at 1380, [118]-[121].

in the booth. Some accumulation of powder in the air was able to be observed in Figure 23 towards the top of the booth, but she noted that this cleared as the particles fell due to gravity.²⁹⁸

147 Ms Power noted that the Spray Painting and Powder Coating COP did not give specific recommendations for inspection and maintenance of dust extraction systems beyond the recommendation to regularly check “plant and equipment being cleaned and maintained including ventilation and spray equipment filters.”²⁹⁹

148 Ms Power described the weekly inspection of cartridge dust filters and filter drums as a basic system designed to ensure the dust extraction systems were working correctly. She stated that it was difficult to know what an appropriate inspection and maintenance program would be for the dust extraction systems for the blast rooms without guidance from the manufacturer. She described some of the weekly period maintenance proposals put forward by Mr Blair in his supplementary report as not specific to the dust extraction systems in place at DPC and that some aspects would not be appropriate.³⁰⁰ Specifically, she stated for the weekly maintenance:-

a. ‘Check Filters/bags and unblock as required’

- i. The system (New Blast Room and Old Blast Room) used by this Business do not have bags.
- ii. The systems both have Reverse Pulse Dust Collectors, which automatically use a pulse jet of compressed air to clean the cartridge filters
- iii. This means that filters do not require regular manual cleaning.
- iv. Cartridge dust filters and filter drums are checked weekly
- v. There is unlikely to be any requirement to unblock filters, unless a catastrophic failure of the system occurred.

b. ‘Check for visible emissions’

- i. It is not clear where ‘visible emissions’ should be checked
- ii. Experienced abrasive blasting operators would be checking for unusual emissions from equipment (e.g. a failure in the blast hose) continuously during equipment operation.

²⁹⁸ Exhibit A1, Tab 25 at 1389, [164].

²⁹⁹ Exhibit A1, Tab 25 at 1392, [173].

³⁰⁰ Exhibit A1, Tab 25 at 1381, [123]-[125].

- iii. Emissions at the exhaust outlet on the roof should be checked periodically, but weekly is probably excessive.
- c. 'Check for no/poor suction'
 - i. It is not clear where 'suction' should be checked.
- d. 'Check for irregular noise or constant vibration'
 - i. Experienced abrasive blasting operators would be checking for unusual noise or vibration continuously during equipment operation.
- e. 'Check pulse valves working'
 - i. Assuming this is referring to pulse valves for the Reverse Pulse Dust Collectors, workers would notice if these valves were not working because that the regular noise of the filters being cleared would not be occurring [*sic*].
- f. 'Check and record the differential pressure'
 - i. It would probably be best to install permanent airflow indicators in enclosures.

In relation to the periodic (3-monthly) maintenance, she stated:-

- a. 'Measure duct velocities'
 - i. This would be appropriate to assess three-monthly.
- b. 'Measure particulate output whilst units are running'
 - i. It is not clear where this would be measured.³⁰¹

149 While Ms Power described the 'Run to Failure' maintenance program as an acceptable maintenance strategy, she indicated that an important part of this type of program is ensuring that failures are identified and rectified quickly. To this end, she recommends that DPC formalise the currently informal inspection program for the dust extraction system for the old and new blast rooms and that improvements in the frequency, thoroughness and specificity of the inspection program should be made to ensure that inspection would efficiently identify system failures. To this extent, the equipment manufacturer should be consulted to determine the scope and frequency of the inspection program, and the inspection processes should be documented and records of inspection should be kept.³⁰²

150 Ms Power provided a summary of the processes and controls for dust from abrasive blasting in place, which she stated mostly met the best practice

³⁰¹ Exhibit A1, Tab 25 at 1381-2 at [126]-[127].

³⁰² Exhibit A1, Tab 25 at 1382, [128]-[130].

recommendations of the Safe Work Australia Abrasive Blasting Model Code of Practice (2018a) in her report. Specifically, she stated:-

- a. **Elimination:** As far as is reasonably practicable the Business has eliminated the use of high risk processes and chemicals, and the risk of exposure to lead dust is very low.
- b. **Substitution:** The Business has selected an appropriate blast medium (garnet) which:
 - i. the Abrasive Blasting COP assesses to be a 'material [which] will not usually result in exposures greater than [sic] national exposure standards';
 - ii. meets the maximum allowable concentration of crystalline silica requirements under Schedule 10 of NSW WHS Regulation 381 (2017); and
 - iii. is not expected to present a significant environmental hazard, given that it is naturally occurring, stable, inert, insoluble in water with no known ecotoxicity.
- c. **Isolation:** All blasting undertaken by this Business is conducted in purpose built blast rooms with the doors shut. Only small quantities of blasting material were seen to be escaping from the blasting area.
- d. **Engineering:**
 - i. Both blast rooms have suitably designed, and fit for purpose dust extraction systems from reputable suppliers who specialised in design and construction of such systems
 - ii. Both systems have a pneumatic conveying system which removes dust from the blast room, an abrasive reclaimer which separates the re-usable garnet blasting medium from the small particles of dust and foreign matter, and returns the blast medium to the Blast Pot for re-use.
 - iii. in both systems the waste dust is captured by a Reverse Pulse Dust Collector, which each use an automatic pulse-jet of compressed air to clean the cartridge filters.
- e. **Administration:**
 - i. Housekeeping: The Business operates a fairly industry standard maintenance program, using both filtered vacuuming (a good control) and dry sweeping (a poor control) to clean dust and blasting material from floors. Cleaning frequency seems sufficient to manage blasting material escaping from the isolation chambers.
 - ii. Equipment inspection and maintenance:
 - Equipment was in an acceptable state at time of assessment.
 - The Business has little documentation and poor record-keeping related to the inspection and maintenance of the dust extraction systems, which is common in these industries.
 - The Business is running a maintenance program that is primarily reactive (a 'Run to Failure' system), but also

incorporates proactive aspects, commensurate to the failure risk.

- A business running this sort of maintenance program should have a robust inspection program to ensure that failures are detected quickly. Whilst this Business does have an informal inspection program for dust filters and drums, the program operated by this Business does not meet the best practice standard.
- The Business should formalise the inspection program to ensure system failures are identified and managed effectively so that they do not present a health, safety or environmental risk, and do not unduly compromise business function.

f. **PPE:** Workers working in blast chambers wear suitable respiratory protection, a full helmet style airline respirator integrated into the ABS174 blast system.³⁰³

151 Ms Power noted that these controls were adequate to manage dust produced from abrasive blasting at the premises. While Ms Power noted the less than ideal housekeeping program and poor equipment and maintenance program for the dust extraction systems, she stated that all controls were of a high standard and specified as best practice controls in the Abrasive Blasting COP.³⁰⁴

152 Ms Power acknowledged that housekeeping meant general care, cleanliness, orderliness and maintenance of the business or property.³⁰⁵ She described the housekeeping for the particular site as being “quite good”.³⁰⁶ She accepted that there had been dust build-up in some areas, but she wouldn’t say they were related to poor housekeeping for the abrasive blasting practices.³⁰⁷ She stated that most businesses would not keep records on housekeeping.³⁰⁸

153 Ms Power did not accept that her statement that low levels of record keeping and documentation were fairly common in these sorts of industries as being a flawed conclusion.³⁰⁹

³⁰³ Exhibit A1, Tab 25 at 1383-4, [136].

³⁰⁴ Exhibit A1, Tab 25 at 1384, [137]-[138].

³⁰⁵ T 113.14-.17.

³⁰⁶ T 113.36.

³⁰⁷ T 113.42-.44.

³⁰⁸ T 114.22-.23.

³⁰⁹ T 114.43-115.01.

154 Ms Power maintained in cross-examination that the 'run to failure' system was an appropriate system.³¹⁰ She stated that the preventative maintenance procedure could also be an appropriate system as long as it is run in a way that meets its objective.³¹¹ Ms Power accepted that in terms of the preventative maintenance activities, she had no evidence that these were undertaken by the First Defendant.³¹² She accepted that the two areas where the business fell short was the less than ideal housekeeping and the poor equipment in inspection and maintenance program for the dust extraction system. She stated that she had no evidence that the pollution control equipment was not working correctly and was causing damage to the Property.³¹³

Daniel Blair in Reply

155 In his reply report of 29 February 2020, Mr Blair stated that Ms Power's report primarily concentrated on Occupational Health and Safety. He reiterated his findings stating that the pollution control devices were not effective in stopping dust and other solid particles of garnet and powder coating reagents from exiting the premises as evidenced by the both his and Ms Power's reports. He acknowledged that the only way to determine if the system was working correctly was to inspect the roof and any discharges coming from it as the filtration system was difficult to access. He stated that he asked Mr Davis how maintenance was performed and he could not tell him.³¹⁴

Consideration

156 The Defendant submitted that I would accept the evidence of Mr Nugent and Mr Davis as to the presence of black dust, and bear in mind that:-

- (1) There are no samples taken by Mr Blair from the smoke detectors themselves;
- (2) Mr Dylan Hughes saw black dust on the back of a smoke detector which he included in his report, which is different to the colour of garnet dust; and

³¹⁰ T 116.14-.19.

³¹¹ T 116.21-.24.

³¹² T 117.18-.21.

³¹³ T 117.26-.33.

³¹⁴ Exhibit A1, Tab 23 at 1312, [165].

(3) Orana, the Fire Company, was of the view expressed in 2010 and 2012 that the black dust from the printing presses was causing the system to go into alarm.³¹⁵

157 The Plaintiff submitted that the contention that black dust had subsisted since the closing of the printing business was an attempt to conceal the fact that the actual dust has come from the operation of the First Defendant and is garnet dust. Further, it submitted that the theory of black ink dust or any black dust or soot had been sufficiently rebuffed by Mr Blair during his cross-examination of the purlins, namely that he did not observe any black dust or soot.³¹⁶

158 On the balance of probabilities, I accept, based on the observations of Mr Blair and the sample from the roof nearby, that there was some interaction of dust from DPC operations with the fire detection system. The question of whether this was causative of the loss the Plaintiff complains is discussed in the damages section below (from [248] onwards). I do not accept that there was interaction with black soot or dust from the printing works after 30 April 2012.

159 The evidence from Orana Protection was, to the extent that this had been an issue, that it was addressed immediately sometime prior to 30 April 2012 when the detectors were changed. It did not feature in subsequent correspondence. As to the presence of black soot in the purlins at the time of Mr Blair's inspection asserted by Mr Nugent, this was not accepted by Mr Blair whose evidence I prefer. Nor am I persuaded that Mr Dylan Hughes' evidence (discussed below) finding "a bit of black dust on...one of the smoke detectors"³¹⁷ together with different colours including grey evidences black dust were from the printing works after the aforementioned date.

160 I am unable to accept Mr Gene Barrett's evidence that since the First Defendant started its powder coating operations in 2004, there were issues concerning dust and paint residue drifting into neighbouring lots and onto the roof sheeting. The issue was first recorded in the minutes of the Owner Strata on 2 October 2013 mentioning also that the problem was not as bad as two years ago. Whilst the minutes of the Extraordinary General Meeting of 7

³¹⁵ Defendants' Written Submissions at [58].

³¹⁶ Plaintiff's Written Submissions at [35(x)].

³¹⁷ T 227.01-.05.

September 2016 record that since the tenancy commenced in 2004 there had been had noise and dust problems, this was not a contemporaneous complaint. The recording of the issue in the 2 October 2013 minutes is to some extent consistent with the fact that Mr Davis recalled that around 2014 there was an incident involving a hole in the cartridge filter of the Burrell Unit and it was around 2013-14 that he recalled that there was a breakdown of the filter in the spray booth extraction unit.

- 161 The minutes of 7 September 2016 meeting records a resolution that the owners corporation would pass on to the owners of Lots 4, 5 & 6 false alarm charges incurred over the last 6 months due to the construction works being undertaken totalling \$18,037.50. This is inconsistent with Mr Gene Barrett's claim "*that from the time*" the First Defendant started operating its powder coating business, the number of false alarm charges being triggered by detectors in Lot 6 and the portion of the business occupied in Lot 5 had been disproportionate to other lots.³¹⁸
- 162 Mr Nugent's evidence that the fire alarm calls increased significantly in 2016 accords with the timing of when the matter was recorded in the minutes referred to.
- 163 Ms Power was an occupational hygiene manager who readily acknowledged that that her experience was focused on assessing and controlling a wide range of occupational health risks. Much of Ms Power's observations were based on an acceptance of what she had been told by Mr Davis.
- 164 Ms Power observed that there was visible damage to the roof immediately below the exhaust outlet for the old blast room and an accumulation of powder coat material surrounding the exhaust outlet that can be ascribed to the isolated events described by Mr Davis in his evidence. She made no observation in relation to the extraction from the curing oven and in respect of the outlet for the new blast room saw "no notable accumulation." Ms Power acknowledged, however, that there were widespread areas of discoloration on the roof but stated that these did not appear to be related to the location of any of the outlet ducts.

³¹⁸ Exhibit A1, Tab 6 at 46 [50]

- 165 It is not apparent what part of Ms Power's experience enables her to express opinions as to the source and mechanism of the damage she observed. She asserted that abrasion to the roof based on her observation suggested that the damage was discreet, although she accepted that there was widespread discolouration of the roof. Whilst she stated that the pattern of discolouration did not appear to relate to the location of the outlet ducts, Mr Blair takes a different position. Overall on these issues, I prefer the evidence of Mr Blair, a chemical engineer of over 25 years' experience, who in my view was better qualified to express an opinion. I found his evidence to be logical and that he made appropriate concessions.
- 166 I accept that some of garnet and powder coat on the roof may be accounted for by the events described by Mr Davis involving a breakdown in the filters in the old blast room and the powder coating room. However, the observations of Mr Blair satisfy me that what he saw included material of more recent origin in areas that had metal abrasions that were not corroded. Moreover, I am satisfied that there were garnet deposits on the roof and gutters adjacent to the main blast room as Mr Blair described and as depicted in the photographs shown to Ms Power in the course of cross-examination. In my view this was more pronounced than what Ms Power was able to recall based on her inspection.
- 167 Both experts accepted the presence of powder coat discharge on the roof. I accept Mr Blair's observations in relation to powder coating dust being recent discharge were subjective as he did not test it. Nevertheless, based on his description of the form of the material, his evidence is preferable to that of Ms Power who was unable to ascribe a time to when this had occurred. Mr Davis' evidence that following the incident of 2013/14 he arranged for his employees to help him clean up and sweep most of the powder up and dispose of it does not account for the significant presence of the powder as accounted by Mr Blair based on his inspection and, to a lesser extent, Ms Power based on her inspection. If in fact he had cleaned most of it up, as he asserted he did, it is not apparent how on a more recent inspection residue remained in the same location of the breakdown.

- 168 Mr Blair's evidence as to the presence of garnet in the neighbouring tunnel indicated that there was a drift of material beyond the subject premises. Ms Power in her evidence acknowledged that she observed grey coloured settled dust that was probably garnet but concluded that it did not appear to be the dominant component of the settled dust. Ms Power observed that much of the dust would not have had a crystalline structure and would not be identified using XRD. She stated that there is insufficient evidence to conclude that the analysis of this material, referring to both the material present on the roof and the material in fire tunnel, confirms that it was "predominately garnet" as was asserted by Mr Blair in his 17 July 2018 report.
- 169 Based on the unchallenged evidence of Mr Ward, together with the evidence of Mr Blair, I am satisfied that it was unlikely that the dust from outdoors is a significant component of the indoor settled dust. I cannot accept Ms Power's evidence that based on the location of the premises in proximity to neighbouring activities and the opening of the west wall roller door that it was likely that dust entering the premises from outdoors would be a significant component of the settled dust.
- 170 I accept Mr Blair's observations that there was a large amount of dust and garnet in and around the premises indicating that the dust extraction system was ineffective in controlling dust emissions. Ms Power accepted as much in respect of the roof adjacent to the primary blast and powder coat exhaust rooms based on her view of the photographs depicted in Mr Blair's report. The fact that the garnet used when Ms Power carried out her inspection was red does not exclude grey garnets being used over a period of time.
- 171 I do not accept that a reactive 'Run to Failure' system described by Ms Power was an appropriate system of maintenance. Ms Power herself acknowledged that the Abrasive Blasting Code of Practice recognised that the process was self-destructive and required every item of equipment to be inspected by a competent person in accordance with the manufacturer's instructions. The Spray Painting and Powder Coating COP also indicated a need for regularly checking plant and equipment being cleaned and maintained including ventilation and spray equipment filters. As to the system of monitoring and

maintenance, I prefer the evidence of Mr Blair's preventative maintenance system being the current industry standard. His evidence on this issue was comprehensive and pertinent to the risk of harm it was seeking to address. I further accept his evidence as to the shortcomings of the alternative "Run to Failure" system.

172 I am satisfied that garnet and powder coating were emitted during the course of the First Defendant's business activities beyond the extent conceded by Mr Davis. I do not accept Mr Davis's evidence to the contrary. His evidence in cross-examination appeared equivocal.³¹⁹ I accept that the issue was raised as asserted by Mr Gene Barrett with Mr Nugent in the former's evidence and as documented in the Strata minutes earlier referred to. The extent to which this is causative of any loss suffered is discussed below (see [245] onwards).

Negligence – Breach of Duty

173 Although the Plaintiff described its principal case as being in nuisance it is appropriate for reasons that will become apparent, to consider the case in negligence first.

Plaintiff's Submissions

174 For the purposes of s 5B(1) of the *Civil Liability Act 2002* (NSW)³²⁰, the Plaintiff identified the relevant risk of harm to the Plaintiff was if sand blasting residue was expelled onto the Plaintiff's roof due to the First Defendant's improper or failed extraction systems, it would be reasonably foreseeable to cause damage to the roof sheeting. Similarly, it was contended that the relevant risk of harm in respect of expulsion and poor extraction equally applied to damage to the fire detectors and the subsequent triggering of false alarms, thereby causing damage to the Plaintiff.

175 The Plaintiff submitted that the duty calls for compliance with the applicable standards of practice regarding sand blasting and extraction and the obligations imposed upon tenants, occupiers and owners of a lot under the

³¹⁹ T 157.30-.48.

³²⁰ Hereinafter 'the 2002 Act'.

2015 Act.³²¹ In the circumstances, a reasonable person would have taken precautions.

176 The Plaintiff contended for the purposes of s 5(1)(b) of the *2002 Act* that a reasonable person would have taken the following precautions against the risk of harm:-

- (1) installed adequate extraction and exhaust systems for the operation of its sand blasting and powder coating and other equipment;
- (2) monitored the extraction system;
- (3) maintained records in the proper implementation of the extraction system;
- (4) ensured that any extraction system properly functioned;
- (5) ensured that any extraction system did not allow the expulsion of dust and other chemical components from the sandblasting process;
- (6) complied with the Abrasive Blasting Code of Practice;
- (7) rectified the extraction and exhaust system to address its deficiencies; and
- (8) ensured that more than a visual inspection of the extractors was undertaken.

177 Section 5B(1)(c) of the *2002 Act* turns attention to whether a reasonable person in the First Defendants' position would have taken precautions against the risk of harm.

178 Section 5B(2) of the *2002 Act* states that in determining whether a reasonable person would have taken precautions against a risk of harm the court is amongst other relevant things to undertake a balancing exercise. According to the assessment under section 5B(2) and to section 5C, the Plaintiff submitted that:-

- (1) The probability of harm was high;
- (2) There was a likely seriousness of harm; and
- (3) The burden was limited or tolerable to avoid the risk of harm, namely the adherence of the Code of Practice and undertaking steps to ensure that the First Defendant removed or eliminated the risk.

179 The Plaintiff contended that the First Defendant breached its duty of care by:-

³²¹ See: sections 151(a) and (b)) and applicable by-laws (3, 6, 11 and 12).

- (1) Failing to install adequate extraction and exhaust systems for the operation of its sand blasting and powder coating and other equipment;
- (2) Failing to monitor the effectiveness of its extraction and exhaust system;
- (3) Failing to cease the activities which were causing such things as:
 - (a) undissipated, unextracted and unexhausted particles thereby triggering and causing:
 - (i) false fire alarm events; and
 - (ii) damage to fire detection systems within the relevant lots;
 - (b) deposits of chemical particles on the roof sheeting of Lots 5 and 6 and the neighbouring lots which is common property;
- (4) Failing to rectify the extraction and exhaust systems to address the general deficiencies;
- (5) **Failing to ensure that dust or residues were removed from the First Defendant's workplace;**³²²
- (6) **Failing to check for visible emissions;**³²³
- (7) **Failing to implement or demonstrate the existence of any extraction system inspection and maintenance program as required by the Code of Practice;**³²⁴
- (8) **Permitted the exhaust of the powder coating room to gather particulate matter that had been discharged from its operations and in further breach of the Code of Practice.**³²⁵

180 The alleged breaches in (5) – (8) went beyond those pleaded in the Statement of Claim (those which appear in bold),³²⁶ although no issue was taken.

181 In the case of the Second Defendant it was submitted that it breached its duty of care by:

- (a) **Knowing that the First Defendant was not operating a powder coating business without proper extraction and exhaust systems;**
- (b) Failing to inspect the First Defendant's extraction and exhaust system for the operation of its sand blasting operation and powder coating and other equipment;
- (c) Failing to ensure the First Defendant's extraction and exhaust system for the operation of its sand blasting and powder coating and other equipment were adequate and effective;

³²² Exhibit A1, Tab 23 at 1310; Exhibit A1, Tab 7 at 372-373 where the relevant sections of the COP are located.

³²³ Exhibit A1, Tab 23 at 1310.

³²⁴ Exhibit A1, Tab 7 at 375-377.

³²⁵ Exhibit A1, Tab 19 at 1078; Exhibit A1, Tab 7 at 375-379.

³²⁶ See Plaintiff's Written Submissions at [37] and Statement of Claim at [39].

- (d) On becoming aware of the inadequacy of its extraction and exhaust system, failing to require the First Defendant to rectify the extraction and exhaust systems to address its deficiencies;
- (e) **Failure to ensure adequate record keeping.**³²⁷

182 The alleged breaches (a) and (e) went beyond those specified in the Statement of Claim,³²⁸ although no issue was taken.

183 In support of its contentions the Plaintiff relied on the chronology of complaints relating to the First Defendant's operation communicated to the Second Defendants.

Defendants' Submissions

184 In relation to the roof, the Defendants pointed out that the pleading in the Statement of Claim was such that there is no nexus between the harm of which the First Defendant ought to have been aware, the breach, causation and the actual damage apparently caused.³²⁹

185 The First Defendant relied upon the following matters to establish that it had taken the appropriate precautions and acted appropriately:-

- (a) The First Defendant installed, even on the Plaintiff's expert evidence, an industry standard abrasive blasting dust extraction system "in that they use both cyclone and cartridge filtration...The size of the dust extraction systems were appropriate for the size of the sand blasting operations";
- (b) Mr Blair for the Plaintiff also noted that "The powder coating filtration system used at Letmin Pty Ltd was a dedicated filtration system from a reputable supplier" and that "it was the correct size system for scale of operations at Letmin Pty Ltd";
- (c) The systems have Reverse Pulse Dust Collectors, which automatically use a pulse jet of compressed air to clean the cartridge filters. This meant that the filters did not require regular manual cleaning;
- (d) The ABSS data sheet for the unit noted that the collector is a "reverse pulse style that uses a pulse jet of compressed air to clean the cartridge filters...This allows for extremely high dust collection efficiency and a longer life expectancy for the cartridge filters". The ABSS Dust collector "captures the fine dust and

³²⁷ See Plaintiff's Written Submissions at [42] and Statement of Claim at [42].

³²⁸ Statement of Claim at [42].

³²⁹ Defendant's Written Submissions at [33(e)].

foreign matter onto the filters, before the air is ducted to the exhaust on the roof of the premises”;

- (e) The filters used in the Reverse Pulse Dust Collector are Farr Gold Series Filters, which have a 99.9% efficiency for particles of 0.5 micron and greater (Farr APC Brochure);
- (f) The cartridge filters are automatically cleaned by the unit ;
- (g) The previous blast room in the south west corner was a Burwell unit which used a similar cartridge system to that in the Dustech Unit. The dust collector in the Burwell unit uses a frequent, automatic pulse jet of compressed air, passed through educator tubes to ensure complete dust removal, regardless of the load on the filter, to clean the cartridge filters;
- (h) Mr Davis took various steps to ensure that dust did not escape from the abrasive blasting and paint spray room into the premises;
- (i) In relation to maintenance, the First Defendant took the steps which included a routine whereby Mr Davis would visually check the dust filters approximately once per week to make sure they are working. He would do it himself or ask one of his employees to do so His inspection process is described at
- (j) The floors of the workshop are regularly swept or vacuumed to collect any dirt and residue, with three industrial vacuum cleaners. Ms Power observed that the cleaning performed around the blast room was probably performed at a frequency between daily and weekly;
- (k) Ms Power noted that whilst the DPC business had little documentation and poor record keeping related to the inspection and maintenance of the dust extraction systems, this does not mean that these processes do not occur. She noted that in discussion with Steve Davis, it was clear that continuous inspection of equipment is undertaken in this business, which includes a weekly process of inspection of all cartridge dust filters and filter drums. This was consistent with Mr Davis’ evidence in respect of maintenance;
- (l) Whilst there were aspects of the approach of DPC which were a run to failure program, this was mitigated by the weekly inspections of the filters and other proactive measures, for example the regular replacement of O rings for the connection between the blast pot and the blast hose; and
- (m) Ms Power was of the view that the measures taken by the First Defendant apart from the housekeeping record matters were adequate.³³⁰

³³⁰ Defendant’s Written Submissions at [34].

In addition to this, reliance was placed on the evidence of Mr Davis as to the range of maintenance measures undertaken.³³¹

186 The above matters were said to illustrate that the First Defendant took appropriate precautions and cannot be found negligent in relation to the alleged damage to the roof. In addition, it submitted:-

- (a) The two 2013 cartridge failure incidents were fixed straight away by Mr Davis with new filters being installed immediately;
- (b) There had been no failures in the 9 years of operation from 2004 to 2013;
- (c) There were no cartridge failures from 2013 to 2019;
- (d) Ms Power was of the view that the premises were not unusually dusty and Mr Hughes for the Plaintiff commented that they were clean and tidy at ground level;
- (e) The presence of garnet on the roof can be explained as residue from the 2013 incident; and
- (f) The First Defendant was not aware of dust in premises causing any difficulties.³³²

187 The position of the Defendants regarding precautions was similar in relation to the allegations concerning the fire alarm system. The Defendants added:-

- (a) It was the view of Orana Fire Protection as expressed in 2010 and 2012 that interference with the smoke detectors was a result of the black dust from the previously operated printing presses which the premises contained prior to 2004. This has nothing to do with the First Defendant's operations or the case pleaded;
- (b) Steps were taken to rectify the system in early 2017 with the replacement of detectors being installed at a cost of over \$7,000 by a fire professional, Orana Protection;
- (c) There is no evidence of repairs to smoke detectors specific to the DPC business; and
- (d) There were no "construction works" as alleged in 2016 that took 6 months; a partition wall was moved about 2 metres. Mr Nugent would not classify the moving of the partition wall in 2016 as "construction works" as it was a wall that was slid along one bay. Mr Nugent also disagreed that the fire alarms were going off in 2016 to 2017 due to construction works.³³³

³³¹ Defendant's Written Submissions at [34(n)], Schedule A.

³³² Defendant's Written Submissions at [35]

³³³ Defendant's written submissions at [36]

188 The thrust of these additional issues appear to go to causation rather than breach.

189 It was further submitted that the case against the Second Defendant is bound to fail. The 2013 failure incidents were caused by failures in the filters of the First Defendant of which the Second Defendant had no prior knowledge. The Second Defendant thereafter asked and had confirmed to him that new cartridges had been installed and the problems had been fixed.

190 The position of the Second Defendant in relation to alleged knowledge was outlined as follows:

- (a) The first roof damage incidents complained about occurred in 2013. These are the failures in the filter in the powder coating dust extraction system and the abrasive blasting filter system.
- (b) These incidents occurred without advanced knowledge on the part of the Second Defendant, in circumstances where the business of the First Defendant had been operating without difficulty or anything adverse regarding its operations recorded in the Owners Corporation minutes for 9 years, since 2004;
- (c) The Second Defendant asked the First Defendant in 2013 and was informed that the broken filters had been immediately replaced with new filters;
- (d) In those circumstances the Second Defendant cannot be responsible for any damage to the roof caused by those incidents in either negligence or nuisance;
- (e) There were no complaints recorded in the Owners Corporations minutes or otherwise until August 2016. This would appear to relate to an increase in fire alarms in the complex generally, and allegations of damage to the roof. However, the latter incidents had occurred in 2013;
- (f) Following those complaints, the Second Defendant was not the operator of the business in Lot 6/part of Lot 5, but responded appropriately by having the fire detectors changed by Orana Fire in February 2017. Mr Nugent couldn't find out what was causing it, so he employed Orana to "fix the bloody thing, I'll pay for it";
- (g) Mr Nugent has visited Mr Davis at least once a month between 2004 and 2013 in the DPC premises. He had not, on any of the occasions, observed dust in the atmosphere of the premises.
- (h) Mr Nugent disagreed that when he said he recalled occasions when the alarms would go off that he was referring to alarms from Lots 5 and 6; it could be any of the 11 units Mr Nugent

disagrees that the reasons for alarms going off between 2004 and 2013 was dust contaminants in those alarms.

- (i) Mr Nugent did not know that it was causing false alarms or increasing the need for the alarms to be replaced or that it was damaging the alarms.
- (j) Mr Nugent disagreed he knew that dust in DPC was an issue.
- (k) David Nugent, his wife and their interests only had about a 20% voting interest in the Owners Corporation, and previously (before Lot 12 was counted) had about a 25% interest. Just because resolutions may have been passed at meetings it cannot be said he and the Second Defendant agreed with them; and
- (l) Gene Barrett's recollection of the 2004 meeting is limited to the assurance being in relation to noise and "trade waste issues": There was no specificity to this and Mr Nugent's evidence should be preferred.

Consideration

191 It was accepted that the First Defendant owed a duty of care to take reasonable care to avoid preventable loss.³³⁴ The Second Defendant contended that it was not and could not be vicariously liable for any actions of the First Defendant that might otherwise be found to have breached the duty of care.

192 However, as the Plaintiff pointed out, the Second Defendant had a duty to take reasonable care to prevent the First Defendant from causing reasonably foreseeable harm to the Plaintiff. Such duties were informed by legislative obligations and acknowledged through the provisions outlined in the lease with the First Defendant.³³⁵ The relevant lease was in evidence and the statutory instruments relied upon by the Plaintiffs were largely acknowledged.³³⁶ Whether the 1997 or 2016 *Strata Scheme Management Regulations* applied, by-laws 3, 6, 11 and 12 were as pleaded by the Plaintiff. The lease required compliance with the *1996 Act* and the by-laws.³³⁷ There were various restrictions on the use of the property and obligations in respect of repair.³³⁸ It

³³⁴ Defendant's Written Submissions at [30].

³³⁵ Plaintiff's Written Submissions at [45]

³³⁶ Statement of Claim at [2]-[4] and [25]-[27] and Defence at [25]-[27].

³³⁷ Exhibit A1, Tab 14 at 852 [6.1.5].

³³⁸ Exhibit A1, Tab 14 at 852-3 [6.1.3, 6.3.2 and 7].

was not submitted that the legislative instruments outsourced the owner's responsibility.

- 193 The Defendants did not challenge the Plaintiff's characterisation of the risk of harm which effectively is the risk of residue being expelled due to a failure in extractions systems causing damage to the roofing and interference with the fire detection equipment. Nor did the Defendants challenge the Plaintiff's submissions that the risk was foreseeable and not insignificant. I accept that the risk was foreseeable and not insignificant.
- 194 The question relating to the state of the pleadings advanced by the Defendants was raised in closing submissions for the first time. Whatever short comings the Statement of Claim may have had, the Defendants were clearly on notice of the case being advanced against them from both from the Plaintiff's Outline of Submissions³³⁹ and the Statement of Issues.³⁴⁰ No objection was raised as to the evidence going to this question. In my view no issue of unfairness has been identified by reason of state the pleading and nothing turns on the Defendant's submission in this regard.
- 195 Much of the submissions going to the First Defendant rested on the equipment used by the First Defendant and its monitoring. I have accepted that garnet and powder coating was expelled from DPC's operation as found by Mr Blair and that it occurred over a period of time beyond that asserted by the incidents in 2013/4 relied upon by the Defendants extending to the recently before Mr Blair's first report.³⁴¹ I have also accepted Mr Blair's evidence as to the precautions that ought to have been taken. It follows that I accept that there was a failure to install adequate extraction and exhaust systems for the operation of the sand blasting and powder costing and other equipment, a failure to monitor the effectiveness of its extraction and exhaust system, and a failure to cease the activities which were causing garnet and powder coat to be emitted on to the roof and into the fire detection system.

³³⁹ Plaintiff's Outline of Submissions at [23]-[35].

³⁴⁰ Plaintiff's Statement of Issues at [4] and [5].

³⁴¹ See [158]-[172] above.

- 196 The Plaintiff's reliance on the First Defendant's failure to comply with the Abrasive Code of Practice was particularised in submissions as referenced to what was specified above.³⁴² Beyond that, it was asserted that there was a breach by failing to undertake adequate inspections of the extraction system and failing to undertake pressure tests to ensure that the filter system was working. Mr Blair conceded in his report that the Code is written by Safe Work Australia and has a safety focus. The scope of his report was to determine if the business had caused material harm to the structure which is not a safety issue. He described the literature reference as largely irrelevant.³⁴³ Nevertheless, the failure to have a proper equipment inspection and maintenance program for the dust extraction systems was an identified failure.
- 197 In the circumstances, I am satisfied that the probability that harm would occur if care were not taken would be high and the likely seriousness of harm would also be significant. Based on the description and cost identified by Mr Blair, I am satisfied that the burden of taking precautions to avoid the risk of harm was not high, and would have comprised of a modest monetary amount assuming a contractor was used. There was no social utility identified. It follows, in my view, that breach on the part of the First Defendant has been established.
- 198 The case against the Second Defendant appears to be largely based on its obligations earlier referred to and contentions of knowledge from certain meetings of the Owners Corporation.
- 199 I am satisfied that from 2 October 2013 the Owner Strata did raise with the Second Defendant the issue of dust drifting from DPC into neighbouring lots and on the roof of the Premises. This is supported by the fact of Mr Gene Barrett taking photographs from 2013 to 2018. I do not regard the absence of minutes recording communications between 2013 and 2016 as indicative that the issue had resolved. Mr Nugent acted in 2013 on the basis only of assurances from his tenant and visual observations on his visits. The minutes of 7 August 2016 meeting recorded that the damage had occurred over a

³⁴² Plaintiff's Written Submissions at [35](q)(vii)(1-4)].

³⁴³ Exhibit A1, Tab 23 at [198].

period; a matter later confirmed by the evidence of Mr Blair. Thereafter, the matter quickly escalated to the initiation of Strata Notices.

200 I accept that the Second Defendant should have ensured that the systems for the operation and of sand blasting and powder coating and other equipment were adequate and effective. On becoming aware that they were not, it should have required the First Defendant to rectify the extraction and exhaust systems and implement a system of inspection and maintenance outlined by Mr Blair

201 For similar reasons in respect of the First Defendant in respect of s 5B(2) of the *2002 Act*, I am satisfied that a reasonable person in the Second Defendant's position would have taken the precautions identified and in the circumstances breach has been established.

202 As the question of causation is inextricably linked to the question of damages, this will be considered at that point after considering the claim in nuisance.

Nuisance

Plaintiff's Submissions

203 The Plaintiff submitted that a claim in nuisance arises when there is a substantial and unreasonable interference with the right to the use and enjoyment of property.³⁴⁴ It submitted that liability in nuisance is strict and requires no proof of intention or negligence.³⁴⁵

204 It stated that the elements of the cause of action are:-³⁴⁶

- (1) The applicant must have standing to bring the action;
- (2) That there is a substantial interference in the applicant's enjoyment of their land; and
- (3) That the interference was unreasonable.

205 It further stated that the determination of "unreasonable interference" is an objective test. Factors relevant to that enquiry concern:-

- (1) the ordinary habits and sensibilities of a person in the Plaintiff's position; and

³⁴⁴ *Hargrave v Goldman* (1963) 110 CLR 40 at 62 (Windeyer J); *Gales Holdings Pty Ltd v Tweed Shire Council* [2011] NSWSC 1128 at [295] (Bergin CJ in Eq).

³⁴⁵ *Benning v Wong* (1969) 122 CLR 249 at 289-299 (Windeyer J).

³⁴⁶ *Stockwell v Victoria* [2001] VSC 497 at [227] and [229] (Gillard J); *Dimitrios Michos & Another v Council of the City of Botany Bay* [2012] NSWSC 625 at [57] (Slattery J).

- (2) "reasonable give and take."³⁴⁷
- 206 It was submitted that another way of stating the test was said to be whether there has been "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions" of the community.³⁴⁸
- 207 Whether there has been an unreasonable interference, it was submitted that the Court ought to take into account:-³⁴⁹
- (1) the locality in which the interference occurs;
 - (2) the duration, time of day, frequency and extent of the interference; and
 - (3) any malice on the part of the person causing the interference.
- 208 The tort of nuisance was described as having broad application to cases concerning complaints about emissions of dust. That point was asserted as being made clear in *Hutton v Martin Lewis Shipwrights Pty Ltd*.³⁵⁰
- 209 In respect of the Second Defendant, the Plaintiff contended that if a person, such as a landlord or lessor permits, allows or authorises a nuisance attributable to their tenant or lessee to occur, they will similarly be liable to the Plaintiff.³⁵¹
- 210 Similarly, liability will also arise if the nuisance is certain to result from the purpose for which the property is let.³⁵²
- 211 The Plaintiff submitted that the meaning of "permission" or permits is said to contain the following elements which, in relation to a landlord or lessor would include the following namely, the lessor:-³⁵³

³⁴⁷ *Dimitrios Michos & Another v Council of the City of Botany Bay* [2012] NSWSC 625 at [57] (Slattery J).

³⁴⁸ *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR (NSW) 482 at 486 (Jordan CJ).

³⁴⁹ *Dimitrios Michos & Another v Council of the City of Botany Bay* [2012] NSWSC 625 at [58] (Slattery J), citing *Sturges v Bridgman* (1879) 11 Ch D 852 (CA) at 865 per Thesiger LJ, *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 and *Christie v Davey* [1893] 1 Ch 316.

³⁵⁰ (Supreme Court of NSW, Bryson J, 19 May 1987).

³⁵¹ *Peden P/L & Ors v Bortolazzo* [2006] QCA 350 at [12]-[17]; *Aussie Traveller Pty Ltd v Marklea Pty Ltd* [1998] 1 Qd R 1; [1997] Q ConvR 54-485. .

³⁵² *Peden P/L & Ors v Bortolazzo* [2006] QCA 350 at [13] citing *Smith v Scott* [1973] Ch. 314 at 321 (Pennycuik V.-C).

³⁵³ *Adelaide City Corporation v Australasian Performing Rights Association* [1928] HCA 10; (1928) 40 CLR 481 at 487 (Knox CJ).

- (1) knows or has reason to anticipate or suspect that the particular act is to be or is likely to be done;
- (2) has the power to prevent it;
- (3) makes default in some duty of control or interference arising under the circumstances of the case; and
- (4) thereby fails to prevent it.

212 The question of whether a landlord/lessor has caused, permitted or authorised an interference was said to have been tempered by the landlord's/lessor's duty to take all reasonable steps open to preserve the tenant/owner's quiet enjoyment and/use of the land.³⁵⁴

213 Similarly, the meaning of the term "authorise" is taken to mean "sanction, approve, countenance",³⁵⁵ which by application would involve a lessor sanctioning, approving or countenancing the conduct of the tenant in the way complained of by the innocent party.

214 It was submitted that the terms permit, allow and authorise are entirely interchangeable in the current context.

215 Applying the principles to the facts the Plaintiff submitted that:-

- (1) The Plaintiff has standing to bring the proceedings against both Defendants;
- (2) The operations of the First Defendant from the inception resulted in:
 - (a) Deposits of garnet on the roof sheeting above Lots 5 and 6, which is common property;
 - (b) Exposure of the roof sheeting above lots 5 and 6, which is common property to garnet through the extraction and exhaust system; and
 - (c) And the triggering of false alarm by expulsing dust and other chemical in the fire detection system.
- (3) The damage was substantial and directly referable to the conduct of the First Defendant; and
- (4) Based on the extent of the physical damage to the roof and the frequency of the incidents referable to the First Defendant business, the conduct was objectively unreasonable.³⁵⁶

³⁵⁴ Aussie Traveller Pty Ltd v Marklea Pty Ltd (1997) QCA 2 at 8 (McPherson J.A, with Fitzgerald P and Thomas J agreeing).

³⁵⁵ Adelaide City Corporation v Australasian Performing Rights Association [1928] HCA 10; (1928) 40 CLR 481 at 489 (Isaacs J).

³⁵⁶ Plaintiff's Written Submissions at [37]-[38].

216 In respect of the Second Defendant the Plaintiff submitted that by virtue of the actions of the First Defendant it permitted, allowed or authorised the nuisance and therefore must be further liable for that nuisance as well. It was submitted that based on the operations of the First Defendant it was certain that a nuisance was likely to arise give the nature of the business, which was clearly contemplated in the lease between the Defendants.³⁵⁷

217 The Second Defendant was said to have:

- (1) Knowledge of the issues associated with the First Defendant's extraction and exhaust system;
- (2) Knowledge of the presence of the dust and other chemicals on the roof;
- (3) Knowledge of the false alarms and the required repair of the alarm;
- (4) Power to prevent the damage to the Plaintiff's property in the form of the roof and fire alarm system, particularly in light of the provisions within its lease with the First Defendant. One power within the lease was to issue a notice to the First Defendant to cure its breach and should that fail, the Second Defendant was empowered to terminate it; it was submitted that it did not take any of these active steps
- (5) Defaulted in controlling the nuisance by the First Defendant; and
- (6) Failed to prevent the nuisance notwithstanding.³⁵⁸

Defendants' Submissions

218 The Defendants submitted that in the type of nuisance under consideration, substantial interference with the enjoyment of land requires proof of culpable conduct on the part of the defendant.³⁵⁹ It submitted that the present case is not a type of nuisance where liability is strict, for example removal of the plaintiff's right of support for land.³⁶⁰

219 The Defendants further submitted that the suggestion in the Plaintiff's submissions, that "liability in nuisance is strict" is incorrect to the extent it is suggested that it applies to the present case.³⁶¹ It stated that *Benning v Wong*, which the Plaintiff relies on in this respect, was discussing the rule in *Rylands v*

³⁵⁷ Plaintiff's Written Submissions at [40].

³⁵⁸ Plaintiff's Written Submissions at [42].

³⁵⁹ *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 897.

³⁶⁰ Defendants' Written Submissions at [37], with reference to Law of Torts, Balkin & Davis (5th Ed) 2013 at 14.2

³⁶¹ Defendants' Written Submissions at [37].

*Fletcher*³⁶² which has since been subsumed into the law of negligence following the decision in *Burnie Port Authority v General Jones*.³⁶³

220 Further, in the case of substantial physical injury to land, it submitted that a defendant will not be liable if it is shown reasonable precautions were taken.³⁶⁴

221 It was submitted that the relevant question is “what is a reasonable use of a defendant’s property?”³⁶⁵ Reference was made to the remarks of Ward J (as her Honour then was) in *Quick v Alpine Nurseries Sales Pty Ltd*.³⁶⁶

“[140] Although it was initially contended for Mr and Mrs Quick that the fact that the defendants had taken all reasonable care would not of itself exonerate them from liability (citing *Cambridge Water Co v Eastern Counties Leather* [1994] 2 AC 264, at 300F per Lord Goff), during the course of argument it was accepted by Mr Philips that liability for nuisance (unless the conduct gave rise to a claim of strict liability) would not be established unless it could be shown that that the defendants had acted recklessly or had either failed to take action or taken action knowing the likely impact on the enjoyment by Mr and Mrs Quick of their property. [141] As noted by Bryson JA in *Sutherland Shire Council v Becker* [2006] NSWCA 344, at [119] and Preston CJ in *Robson v Leischke* [2008] NSWLEC 152; (2008) 72 NSWLR 98; (2008) 159 LGERA 280 (at [44]-[46]), the tort of nuisance involves fault of some kind or another That fault generally involves foreseeability (Preston CJ in *Robson* citing *The Wagon Mound (No 2)*, at 639-640; *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485, at 522, 524; *Solloway v Hampshire County Council* (1981) 79 LGR 449, at 452, 457-458, 460 and 461; *City of Richmond v Scantelbury* [1991] 2 VR 38, at 45; *Cambridge Water*, at 300; *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321, at 332 [29]). Liability for nuisance, therefore, is not strict liability (there citing *SedleighDenfield v O’Callaghan* [1940] AC 880, at 904).

222 Evidence that a defendant has taken proper precautions to avoid harm was said to be not immaterial, because it has a bearing on whether the Plaintiff was subjected to an unreasonable interference.³⁶⁷

223 It submitted that it was not culpable and should not be found liable in nuisance. Further, it submitted that there was no evidence from any occupiers or lessees of any neighbouring lots saying they had problems from DPC dust in their premises.

³⁶² [1868] UKHL 1, (1868) LR 3 HL 330.

³⁶³ [1994] HCA 13; (1994) 179 CLR 520.

³⁶⁴ *Kraemers v A-G (Tas)* [1966] Tas SR 113 at 122-3 (Burbury CJ), cited in Balkin and Davis on Torts (5th Ed) (2013) at 14.10.

³⁶⁵ *Sedleigh-Denfield v O’Callaghan* [1940] AC 880 at 903; *Kennaway v Thompson* [1981] QB 88 at 94 (CA); *Murillo v SKM Services* [2019] VSC 663 at [90].

³⁶⁶ [2010] NSWSC 1248.

³⁶⁷ *Daily Telegraph v Stuart* (1928) 28 SR (NSW) 291; *West v Nicholas* (1915) 17 WALR 49 at 54 (McMillan CJ).

- 224 The First Defendant repeated and relied upon the same precautions outlined above ([185]-[187]) in that a reasonable person in the First Defendant's position would have taken those precautions.
- 225 In the event that there was no finding that the First Defendant was liable in nuisance, it was submitted that the question of the liability of the Second Defendant would not arise. On the assumption that it were otherwise it was argued as follows.
- 226 It submitted that a landlord who lets premises for a particular purpose, the necessary consequence of which results in an interference with the enjoyment of land by neighbours, will be liable to those neighbours.³⁶⁸ However on the other hand the nuisance arises from the way in which the tenant uses the demised premises, rather than the purpose for which they have been let, it is the tenant and not the landlord who is liable.³⁶⁹
- 227 The Second Defendant submitted that there was nothing in the present case which makes it of the type mentioned in the first part of the last paragraph. It was not a "necessary consequence" of the work undertaken by DPC that nuisance would result.
- 228 Reference was made to *Fleming's The Law of Torts* where it was stated:-³⁷⁰

"Passing from cases of disrepair, the owner is not responsible for any nuisance created by his tenant, unless he let premises to him for a purpose calculated to cause a nuisance, like using a hall for noisy parties: *De Jager v Paynham* (1984) 36 SASR 498 (FC); *Sampson v Hodson-Pressinger* [1981] 3 All ER 710 (CA). In the traditional formula, the nuisance must have been either expressly authorised or certain to result from the purpose for which the property is being let. Nothing less than a high degree of probability that the tenants would misbehave will suffice: *Smith v Scott* [1973] Ch 314, *Hussain v Lancaster County Council* [2000] QB1 (CA), nor will the landlord's mere failure to intercede and terminate the tenancy after becoming aware of the nuisance. Beyond that, a landlord cannot be held to account."³⁷¹

³⁶⁸ *Ross & Glendinning v Hancock & Co* [1929] NZLR 204, *Sampson v Hodson Pressinger* [1981] 3 All ER 710 (CA).

³⁶⁹ *Sykes v Connolly* [1895] 11 WN (NSW) 145, *Hussain v Lancaster County Council* [2000] QB1 (CA).

³⁷⁰ Defendants' Written Submissions at [46].

³⁷¹ Carolyn Sappideen and Prue Vines (eds), *Fleming's, The Law of Torts* (10th ed, Lawbook, 2011) at 513

- 229 This was said to be supported in the *Law of Torts* (5th Ed) by Balkin and Davis (2013) where it was stated that the liability of a landlord is confined to those nuisances of which he knows or ought to know.³⁷²
- 230 The Defendant submitted that the case *Adelaide City Corporation v APRA*³⁷³ cited by the Plaintiff was distinguished as a copyright case interpreting legislative definitions relevant to permitting in a copyright context and was not relevant in a nuisance context.
- 231 It instead relied on the case of *Torette House Pty Ltd v Berkman*,³⁷⁴ which was said to be an analogous situation; an occupier was asserted to not be liable if the acts of an independent contractor cause injurious consequences which are neither a necessary or natural consequence of the employment of the contractor.
- 232 The case against the Second Defendant was said to be largely based on contentions of knowledge from certain meetings of the Owners Corporation. The position of the Second Defendant in relation to this alleged knowledge replicated that advanced in respect of negligence (see [190]).
- 233 On this basis it was said that the nuisance case against the Second Defendant must fail.

Consideration

- 234 In *Fleming's, The Law of Torts*, there is discussion on the effect of negligence on nuisance and whether or not liability is strict:-

...Nevertheless, although the standard of reasonableness is the touchstone for the adjustment of competing interests in nuisance, it differs in several respects from the central notion of reasonable care in negligence. In the first place, "unreasonable risk" in negligence involves the idea of foreseeable harm to which a reasonable man would not expose others, while unreasonableness in nuisance relates primarily to the character and extent of the harm caused that that threatened. Secondly, the "duty" not to expose one's neighbours to a nuisance is not necessarily discharged by exercising reasonable care or even all possible care. In that sense, therefore, liability is strict. At the same time, evidence that the defendant has taken all possible precaution to avoid harm is not immaterial, because it has a bearing on whether he subjected the plaintiff to an unreasonable interference, and is decisive in those cases where the offensive activity is carried on under statutory authority. Therefore, while

³⁷² Citing *St Anne's Well Brewery Co v Roberts* (1928) 140 LT1 (CA).

³⁷³ [1928] 40 CLR 481 at 489.

³⁷⁴ (1940) 62 CLR 637.

carelessness is not a requisite, fault, as we shall see, is usually relevant. Thirdly, the law of nuisance allows a defendant the privilege to make use of his property within reasonable bounds though aware that he may thereby cause his neighbours some annoyance and inconvenience; whereas in negligence, given a duty to protect others from a certain kind of injury, the actor will be liable if he ought reasonably to have foreseen it as a likely consequence of his conduct. But just as in trespass, so in nuisance it is up to the defendant to exculpate himself, once a *prima facie* infringement has been established, for example, by proving that his own use was "natural" and not unreasonable.³⁷⁵ (*footnotes omitted*)

235 Similar commentary in respect of nuisance is to be found in *Court Forms, Precedents & Pleadings NSW*³⁷⁶ and *Law of Torts* by Balkin and Davis.³⁷⁷

236 In *Kraemers v Her Majesty's Attorney-General for the State of Tasmania*,³⁷⁸ Burbury CJ stated at 122:

...The distinction between liability in nuisance and liability in negligence in the present case is an important one not only in relation to burden of proof but also because it cannot be suggested that the Public Works Department could reasonably have been expected to have foreseen the damage. The learned author of *Salmond on Torts*, 14th edn., pp. 97-98, says:

"It is also well settled that in nuisance the wrongful character of the defendant's act is not to be tested, as it is in negligence, by asking whether he could have foreseen the damage. It has been said that 'the proper angle of approach to a case of alleged nuisance is rather from the standpoint of the victim of the loss or inconvenience than from the standpoint of the alleged offender . . . The critical question is whether what he was exposed to was *plus quam tolerabile* when due weight has been given to all the surrounding circumstances of the offensive conduct and its effects."

So that while it may be true to say that (in the words of Windeyer J. in *Gartner v. Kidman*) " ... the idea of reasonableness that is basic to so much of the common law, is firmly embedded in the law of nuisance today", it is not true to say that unreasonable conduct of the defendant vis-a-vis the plaintiff is an ingredient in the cause of action for nuisance. The plaintiff in an action for nuisance must no doubt show that his enjoyment of his land is affected to a degree going beyond trifling inconvenience. (*footnotes omitted*)

237 He proceeded to state at 123:

The cause of action in nuisance is unlawful interference with the plaintiff's enjoyment of his land. Interference causing material damage whether it could reasonably be anticipated or not is *prima facie* unlawful and it is for the defendant to allege and prove lawful justification in

³⁷⁵ Carolyn Sappideen and Prue Vines (eds), *Fleming's, The Law of Torts* (10th ed, Lawbook, 2011) at 506 [21.120].

³⁷⁶ M Young, S Loughnan and A Coorey, *Court Forms, Precedents & Pleadings NSW – Nuisance Commentary* (18 April 2018), [41,065].

³⁷⁷ Balkin and Davis, *Law of Torts* (5th ed, 2013) at 472 [14.2].

³⁷⁸ [1966] Tas SR 113.

accordance with some recognized criterion of exculpation from liability such as "natural" and reasonable user causing the damage which could not reasonably have been avoided. (*emphasis added*)

238 In *Woodhouse v Fitzgerald and McCoy (No 2)*,³⁷⁹ the Plaintiff owned a farming property which was extensively damaged by fire. The Plaintiff claimed that the fire started on the adjoining property, and that it was as a result of negligence during and after a controlled burned conduct by the Rural Fire Service (RFS) to eradicate two types of noxious weeds. He sought damages in negligence and nuisance.

239 With reference to the case in nuisance and its interrelationship with negligence, Schmidt AJ summarised legal principles as follows:-

361. Mr Woodhouse relied on the evidence which had established negligence, to submit that he had also made out a case in nuisance, relying on the principle discussed by Windeyer J in *Hargrave v Goldman* at p 60:

"In nuisance, liability is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) which, to a substantial degree, harms another person (an owner or occupier of land) in his enjoyment of his land."

362. In *Gales Holdings Pty Limited v Tweed Shire Council* (2013) 85 NSWLR 514; [2013] NSWCA 382 it was observed at [131]-[132]:

"A nuisance is either a continuous or recurrent state of affairs. An occupier of land will be liable for continuing a nuisance if, with knowledge or presumed knowledge of the state of affairs, the occupier fails to take reasonable steps to bring it to an end despite having had ample time to do so (*Hargrave v Goldman* [1963] HCA 56; 110 CLR 40 at 59-61). There will be nuisance if a state of affairs created, adopted or continued by an owner or occupier of land harms another person's enjoyment of land occupied or owned by that other person, unless the first person's conduct involves no more than the reasonable and convenient use of its own land (*Hargrave v Goldman* at p 62)."

"That is to say, nuisance is a wrongful interference with another's enjoyment of land by the use of other land occupied or owned by the alleged wrongdoer. However, an owner or occupier of land is not an insurer. There must be more than mere harm being done to another's enjoyment of land. The harm must be caused by the alleged wrongdoer's use of its own land. The word use connotes that a degree of personal responsibility is usually required, even though a deliberate or negligent act is not. A deliberate or negligent act will however be sufficient. A balance must be maintained between an owner or occupier's right to do what it likes with its land and a neighbour's right not to be interfered with. **The proper test to apply in most cases is what is reasonable, according to the ordinary usages of a**

³⁷⁹ [2020] NSWSC 450.

particular society. While negligence is not essential, fault of some kind is almost always necessary (*Elston v Dore* [1982] HCA 71; 149 CLR 480 at 487-488).at [132]” (emphasis added)

240 Schmidt AJ continued:-

375 While reliance was placed by the defence on *Sutherland Shire Council v Becker*, Bryson JA there referred to *Sedleigh-Denfield v O’Callaghan & Ors* [1940] AC 880, where it was observed at 904-905:

“The gist of the present action; however, is the unreasonable and unjustified interference by the defendants in the user of their land with the plaintiff’s right to enjoy his property. Negligence, moreover, is not a necessary condition of a claim for nuisance. What is done may be done deliberately, and in good faith, and in a genuine belief that it is justified. Negligence here is not an independent cause of action, but is ancillary to the actual cause of action, which is nuisance.

...

The liability for a nuisance is not, at least in modern law, a strict or absolute liability. If the defendant, by himself or those for whom he is responsible, has created what constitutes a nuisance, and if it causes damage, the difficulty now being considered does not arise; but he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it. This rule seems to be in accordance with good sense and convenience. The responsibility which attaches to the occupier because he has possession and control of the property cannot logically be limited to the mere creation of the nuisance. It should extend to his conduct if, with knowledge, he leaves the nuisance on his land. The same is true if the nuisance was such that, with ordinary care in the management of his property, he should have realised the risk of its existence.

...

...if the defendant did not create the nuisance, he must, if he is to be held responsible, have continued it, which I think means simply neglected to remedy it when he became, or should have become, aware of it.”

376 In *Rickard & Ors v Allianz Australia Insurance Ltd & Ors* (2009) 54 MVR 214; [2009] NSWSC 1115, after again referring to *Sedleigh-Denfield*, Hoeben J observed:

“As Lord Wright made clear in *Sedleigh-Denfield*, constructive knowledge for the purposes of nuisance does not equate with foreseeability in negligence. The test is not whether a risk is farfetched or fanciful, **but whether there is evidence of facts, matters or circumstances from which the defendant ought to have known of the nuisance. In this case that means “ought to have actual knowledge of the fact of water flowing directly from the driveway across the highway”**, not, “ought to have foreseen the risk that water might flow directly from the driveway across the highway if a

sufficiently severe rainfall event were to occur at some time in the future” at [188]. (*emphasis added*)

- 241 In the instant case, whilst I accept that liability in nuisance is not strict, evidence of taking all possible precaution to avoid harm is not immaterial, because it has a bearing on whether a Plaintiff has been subjected to an unreasonable interference, and is decisive in those cases where the offensive activity is carried on under statutory authority. Therefore, while carelessness is not a prerequisite, fault as described above is.
- 242 However for the reasons given in respect of the action in negligence I am not satisfied that the First Defendant took all reasonable precautions to avoid the harm. I am satisfied that in conducting its operations resulting in discharges as described there was an unreasonable interference in the Plaintiff’s property which was substantial within the terms discussed.
- 243 On my findings the Second Defendant was clearly aware of the discharges and should have been aware of the risk of its continued existence such as to make it liable in nuisance
- 244 It is no answer to the Plaintiff’s claim that this was a category of case where the nuisance arises from the way the tenant uses the premises rather than the purpose for which they are being let. As noted earlier the Second Defendant had provisions in the lease which it could have enforced to ensure the Plaintiff’s rights were not interfered with but failed to do so, making it liable in nuisance.³⁸⁰

CAUSATION AND DAMAGES

- 245 Causation in negligence is governed by ss 5D and 5E of the *2002 Act*. Causation in nuisance is governed by the common law.³⁸¹ The question of whether and to what extent the *2002 Act* imposes a different test to the common law was not explored by the parties in their submissions.³⁸² Nor was it suggested in the circumstances of this matter it would lead to a different outcome.

³⁸⁰ *Hilton v James Smith & Sons (Norwood) Ltd* (1979) 251 EG 1063 (CA)

³⁸¹ *March v Stramare (E & MH)* [1991] HCA 12, (1991) 171 CLR 506.

³⁸² See discussion in *Dominic Villa*, *Annotated Civil Liability Act 2002* (Thomson Reuters, 3rd ed, 2018) at 151.

246 The Plaintiff submitted that the cause of the damage to the roof, fire detectors, replacement costs of the detectors, was due to the actions and omissions of the Defendants who permitted or allowed garnet to be dispersed on the Premises. It submitted that the Court can be satisfied on the balance of the probabilities that the Defendants were the cause of the Plaintiff's harm.

247 The Defendant submitted that to give context to these questions it is necessary to keep in mind the damage alleged:-

- (a) In the case of the roof, the maximum damage is about \$22,000, but that properly considered, and specifically when alleged damage due to water from evaporative coolers is removed, the claim is in the realm of \$10,000; and
- (b) In the case of the fire alarms, the Plaintiff has not proved its case, but the allegations primarily concern the need for callouts due to damage to detectors.
- (c) In the case of a different fire system, the case has not been made out given the matters discussed in the context of the Hughes report.

248 The amount sought by the Plaintiff was advanced on the basis of an Updated Schedule of Damages.³⁸³ This identified both the Plaintiff's claim in nuisance and, in negligence. The damages referred to were as follows:-

Head of Damage	Quantum
Damage to Roof of Lot 6 and Part of Lot 5	\$22,536.25 ³⁸⁴
Payment of Fire Brigade Callouts and False Alarm Charges in respect of Lot 6 and Part of Lot 5	\$114,576.50 ³⁸⁵
Charging and cleaning and replacing detectors	\$32,748.35 ³⁸⁶
Intermediate repairs to roof	\$2,318.25 ³⁸⁷

³⁸³ MFI E.

³⁸⁴ Based on calculations in Exhibit A1, Tab 20 at 1106.

³⁸⁵ Based on calculations in MFI E, Tab A.

³⁸⁶ Based on calculations in MFI E, Tab B. MFI E was incorrectly calculated this as \$32,751.35.

³⁸⁷ Based on calculations in MFI E, Tab C. MFI E was incorrectly calculated this as \$2,318.25.

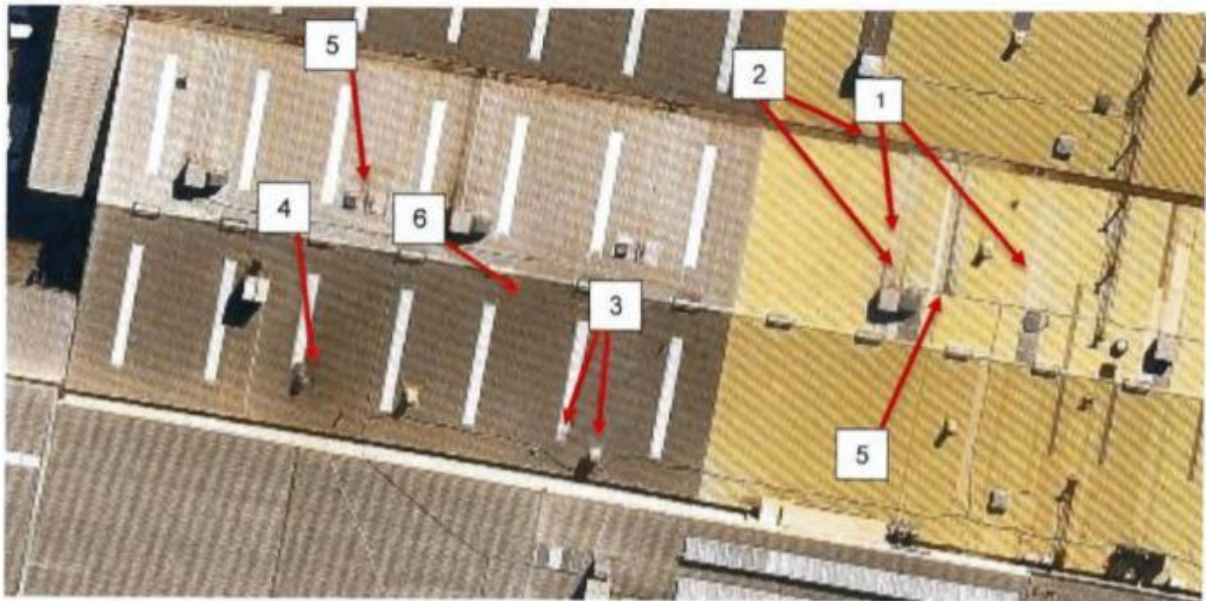
Replacement of fire system	\$45,100.00 ³⁸⁸
Total	\$217,279.35

249 I will consider each of these in turn.

Damage to Roof

Plaintiff's Expert Peter Thew

250 Mr Peter Thew, an engineer, inspected the roof of the premises on 15 June 2018. In his report³⁸⁹ the potential damage to the roof was identified in 6 areas, as referred to on Plate 2, which was also reproduced in Exhibit 3:-³⁹⁰



251 Areas of damage correlate with the damage described in Mr Thew's report in sections 3.3.2-3.3.7.³⁹¹ By reference to the locations indicated, the evidence was as follows.

Location 1

252 Mr Thew recorded that in this location there was an exhaust duct located directly below the evaporative cooler. He was informed that this duct came from the blasting booth and that at the time of inspection the duct was expelling

³⁸⁸ Based on calculations in Exhibit A1, Tab 21 at 1172.

³⁸⁹ Exhibit A1, Tab 18 at 1024-1063.

³⁹⁰ Exhibit A1, Tab 18 at 1033; T 85.36; Exhibit 3.

³⁹¹ T 85.38-86.05. Exhibit A1, Tab 18 at 1034-36.

a large volume of air and the evaporative cooler did not appear to be running.

His report records:-

The roof near this duct has had much of the colour and corrosion protection removed. This is consistent with continue exposure to light abrasive material. This wear on the protective surface on the steel is concentrated on the areas close to exhaust ducts much more than the general roof. The difference is visible from the aerial photograph. The colour loss is limited to the troughs in the roof down to the gutter, consistent with the blast material collecting in the troughs and abrading the roof as rain water washes it down.³⁹²

253 During cross-examination, Mr Thew was asked, assuming the evaporative cooler had been placed there since 2004, whether the damage shown in Location 1 was consistent with water leaking from the evaporative cooler. Mr Thew initially stated that he would not draw that conclusion as the evaporative cooler had been decommissioned and was stationed above the air vent where there was lots of air coming out. He further stated that he found sand and grit, and he deduced from its presence that the damage was caused by the sand and grit.³⁹³ He was then asked to assume that the evaporative cooler had been there since 2004. Acknowledging in an earlier statement that he stated that they are prone to leaks, and that the exhaust fan was built in 2016, he was then asked whether it was the case whether he couldn't tell what the damage to the roof had been caused by.³⁹⁴ Mr Thew responded:-

A. it's, it's very hard to differentiate. I think, going from memory, in this photograph's what the damage would be. I recall at the time my distinct impression was the grit was the cause of the damage. I would struggle to describe to you how it's different except to say that it's, you know, gathered in the corners and it's, it's the location of where the grit was, but I take your point. It's hard to - there was damage possibly caused by both and it's very hard to tell the difference.

Q. You just can't tell which one it was sitting here in the witness box?

A. Sitting here now, no, I couldn't describe why one would be damage rather than the other. No, let me backtrack slightly on that. The grit will tend to take the paint off and then if there's rust it will clean the rust off as well so you'll always see shiny steel. Where there's evaporative cooler's damage, it will first start eating away at the galvanising and then, once that happens, the rust will appear on the steel and it will remain rusty. But, to anticipate your next question, if I may, the photograph on the right has not got to that point and so

³⁹² Exhibit A1, Tab 18 at 1034, 3.3.2.

³⁹³ T 89.42-90.01.

³⁹⁴ T 90.10-.14.

it's just damage to the galvanising so, no, I can't tell the great difference of damage.³⁹⁵

254 Mr Thew further acknowledged that the photograph shown in his report at 3.3.2 on the right hand side was not at the location within the area marked on Exhibit 2 (being referenced in his report as Plate 2) and marked in red by Mr Barrett the approximate area of the First Defendant's tenancy.

Location 2

255 Mr Thew reported that around the exhaust duct above the blasting area, there was a significant amount of material which had collected on the roof and in the gutters. That material around the air exhausts had the appearance of loose fine grey sand with red specks in it. This, he said, was consistent with the appearance of grit used in the sand blasting process. He stated that the sand was visually different from the typical brown dust found in the Dubbo area, and that the collection of grey sand around the exhaust ducts and relative lack of deposits elsewhere suggested it came from the air ducts and was not blown in from somewhere offsite. In the gutter, he noted that the grit had collected and gradually washed through the storm water system and, being a reasonably heavy material, it may have collected in pipes and junctions in the storm water system.³⁹⁶

Location 3

256 Location 3 was an area alleged to be locations where paint residue was found on the roof. Mr Thew reported:-

Around the exhaust duct over the powder coating booth, there is material accumulating on the roof. This material is silvery grey in colour and has caked on over the roof sheeting. It is different in texture and colour to the sand collecting around the blasting booth. This material partially holds together. As well as on the roof it is accumulating in the adjacent gutter. To determine the exact make up of this material will require a chemical analysis, however the texture and appearance is consistent with powder overspray.

The effects of this overspray on the roof are more benign than the blasting sand, however the accumulation of material on the roof and in the gutters may cause blockages and problems in the drainage system. It also adds weight to the roof which has not been designed for.³⁹⁷

³⁹⁵ T 90.17-.34.

³⁹⁶ Exhibit A1, Tab 18 at 1034, 3.3.3.

³⁹⁷ Exhibit A1, Tab 18 at 1035, 3.3.4.

257 Mr Thew opined that he could not confirm that the caked-on material was causing damage to the roof, however, he stated that it would collect moisture on the roof (rain and dew) and make the roof wetter for longer and would probably increase the likelihood of rain and corrosion. In addition, it would collect in the gutter and contribute to drainage blockages.³⁹⁸ He maintained that he was qualified to express this view, and maintained this opinion under cross-examination.³⁹⁹

Location 4

258 This was a location near an air vent where there was rust on the roof. The damage consisted of rusted parts of the roof sheet below the air vent. Mr Thew noted that the pattern of damage was consistent with abrasive particles being blown out of the vent at high speed causing localised loss of the zincalume layer and subsequent corrosion. He stated that the corrosion also indicated that the vent probably no longer ejected material as the abrasive material would remove the corrosion as it occurred.⁴⁰⁰

Location 5

259 These were areas of water damage said to be consistent with evaporative coolers. Mr Thew recorded the corrosion pattern was consistent with a leaking pipe tricking water on the roof for an extended period. He noted that the pipe was fixed, but the damage remained. He noted that coolers often leak water onto roofs and that the water in Dubbo is known to be hard and relatively corrosive on galvanised steel. He observed that damage like that was typical where evaporative coolers have been located for a number of years.⁴⁰¹

Location 6

260 Mr Thew noted that this was an area of damage that had been identified by the Strata Manager, but he discounted that damage. The Strata Manager had suggested to him that the damage may have been caused by the heat from the oven below. At the time of inspection of this section of the roof, Mr Thew noted that the section of the roof was warm to touch but not noticeably warmer than

³⁹⁸ Exhibit A1, Tab 18 at 1039, 4.5.

³⁹⁹ T 91.39-92.11.

⁴⁰⁰ Exhibit A1, Tab 18 at 1035, 3.3.5.

⁴⁰¹ Exhibit A1, Tab 18 at 1036, 3.3.6.

other parts of the roof, nor was it in excess of what would have been expected for that time of day. He noted that the texture of the roof was well bonded with a slightly rough appearance which was consistent with the appearance of paint accumulation and not heat damage to a galvanised surface.⁴⁰²

Submissions as to Calculation of Damage

261 The calculation of damages for the roof made by the Plaintiff was based on square meterage of areas on a document titled Attachment D, annexed to Mr Walton-Smith's report:-⁴⁰³



262 This lies in the approximate boundaries of the First Defendant's tenancy.⁴⁰⁴

263 This was a document prepared by Mr Thew⁴⁰⁵ after the main report,⁴⁰⁶ and was provided to a Quantity Surveyor, Mr Walton Smith.

⁴⁰² Exhibit A1, Tab 18 at 1036, 3.3.7.

⁴⁰³ Exhibit A1, Tab 20 at 1155.

⁴⁰⁴ Exhibit 2.

⁴⁰⁵ T 98.24-.28.

⁴⁰⁶ T 98.36-.41.

264 The Defendants submitted that Attachment D to Mr Walton-Smith's report should be used for costing purposes in assessing what needs to be rectified on the roof. The Defendants observed that both Exhibit 3 and Attachment D used the same numbering system, but there were no numbers 2 or 6 on Attachment D.⁴⁰⁷ In short, the Defendant contended that in relation to the damage to the roof:-

- (1) The only possible damage is that shown on Attachment D;⁴⁰⁸
- (2) There is no claim made for water damage from evaporative coolers;⁴⁰⁹
- (3) There was only one area of Location 1 damage identified by Mr Thew on Attachment D, with Mr Thew agreeing that the second photo from his report (marked "No 1") was on an area of roof which was outside the tenancy marked by the red box in Exhibit 2.⁴¹⁰ In respect of the remaining part of Location 1, it argued the Defendants could not be responsible for that damage because Mr Thew could not say with certainty what caused that damage in circumstances where there was an evaporative cooler in the same location, and his evidence was that they were well known to cause leaks. It contended that discolouration was caused by water damage and the Plaintiff has not discharged its onus of proof to show the damage as caused by DPC;⁴¹¹
- (4) As there were no Location 2 or 6 on Attachment D, neither Defendant could be responsible for any such damage;⁴¹²
- (5) In relation to Location 3, the Defendants admitted that following a failure in a cartridge filter for the extraction system in its paint spray booth, paint residue landed on the roof in this area in 2013. However it relied on Mr Davis's evidence that this area has been largely cleaned up and any remaining residue did not corrode or otherwise harm the roof. Mr Davis had given evidence that the area is not damaged;⁴¹³
- (6) In relation to Location 4, the Defendant contended that there had been a failure in the cartridge filter for its abrasive cleaner in or about 2014 which removed Zincolume coating leaving an area without coating of approximately 30cm. Mr Davis had given evidence that he fixed that area utilising a plumber that the strata scheme use. He stated that a piece of trim was used, being a different colour to the trim deck and describing it as dark green. He stated it was done later in 2019 after he observed it for the first time;⁴¹⁴ and

⁴⁰⁷ Attachment D, Item 5 had 4 subitems, being 5a, 5b, 5c and 5d.

⁴⁰⁸ Defendants' Written Submissions at [80(a)].

⁴⁰⁹ Defendants' Written Submissions at [80(d)].

⁴¹⁰ T 88.46-.50.

⁴¹¹ Defendants' Written Submissions at [74].

⁴¹² Defendants' Written Submissions at [80(b)].

⁴¹³ Defendants' Written Submissions at [76].

⁴¹⁴ Defendants' Written Submissions at [77].

(7) In relation to Location 5, it submitted that it could not be responsible for any damage as this was due to evaporative coolers which were there since before 2004 and which formed part of the roof (i.e. common property) and therefore the Defendants could not be responsible for that.⁴¹⁵ It contended that the areas marked 5a, 5b, 5c, and 5d are where water has damaged the roof and there is no claim in respect of water damage. Beyond that, it contended that it was caused by water damage from the evaporative coolers that have been there since prior to the First Defendant taking the lease in 2004.⁴¹⁶

265 The Defendants contended that the area taken up by Location 5 would amount to about 40% of all the areas on Attachment D, such that the appropriate reduction of \$13,521 should be made. The Defendants noted that both the Court and the Plaintiff were receptive to such approximations rather than requiring Mr Walton-Smith to prepare a further report.⁴¹⁷

266 The Defendants thereafter submitted:-

82. The 1a area is about 10% of the total area. If the Court accepts that this should not be allowed this would be a further reduction of **\$2,253**.

83. The area marked area 4 is between 5 to 10% of the total area (say 7.5%). A reduction of this amount would be **\$1,690**.

84. The Defendants contend that the maximum that can be allocated for roof damage is:

- a. **\$9,578** if all the deductions above are allowed;
- b. **\$11,268** if the Area 5 and Area 1 deductions are allowed; or
- c. **\$13,521** if the area 5 deductions alone are allowed.⁴¹⁸

267 The Plaintiff submitted that although damages to leaks were not contained within its claim, there was no evidence before the Court to establish what the amount of damages would be when removing the claimed parts of the roof described in the Walton-Smith report as to areas 5(a) to (d). Further, that there was a factual overlap between the damages to the roof by garnet and water damage such that the two cannot be separated on the evidence of Mr Blair. In the event that the Court was against that submission, the Plaintiff submitted that removal of that part of the claim reduces the amount down by 30% to \$15,775.39.⁴¹⁹

⁴¹⁵ Defendants' Written Submissions at [80(c)].

⁴¹⁶ Defendants' Written Submissions at [78].

⁴¹⁷ T 101.48-102.30.

⁴¹⁸ Defendants' written submissions at [82]-[84].

⁴¹⁹ Plaintiff's Written Submissions at [58]-[59].

Consideration

- 268 The Plaintiff's particularised claim as costed by Mr Walton Smith was for \$22,536. This related to cleaning and locally repairing the damaged portions of the roof. It appears accepted that that particularisation relates only to the areas marked in Attachment D. It follows, and I accept, that as locations 1b, 2 and 6 are not in Attachment D no claim arises.
- 269 With respect to Location 1 in Attachment D, the evidence of Mr Thew in his report was that the wear on the protective surface on the steel was concentrated on the areas close to exhaust ducts much more than the general roof. He stated that the colour loss is limited to the troughs in the roof down to the gutter, consistent with the blast material collecting in the troughs and abrading the roof as rain water washes it down. This was consistent with the evidence of Mr Blair who stated that the water itself does not cause abrasion but rather it does so in combination with garnet. Mr Blair described his observation as consistent the effects of garnet being discharged. Both Messrs Blair and Thew affirmed the presence of garnet at the location. To the extent of any difference in the two opinions I prefer the evidence of Mr Blair which was logical and sensible. It follows that on the balance of probabilities I am satisfied that the damage in question was caused by the garnet.
- 270 I accept that Location 3 was damaged as was asserted by Mr Thew by the residue from the exhaust dust over the powder coating room. I do not accept Mr Davis's evidence to the contrary. I accept that Location 4 was damaged but repaired late in 2019, there being no evidence challenging Mr Davis' evidence to this effect. Whilst given in re-examination, the Plaintiff did not seek leave to further cross examine or call evidence in reply.⁴²⁰
- 271 I accept that Location 5 arises from water damage due to evaporative coolers which were there since before 2004 and which formed part of the roof as part of the common property. The Plaintiff conceded making no claim for water damage from evaporative coolers against the Defendants and I am not satisfied that the Plaintiff has established a causal connection with the pleaded activities of the Defendants.

⁴²⁰ T 221.24-222.44.

272 Deducting Locations 4, 5 and allowing Locations 1a and 3, I would allow 55% of the Plaintiff's claim in the sum of **\$12,395** (rounded up).

Residue claim

273 Mr Barrett in his affidavit indicated that residue caused damage to three sections of box guttering above the boundary between Lots 6-3, 6-10, 5-2 and 5-7, and over the last 5 years parts of the box gutters have rusted out and the Plaintiff has replaced them as required.⁴²¹ This evidence was admitted to a limitation under s 136 of the *1995 Act* as to Mr Barrett's perception.⁴²² It was contended that invoices paid by the Plaintiff for this amount were claimable,⁴²³ amounting to:-

Firm	Date	Description	Amount (incl. GST)
Porter's Plumbing and Gas Fitting	5 April 2016	Sealing and repairs to roof where leaking	\$286.00
Porter's Plumbing and Gas Fitting	2 December 2017	Sealing and repairs to roof leak in box gutter and replacing of ball valve where leaking and split	\$572.00
Jl Carpentry and Maintenance	16 March 2017	Supply of labour on storm damage/roofing	\$1,460.25

The total for the invoices claimed amounted to \$2,318.25 (including GST).

⁴²¹ Exhibit A1, Tab 6 at 45, [44].

⁴²² T 20.27-37.

⁴²³ Exhibit A1, Tab 7 at 189-91.

- 274 Mr Barrett was cross-examined in relation to his evidence.
- 275 In relation to the first invoice he acknowledged that it said nothing about a repair of rusted out box gutters.⁴²⁴ He further accepted that it said nothing about the location in which those leaks occurred.⁴²⁵
- 276 In relation to the second invoice, he accepted that it said nothing about the location at which those the repairs were carried out.⁴²⁶
- 277 Further, in relation to third invoice, Mr Barrett stated that this was not for a repair of the box gutter that had rusted out due to damage from the residue.⁴²⁷ He accepted that it was for work on the roof.⁴²⁸
- 278 Attention was drawn to Mr Barrett's affidavit⁴²⁹ which stated that the residue caused damage to three section of box guttering and the invoices related to their replacement.⁴³⁰ Mr Barrett stated that they fixed the box gutters and they may have fixed something else on the roof at the same time. He added that the invoice for work done on the roof included a leaking ball valve.⁴³¹
- 279 Mr Barrett accepted that there was a storm in Dubbo in early March 2017, and that the invoice from JI Carpentry dated 16 March 2017 was three days after that event.⁴³² He conceded that the invoice was in relation to work carried out to rectify damage from the large storm which had "golf ball sized hailstones", amongst other things.⁴³³ He acknowledged that the invoice did not say anything other than "supply of labour on storm damage/roofing".⁴³⁴ He rejected the suggestion that the invoice was a direct result of the storm damage three days previously.⁴³⁵ He stated that whether it was repairs for storm damage or fixing damage prior to the storm, it was work that was done.⁴³⁶

⁴²⁴ T 61.29-.31.

⁴²⁵ T 61.22-.24.

⁴²⁶ T 61.40-.42.

⁴²⁷ T 62.08-.11.

⁴²⁸ T 62.14; T 62.33-36.

⁴²⁹ Exhibit A1, Tab 6 at 45, [44].

⁴³⁰ T 62.19-.25

⁴³¹ T 62.38-.42.

⁴³² T 63.35-64.04.

⁴³³ T 64.09-.11.

⁴³⁴ T 64.16-.17.

⁴³⁵ T 64.33-.34.

⁴³⁶ T 64.36-.39.

Plaintiff's Submissions

280 The Plaintiff submitted that the subject invoices were claimed as a consequence of the presence of garnet on the roof and in the gutters of the premises, particularly given the evidence of Mr Gene Barrett that the build-up of garnet and powder costing dust had a significant detriment to the performance of the box gutter in a storm and removal would help the box gutter's performance in a storm.⁴³⁷

Defendant's Submissions

281 In relation to the first invoice, the Defendants submitted that there was no reference to particular lots and there was nothing in relation to replacing guttering. In relation to the second invoice, the Defendants submitted that there was no reference to particular lots and there was a reference to a ball valve which must be different. In relation to the invoice by JI Carpentry, the Defendants submitted that there was no reference to particular lots, the invoice refers to "storm" damage and that there was a major storm with hailstones 3 days before the invoice as accepted by Mr Barrett. Overall, the Defendants submitted that there was no evidence that the invoices were due to "damage from the residue" as alleged by Mr Barrett in his affidavit, and the Defendants were not responsible for this damage.⁴³⁸

Consideration

282 I am unable to be satisfied on the evidence that the invoices did relate to any pleaded claims. Mr Barrett's affidavit evidence asserted that they related to replacement of three sections of box guttering. The invoices make no reference to this and assert roof repairs without identifying to which Lot. The third invoice on its face follows consequences of storm damage not the pleaded activities of the First Defendant. The invoices were subject to the limitation earlier described. The minutes of the AGM of 19 August 2016 describe "sections of the box gutter have been replaced over the last week, and the box gutters have been cleaned." No claim has been advanced in this respect but it is not

⁴³⁷ Plaintiff's Written Submissions at [68] and T 64.24-.30.

⁴³⁸ Defendant's Written Submission at [86]-[88].

apparent how those repairs fit in with the further repairs advanced by the Plaintiff.

283 Overall, I am not satisfied that Mr Gene Barrett's evidence is reliable and together with the contents of the invoices, it has left me unpersuaded that the damage was caused by any negligence or nuisance of the part of the Defendants.

Charges for cleaning and replacing detectors

284 The Plaintiff has claimed an amount of \$32,748.35 for charging and cleaning and replacing detectors.

285 According to Mr Gene Barrett, in addition to the false fire alarm charges, there had been an increase in maintenance that was required to maintain the fire detectors in Lots 5 and 6. He stated that they needed to be cleaned much more frequently than those in other lots.⁴³⁹ Beyond that, Mr Barrett stated that some of the detectors had become so damaged that they needed replacing at far more frequent intervals than those in other lots. On his estimate, there had been a replacement of every detector in the DPC's premises at least once.⁴⁴⁰ Copies of the invoices said to be for "cleaning and replacement" of the fire detectors in DPC were located in the exhibit to Mr Gene Barrett's affidavit.⁴⁴¹

286 The Plaintiff provided an updated schedule of the amounts claimed. Those charges were all in respect of work performed by Orana Fire Protection which were described as:-⁴⁴²

Date	Page reference	Amount	Invoice Number
14 October 2011	GCB Affidavit 1 Tab 21 Page 338	\$1,980.00	29470

⁴³⁹ Exhibit A1, Tab 6 at 47, [59].

⁴⁴⁰ Exhibit A1, Tab 6 at 47, [60].

⁴⁴¹ Exhibit A1, Tab 7 at 333-48 and 351.

⁴⁴² MFI E, Tab B.

30 May 2012	GCB Affidavit 1 Tab 21 Page 339	\$2,491.50	30881
29 March 2013	GCB Affidavit 1 Tab 21 Page 342	\$1,801.80	290313
2 April 2013 ⁴⁴³	GCB Affidavit 1 Tab 21 Page 333 or 343	\$1,966.25	31997
2 May 2013	GCB Affidavit 1 Tab 21 Page 337	\$495.80	2/5/13
7 May 2013	GCB Affidavit 1 Tab 21 Page 336	\$247.50	32366
25 October 2013	GCB Affidavit 1 Tab 21 Page 335	\$858.00	33356
9 March 2015	GCB Affidavit 1 Tab 21 Page 346	\$2,543.75	36333
30 November 2015	GCB Affidavit 1 Tab 21 Page 345	\$1,930.50	37626
19 April 2016	GCB Affidavit 1 Tab 21 Page 347	\$2,860.00	40322
3 October 2016	GCB Affidavit 1 Tab 21 Page 334	\$495.00	39128
21 February 2017	GCB Affidavit 1 Tab 22 Page 351	\$7,177.50	40072

⁴⁴³ Noting this invoice was listed twice in MFI E, Tab B.

18 April 2017	GCB Affidavit 1 Tab 21 Page 341	\$3,146.00	40322
20 November 2017	GCB Affidavit 1 Tab 21 Page 348	\$4,754.75	41068

287 The total charges for cleaning and replacing the detectors totaled \$32,748.35. An invoice dated 2 December 2010 for \$1,860 was not included in the Plaintiff's Schedule.⁴⁴⁴

Plaintiff's Submissions

288 The Plaintiff's submitted that Orana Fire Protection issued the invoices due to the presence of garnet within them. It stated that given the findings of Mr Hughes in his report as to the presence of garnet, the cleaning of contaminated detectors was consistent with the works required on the detectors due to the presence of garnet. It asserted there was no basis but to award the sum sought by the Plaintiff given that work was still required according to Mr Hughes.⁴⁴⁵

Defendant's Submissions

289 The Defendants drew attention to a number of the features of the invoices:-⁴⁴⁶

- (1) None of the invoices identifies Lots 6 and 5 in the complex as being the cause of any replacements. This was conceded by Mr Barrett in his evidence;⁴⁴⁷
- (2) Each of the invoices are addressed to Lot 12/55 Wheelers Lane;
- (3) Mr Gene Barrett conceded that he has replaced detectors in various lots in the premises;⁴⁴⁸
- (4) With a small number of exceptions (which do not mention the Powder Coaters premises) no individual lots are identified;
- (5) It cannot be known what lots the invoices relate to;
- (6) There is no affidavit from anyone at Orana Fire Protection, the alleged source of the invoices, to explain them.

⁴⁴⁴ Exhibit A1, Tab 7 at 348.

⁴⁴⁵ Plaintiff's Written Submissions at [66].

⁴⁴⁶ Defendants' Written Submissions at [102].

⁴⁴⁷ T 75.01-.04 and T 75.25-.39.

⁴⁴⁸ T 75.10-.15.

290 The Defendants further submitted that these invoices can be contrasted to the Orana Fire Protection invoice that David Nugent paid.⁴⁴⁹ The invoice for \$7,177.50 was in fact rendered to Mr Nugent and specifically indicated that it was to “Powdercoaters”. Beyond that, the Defendants drew attention to the fact that the invoices be contrasted to those which the Plaintiff otherwise relied upon, which do not specifically indicate the location of which the work was carried out.⁴⁵⁰

291 The Defendants further draw attention to a number of specific entries on the invoice that indicate they do not relate to cleaning the detectors, in particular:-

451

- (1) Invoice #39128⁴⁵² dated 3 October 2016, is described as “Fix loop break, fault finding”;
- (2) Invoice #32366⁴⁵³ dated 7 May 2013, is described “Replace batteries in panel” and “fault find and replace detector in latex company office with spare detector”;
- (3) Invoice #29470⁴⁵⁴ dated 14 October 2011 is said to include “supply and install loop card”;
- (4) Invoice #30881⁴⁵⁵ dated 30 May 2012 is said to include “supply and install new detector to Makin Mattresses”;⁴⁵⁶ and
- (5) Invoice #40322⁴⁵⁷ dated 18 April 2017 is said to include “repair exit and emergency lighting.”

292 The Defendants point out that on the evidence of Mr Hughes,⁴⁵⁸ ionising detectors need to be replaced every 10 years. It submitted that this corresponded with the evidence of Mr Nugent who disagreed that the fire alarms being repaired were in relation to the presence of garnet, and suggested that it was normal maintenance of the fire system, which has got to

⁴⁴⁹ Exhibit A1, Tab 14 at 952.

⁴⁵⁰ Defendants’ Written Submissions at [103].

⁴⁵¹ Defendants’ Written Submissions at [104].

⁴⁵² Exhibit A1, Tab 7 at 334.

⁴⁵³ Exhibit A1, Tab 7 at 336.

⁴⁵⁴ Exhibit A1, Tab 7 at 338.

⁴⁵⁵ Exhibit A1, Tab 7 at 339.

⁴⁵⁶ This invoice also states “Clean contaminated detectors. Replace faulty detectors”.

⁴⁵⁷ Exhibit A1, Tab 7 at 341.

⁴⁵⁸ Discussed below at [305].

be cleaned everywhere as part of the maintenance schedule all over the building.⁴⁵⁹

293 Beyond that, the Defendants submitted that Mr Davis gave evidence that he did not recall anyone coming to replace detectors in his premises other than Mr Michael Theris, from Orana Fire Protection who replaced fire detectors in early 2017.⁴⁶⁰ Mr Davis was not challenged on this aspect of his evidence.

Consideration

294 The claim for maintenance was not specifically identified in the Plaintiff's Statement of Issues beyond the reference to "damage to the fire alarm system." No issue was taken in this regard.

295 The evidence of Mr Gene Barrett indicates that work done in relation to the fire detection system required replacements in various lots of the premises. The invoices do not identify the lots in which the replacements occurred. It is clear that Mr Nugent himself arranged for Orana Fire Protection to carry out work in relation to DPC premises, which he was invoiced \$7,177.50.⁴⁶¹ Mr Nugent's evidence that it was paid,⁴⁶² was not challenged. Moreover its contents referring to "Powdercoaters' is to be contrasted to the lack of a similar reference in the other invoices.

296 Mr Davis himself could not recall anyone coming to replace detectors in his premises, other than the occasion early 2017. Beyond that, Mr Theris in correspondence with Mr Nugent, which was tendered as part of the Plaintiff's case through the affidavit of Mr Gene Barrett, stated:-

The detectors around the site, except for your areas, are cleaned on a regular basis as the panel indicates how contaminated the detectors are.⁴⁶³

297 This seems to accord with Mr Davis' evidence. Beyond that, it is not apparent as to why Mr Nugent would have been required to carry out the work that he did through Orana Fire Protection in 2017. The Plaintiff has not identified any

⁴⁵⁹ T 206.24-.29. Defendants' Written Submissions at [106].

⁴⁶⁰ Exhibit A1, Tab 11 at 633, [261]; Exhibit A1, Tab 7 at 351.

⁴⁶¹ Exhibit A1, Tab 7 at 351.

⁴⁶² Exhibit A1, Tab 13 at 801, [93].

⁴⁶³ Exhibit A1, Tab 7 at 349.

such claim for cleaning detectors as recorded in the Minutes, referable to Lots 5 and 6 at a time when other claims were being advanced.

298 In the circumstances and bearing in mind the contents of the invoices as submitted by the Defendants, I am not satisfied that the Plaintiff has established that they arise out of the pleaded activities.

Different fire detection system

299 The Plaintiff's relied on the report of Mr Dylan Hughes of Dragon Project Engineers.⁴⁶⁴ Mr Hughes was an expert as to automatic fire alarm and detection systems. He carried out an inspection on 4 July 2018.⁴⁶⁵ In his report, Mr Hughes found that three smoke detectors in Lots 5 and 6 had been isolated, and there were a total of eight isolations in other tenancies.⁴⁶⁶

300 In his report, Mr Hughes stated:-

Dust contamination within smoke detectors.

In my opinion, the powder coat works carried out in tenancy 5 & 6 is producing substantial dust which is contaminating smoke detectors, causing them to malfunction and creating nuisance alarms.⁴⁶⁷

301 His report identifies that he examined three detectors within the tenancy in which he found dust contamination. These were loop 2 detector 27 and detectors 15 and 26.⁴⁶⁸

302 In the course of cross-examination, Mr Hughes conceded that he was not an expert in powder coating work or abrasive blasting.⁴⁶⁹ He stated, however, that with the sort of dust that he would expect to see in Dubbo area, if the dust was external, would be a different colour from what shown in the purlins above the detector. He could see that the dust, which is shown in the photograph in his report,⁴⁷⁰ as black with a bit of grey. He acknowledged that he wasn't exactly sure which dust was causing the contamination, but stated that this would be a matter for the expert who was taking samples from the dust for testing.⁴⁷¹

⁴⁶⁴ Exhibit A1, Tab 21 at 1161-1288.

⁴⁶⁵ Exhibit A1, Tab 21 at 1164, [2(e)].

⁴⁶⁶ Exhibit A1, Tab 21 at 1168-9.

⁴⁶⁷ Exhibit A1, Tab 21 at 1169.

⁴⁶⁸ Exhibit A1, Tab 21 at 1169 and 1171.

⁴⁶⁹ T 226.35-.37.

⁴⁷⁰ Exhibit A1, Tab 21 at 1171.

⁴⁷¹ T 226.45-227.10.

- 303 Mr Hughes then went on to state that the detection system within the premises was not compliant with Australian Standard 1670.01-1995, stating that the layout did not comply with the basic requirements, which required the distance between smoke detectors and adjacent thermal detectors to be approximately 10 metres. According to Mr Hughes, the maximum radius from a thermal detector was 3.6 metres and 5.1 metres for a smoke detector. In this instance, there was a short fall of 1.3 metres in terms of coverage.⁴⁷² In this respect, he stated that if the system was installed in 2003/2004 there would have been a period of around 8 years to get used to that Australian standard.⁴⁷³
- 304 Secondly, Mr Hughes observed that the system had been installed at the subject premises in accordance with a report prepared Dr Victor Shestopal.⁴⁷⁴ It was noted as option 2(B) of Dr Shestopal's report as an automatic smoke detection system and alarm system. Mr Hughes observed that in his opinion this meant that the main component of the system as proposed by the report is a smoke detection system with thermals only to be used in kitchens or the like. He noted that Lots 5 and 6 currently consists of both thermal and smoke detectors which in his opinion was non-compliant with the specific terms of the report.⁴⁷⁵
- 305 Thirdly, Mr Hughes observed that the smoke detectors 25, 26 and 27 in the tenancy were ionization type detectors which were allowed under the 1995 standard, however, were written of the subsequent standard (AS1670.1-2004). He stated that ionization smoke detectors are no longer used for commercial systems and even if ionization detectors were installed in 2003 they would only have a life span of 10 years and should have been replaced in 2013 with a photo electric type detector.⁴⁷⁶ In cross-examination, Mr Hughes stated that it is typically the Owners Corporation who install the fire systems.⁴⁷⁷ He stated that Dr Shestopal's report recommended specifically the use of smoke detector for early warning, except in kitchens or shower rooms where you can't use smoke

⁴⁷² Exhibit A1, Tab 21 at 1171.

⁴⁷³ T 227.26-36.

⁴⁷⁴ Exhibit A1, Tab 21 at 1165. Dr Victor Shestopal's report was annexed to Mr Hughes' report and marked as Appendix D. It appears as Exhibit A1, Tab 21 at 1181-5.

⁴⁷⁵ Exhibit A1, Tab 21 at 1171.

⁴⁷⁶ Exhibit A1, Tab 21 at 1171-2.

⁴⁷⁷ T 227.38-40.

detectors.⁴⁷⁸ He specifically stated that thermals did not comply with Dr Shestopal's intentions in this plans.⁴⁷⁹ He accepted that that was a matter for whoever is installing and rectifying the fire detection system for each annual fire safety statement.⁴⁸⁰ He stated that whilst it was possible that the thermals were installed at a later date, whoever installed or modified that system would need to ensure they complied with the Australian Standards.⁴⁸¹

306 Mr Hughes was of the view that the existing smoke detection systems within DPC should be redesigned to a VESDA aspirated type detection system, which drew samples of air from throughout the tenancy which is then monitored by a laser type smoke chamber.⁴⁸² This would involve a system of pipes which would draw samples of air which is then monitored by a laser type smoke detector.⁴⁸³ He accepted that the current system was not suitable to powder coating applications.⁴⁸⁴ Mr Hughes indicated that the installation of the new system would reduce the number of nuisance alarms provided the installation is designed and implemented correctly. As far as costing is concerned, Mr Hughes opined that the measures would cost some \$41,000+GST (save \$45,100 incl. GST).⁴⁸⁵

307 During the course of cross-examination, Mr Hughes was informed that the First Defendant was no longer operating in the complex and had vacated the premises in April 2019.⁴⁸⁶ His recommendation for the VESDA system was based on the fact that DPC was operating.⁴⁸⁷

308 Mr Hughes went on to state in his report:-

The system is not damaged as such, it is affected by the dust resulting from current operations. The general operations at ground level are clean and tidy, however, the powder coating process creates a fine dust which has settled into the smoke and thermal detectors located at roof level and also within the steel purlins, which support the roof (refer to photos in section 7 above). The filter gauze on smoke detectors is not fine enough to prevent this type of dust

⁴⁷⁸ T 228.13-.18.

⁴⁷⁹ T 228.20-.25.

⁴⁸⁰ T 228.26-.30.

⁴⁸¹ T 227.42-228.08.

⁴⁸² Exhibit A1, Tab 21 at 1172, [8(a)].

⁴⁸³ T 229.08-.10.

⁴⁸⁴ T 229.12-.14.

⁴⁸⁵ Exhibit A1, Tab 21 at 1172, [8(f)].

⁴⁸⁶ T 229.29-.32.

⁴⁸⁷ T 229.40-.45.

affecting point type smoke detectors and is therefore unsuitable for this application.⁴⁸⁸

309 This was further reiterated later on in his report, stating:-

The system is not damaged as such, it is affected by the dust resulting from current operations.⁴⁸⁹

Plaintiff's Submissions

310 The Plaintiff submitted that the amount claimed was derived from the report of Mr Hughes, and notwithstanding the absence of tenants in Lots 6 and part of Lot 5, the best evidence the court had, of course, was Mr Hughes' total. It was argued that Mr Hughes did not concede that there would be no costs involved in the replacement required for the fire alarm system, but held that a replacement was required. It contended that it was a matter for the Defendants to convince the court, particularly in the absence of contrary evidence, as to what the replacement costs would be outside of the estimates provided by Mr Hughes.⁴⁹⁰

Defendants' Submissions

311 In the course of written submissions, the Defendants argued that the "current use application" ceased in April 2019 and accordingly, Mr Hughes prescription for a \$45,000 system was no longer relevant. In particular, the tenancy could be operated by a large range of tenants, many if not all of which would not require such a system. Even if this was the case, it would be a matter between the particular tenant/owner of the Lot and the Plaintiff. It argued that given the fact that the premises were currently empty, the laser system would not be required, and it would be unlikely such a system would be required for any future uses (such as hospitality or furniture storage), and a point detector would be sufficient.⁴⁹¹

Consideration

312 The evidence of Mr Hughes establishes that the system he has recommended, and on which the Plaintiff has based its claim, was not necessary in the circumstances where the First Defendant is no longer occupying and using the

⁴⁸⁸ Exhibit A1, Tab 21 at 1172a.

⁴⁸⁹ Exhibit A1, Tab 21 at 1172a.

⁴⁹⁰ Plaintiff's Written Submissions at [69]; T 304.36-.45.

⁴⁹¹ Defendant's Written Submissions at [117]; T 230.15-.30.

premises. Beyond that, Mr Hughes' report identified that the system is not damaged as such and was simply been affected by dust. Ultimately, if a replacement is to be made to the fire detection system, it would be dependent upon what use the premises are subsequently put to, and moreover, require compliance with the relevant Australian Standards. In all of the circumstances the Plaintiff has not made out this aspect of its claim.

Payment of fire brigade call outs and false alarm charges in respect of Lot 6 and Part of Lot 5

Plaintiff's Submissions

313 The Plaintiff contended that based on the evidence of Mr Gene Barnett and Mr Blair, the Court would be satisfied that the fire alarms were contaminated by garnet.

314 The Plaintiff contended that the combination of the materials referred to by Mr Gene Barnett was the basis for an Updated Schedule of Damages⁴⁹² which broke down the fire alarm charges into three categories, being:-

- (1) Fire alarm charges for Lots 5 and 6: \$41,212.50
- (2) Fire alarm charges occurring in Lots 5, 6 and the immediate neighbouring lots (Lots 2, 3, 4, 7 and 10): \$91,258.00⁴⁹³
- (3) Fire alarm charges in total: \$114,569.50.

315 The Plaintiff submitted that the Court could and should find that the total sums associated with the false alarms should be paid by the Defendants given that:-

- (1) The False alarms have been attributed to the presence of garnet within the alarm system;
- (2) The evidence that the garnet had drifted from First Defendant's former premises into neighbouring lots, not just on the roof; and
- (3) The increased frequency of the false alarms during 2016 and 2017 which the Plaintiff submitted was due to the construction work undertaken within the First Defendant to reallocate the wall between Lot 5 and 6.⁴⁹⁴

⁴⁹² MFI E.

⁴⁹³ MFI E incorrectly calculated this as \$91,245.00.

⁴⁹⁴ Plaintiff's Written Submissions at [65].

Defendant's Submissions

316 The Defendants pointed out that none of the invoices identified Lots 5 and 6 in the complex as being the cause of any alarms; they were addressed to Lot 12/55 Wheelers Lane; no individual lots are identified; and it could not be known what lots the invoices relate to. In relation to the spreadsheet allegedly prepared by Romteck,⁴⁹⁵ the Defendants submitted:-

- (1) There is no explanation of its provenance or how it was prepared;
- (2) A large number of the entries are incomplete;
- (3) There is no uniformity in the document;
- (4) It seems to have been prepared in a piecemeal fashion; and
- (5) Critically, there is no one from Romteck who has given evidence to attest to the fact that it is correct or to explain the spreadsheet.⁴⁹⁶

317 In the course of oral submissions, the Defendants conceded that the spreadsheet documents came from subpoenaed material, but otherwise reiterated its earlier submissions:-

Then I've discussed on the following page of my submissions at p 29 - we can probably go to para 98 on p 30 of the submissions - the reference in para 58 to a spreadsheet at tab 20 which is allegedly prepared by Romteck. We say that document has a number of deficiencies. There is no explanation of its provenance or how it was prepared. We accept that it came - or a version of it was part of a subpoena packet but there is no explanation of who prepared the document, how it was prepared, what it was meant to reflect, especially given the following matters; a large number of entries are incomplete, there's no uniformity in the document, it seems to have been prepared in a piecemeal fashion and critically there is no one from Romteck who has given evidence to attest to the fact that it's correct or to explain the spreadsheet, given that it is in such a piecemeal fashion. We say your Honour would give it little, if any, weight without that sort of proper explanation for it.⁴⁹⁷

318 The Defendants further submitted that there was no evidence that the invoices had been paid by the Plaintiff at any time or were required to be paid. Accordingly, it submitted Plaintiff had failed to adduce any evidence that the Owners Corporation had suffered any loss in this regard.⁴⁹⁸

319 With respect to the charges claimed by the Plaintiff, the Defendants submitted that it could not have any liability in respect of the total false alarms "for the

⁴⁹⁵ Exhibit A1, Tab 7 at 326-332.

⁴⁹⁶ Defendants' Written Submissions at [99].

⁴⁹⁷ T 290.18-.30.

⁴⁹⁸ Defendants' Written Submissions at [93]-[94].

whole complex” (\$114,569.50) or the false alarms for lots 5 and 6 in conjunction with the neighbouring lots (\$91,245). It was submitted that there was no evidence of spread of garnet or dust within the other lots that has activated fire alarms in those lots. Further, there was no evidence taken from or anywhere near the fire detectors in the neighbouring lots, and there was no evidence at all that any fire alarms in any neighbouring lots were caused by the First Defendant’s conduct. As far as Lots 5 and 6 are concerned, attention was drawn that most of Lot 5 is the business operated by the Second Defendant, which since 2013 has been “Reward Hospitality” and before that was the Makin Mattresses Factory. It was contended that it was not possible to consolidate all charges for Lot 5 and Lot 6 in this way.⁴⁹⁹

320 The Defendants further pointed out that an attempt was made by the Plaintiffs to pass on to the owners of Lots 4, 5 and 6 false alarm charges over the last 6 months “due to construction works being undertaken.”⁵⁰⁰ This was at the meeting dated 7 September 2016. The Defendant pointed out that there was no claim in the present proceedings that the false alarm charges were due to construction work, nor was there any claim in those Minutes in respect of false alarm charges in respect of the neighbouring lots.

Consideration

321 Whilst Mr Gene Barrett stated that from 2008 onwards he also saw substances that he considered emanated from DPC in neighbouring lots, particularly Lots 2, 3, 5, 7 and 10 (which were adjacent to DPC), fire alarm charges emanating from neighbouring lots were neither documented in the minutes nor incorporated in the claim of 7 September 2016 which was said to relate to construction works. The Plaintiff advanced little evidence other than Mr Gene Barrett’s assumption that DPC’s activities triggered the false alarms elsewhere in the Property.

322 I have noted the contents of the correspondence from Orana Fire Protection, dated 13 December 2016 stating that the activities at the powder coaters were setting the detectors off and also detectors in the adjacent lot. The letter also

⁴⁹⁹ Defendants’ Written Submissions at [96]-[97].

⁵⁰⁰ Exhibit A1, Tab 7 at 176.

identified the alarms being set off in other lots but didn't identify the source as DPC's activities. In respect of the affected lot, it was recommended that the walls be extended so contaminants created by the powder coaters do not intrude into the areas next door and set them into alarm. Mr Hughes who carried out an inspection on 4 July 2018 does not appear to have examined alarms in neighbouring lots. Apart from the location of garnet in the neighbouring tunnel, Mr Blair didn't examine neighbouring lots, let alone identify the cause of any fire alarms being triggered

- 323 The author of the correspondence of 13 December 2016 from Orana Fire Protection and the context in which it was written was not identified. The observations made appear to be limited to the neighbouring Latex factory which I infer is a reference to the Lots occupied by the Second Defendant and Mr and Mrs Nugent.
- 324 The correspondence of 11 April 2017 from Mr Theris was objected to by the Plaintiff as an annexure to Mr Nugent's affidavit of 19 July 2016. For reasons given on 19 March 2020, I held that the correspondence was inadmissible by reason of s 69(3)(a) of the *1995 Act*. At the time the objection was being dealt with, neither party drew attention to the fact that the correspondence had already been admitted into evidence without objection through the reading of the affidavit of Mr Gene Barrett dated 3 August 2018.⁵⁰¹ After I reserved judgment, my Associate wrote to the parties on 14 May 2020, drawing the matter to their attention and inviting any further submissions by 18 May 2020. The Defendants submitted that the emails should, in the circumstances, remain admitted but advanced no further submissions on the matter. The Plaintiff's primary position was that the relevant correspondence should be excluded as it is indistinguishable from that which was ruled inadmissible.⁵⁰² Alternatively, it submitted that if admitted, it would carry little to no weight as it is entirely unreliable and must be irrelevant to the adjudication of the facts in the proceedings.⁵⁰³

⁵⁰¹ Exhibit A1, Tab 6 at 47, [62] and Tab 7 at 349.

⁵⁰² Plaintiff's Submissions in Evidential issues in dated 18 May 2020 at [7].

⁵⁰³ Plaintiff's Submissions in Evidential issues in dated 18 May 2020 at [10].

- 325 The document in question was admitted into evidence at the instigation of the Plaintiff. It remains in evidence. However, its weight must be assessed having regard to the matters which informed my ruling of 19 March 2020, its context with other evidence and the fact that the Defendants advanced no substantive submissions based on it. That letter appears not to be addressed to anything concerning neighbouring properties except to refer that “sensors were going into alarm and could not be identified as they had deteriorated and the indicator lights were no longer showing.”
- 326 In the circumstances I cannot determine the extent of contaminants in any fire alarms in neighbouring lots emanated from the First Defendant’s operations, let alone that this led to a triggering of false fire alarms. This part of the claim fails.
- 327 In the context of Lots 5 and 6, the Plaintiff has prepared a schedule listing 32 claims of alarms said to set off in Lots 5 and 6. These have been claimed by reference to the documents earlier described. The corresponding contents of each document have been collated in the attached spreadsheet that I have prepared for the purposes of comparison (Annexure A). With reference to MFI E, each call out date has been allocated a number. For instance, the claim for 26 September 2012 is Claim 1; the claim for 30 November 2012 is Claim 2; and so on and so forth.
- 328 The primary document going to the charges appears to be the records of Romteck Grid Pty Ltd and the associated Fire and Rescue NSW Fire Alarms Records Management Systems Billing advices.⁵⁰⁴ I have assumed that the relevant costs claimed by the Plaintiff have been derived by dividing the total reimbursement and administration fees by the number of charges. These documents do not indicate the location of the detector triggering the fire alarm.
- 329 The descriptions provided in the invoices appear to be generic descriptors for the call out referable to a code. It shows:

Code	Description	Total
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⁵⁰⁴ Exhibit A1, Tab 7 (15).

732	Smoke detector suspected malfunction e.g. continuous or intermittent fault in detector or FIP (defective apparatus)	7
733	Heat detector suspected malfunction e.g. continuous or intermittent fault in detector or FIP (defective apparatus)	3
738	Alarm system suspected malfunction	1
752	Heat detector operated - no fire - e.g. heat from oven; dryer; heater; hair straightener etc.	5
758	Simulated conditions - e.g. incense; candles; sparklers; smoke machine; smokers materials etc	3
765	Alarm activation due to workers/occupiers activities	9
766	Alarm activation due to poor building maintenance - e.g. dust; cobwebs; damage; insects; etc.	1
772	Fire Indicator Panel active; Alarm Signalling Equipment not activated	1

330 Notably only one claim, being Claim 12 (4 August 2016), is said to be due to poor building maintenance eg dust cobwebs; damage; insects; etc but goes no further than this.

331 The records of the main panel of the fire detection systems are not comprehensive and only embrace Claims 1, 2, 3, 4, 15, 16, 17, 18, 21, 22, 23, 24, 25, 31 and 32. However, in each instance the times do not align with records of NSW Fire and Rescue. In Claims 31 and 32 there was no record of an invoice from NSW Fire and Rescue tendered. Furthermore, Claim 3 marks a case where the detector is said to be in Lot 4, which is acknowledged in MFI E.

In relation to Claim 23, MFI E identifies a reference to the relevant fire alarm log reference.⁵⁰⁵ However, that reference is incorrect, and there are a number of fire alarms for that Claim date (10 April 2017) in the fire alarm detection log.

332 I accept the Defendants' arguments in respect of the Romteck spreadsheet. It is not apparent as to when, how and in what circumstances that document came to be prepared. Whilst Mr Gene Barrett has stated that based on data from Fire and Rescue NSW, which showed the fire alarms in the complex and charges from 2005 to 31 May 2018, there is nothing in the Fire and Rescue documents to indicate where the detection source was derived. A specific detector is only indicated in Claims 9, 18, 19, 22, 23, 25, 27 and 28, although there is no claim in the case of 27 and 28.⁵⁰⁶ Claim 9 is also referred to as being in the rear of the 'Reward' storage area. Claims 14, 16 and 18 have incomplete details of the detector location. Claim 29 indicates that it is not in either Lots 5 or 6 but rather in a place identified by reference to Exhibit B as "Nagles." Of the claims lacking a detector indicator, Claims 4, 6, 8, 11, 13, 17, 20, 24, 31, and 32 do not identify "Powder coaters".

333 In the end I can have no reliance on this document to indicate the source of the activation, let alone the cause. Mr Hughes's relied on material from Romteck to suggest the alarms were malfunctioning and creating nuisance alarms. That assumption was based on the information Romeck schedule annexed to Mr Gene Barrett's affidavit.⁵⁰⁷ Whilst I was advised that the material supplied to Mr Hughes was different, being a reduced version of entries with two extra columns, in the form presented to the Court it was unreadable.⁵⁰⁸ In the circumstances, I have had to proceed on the version in the annexure to Mr Barrett's affidavit as containing the content of the material Mr Hughes relied on.⁵⁰⁹ Beyond that Mr Hughes, did not undertake any testing to support his conclusion. To the extent Mr Hughes' opinion rests on the Romteck schedule I cannot accept it.

334 Accordingly this part of the Plaintiff's also fails.

⁵⁰⁵ Referencing Exhibit A1, Tab 18 at 298, Event No. 298.

⁵⁰⁶ MFI E recognises this, indicating the cost for these entries as "Nil".

⁵⁰⁷ Exhibit A1, Tab 7 (20).

⁵⁰⁸ Exhibit A1 Tab 21 at 1283-4.

⁵⁰⁹ See T 41.21-43.111.

Summary

335 The Plaintiff has succeeded in its claim for roof repairs in the sum of \$12,395.00 but failed in respect of the other components of its claim.

ORDERS

336 For these reasons the Court orders:

- (1) Verdict and judgment for the Plaintiff in the sum of \$12,395.00
- (2) The Defendants are to pay interest on the said sum from 17 November 2017 to date in accordance with s 100 of the *Civil Procedure Act 2005* (NSW) and District Court Practice Note 15 clause 5
- (3) I will hear from the parties as to costs.

[Annexure A \(19225, xlsx\)](#)

Note: Formatting and typographical errors have been amended since the Judgment was handed down on 16 July 2020.

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