



Supreme Court
New South Wales

Case Name: Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)

Medium Neutral Citation: [2022] NSWSC 624

Hearing Date(s): 11 – 12 April 2022; further written submissions 13, 18, 22 and 26 April 2022

Decision Date: 19 May 2022

Jurisdiction: Equity - Technology and Construction List

Before: Stevenson J

Decision: Second defendant liable to pay damages to plaintiff

Catchwords: BUILDING AND CONSTRUCTION – malicious damage to property – action for trespass – standing of plaintiff to bring action for trespass – whether plaintiff had exclusive possession of the property – whether plaintiff entitled to recover loss for damage to the reversion – measure of damages for damage to the reversion – whether second defendant caused the malicious damage – whether second defendant carried out construction work for the purpose of the Design and Building Practitioners Act 2020 (NSW) – whether second defendant acted in breach of his statutory duty of care under that Act in relation to that construction work

Legislation Cited: Building Products (Safety) Act 2017 (NSW)
Community Land Management Act 2021 (NSW)
Corporations Act 2001 (Cth)
Design and Building Practitioners Act 2020 (NSW)
Design and Building Practitioners Regulation 2021 (NSW)
Environmental Planning and Assessment Act 1979 (NSW)

Evidence Act 1995 (NSW)
Home Building Act 1989 (NSW)
Local Government Act 1993 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited:

Beaudesert Shire Council v Smith (1966) 120 CLR 145; [1966] HCA 49
Birtchnell v Fred Walker & Co Pty Ltd (1930) Argus LR 176
Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (2008) 166 FCR 494; [2008] FCAFC 38
Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34
Concrete Constructions (NSW) Pty Ltd v Australian Building Construction Employees' and Builders' Labourers' Federation (1988) 83 ALR 385; [1988] HCA 485
De Gruchy v The Owners – Units Plan No 3989 [2020] ACTSC 65
Gagner Pty Ltd t/as Indochine Cafe v Canturi Corporation Pty Ltd [2009] NSWCA 413
Georgeski v Owners Corporation – Strata Plan 49833 (2004) 62 NSWLR 534; [2004] NSWSC 1096
Goodrich Aerospace Pty Ltd v Arsic (2006) 66 NSWLR 186; [2006] NSWCA 187
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8
Jones v Llanrwst Urban District Council (1911) 1 Ch 393
Joyner v Weeks [1891] 2 QB 31
Livingstone v Rawyards Coal Co (1880) 5 App Cas 25
Pollack v Volpato [1973] 1 NSWLR 653
Shelfer v City of London Electric Lighting Company [1895] 1 Ch 287
Shell Company of Australia Ltd v Bailey & Drysdale [1980] WAR 233
Smiley v Townshend [1950] 2 KB 311
Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co [1924] 20 Ll L Rep 140
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118; [1966] HCA 40

Texts Cited:

New South Wales Legislative Council, Parliamentary Debates (Hansard), 2 June 2020

Category: Principal judgment

Parties: Goodwin Street Developments Pty Ltd as trustee for
Jesmond Unit Trust (Plaintiff)
DSD Builders Pty Ltd (in liq) (First Defendant)
Daniel Roberts (Second Defendant)

Representation: Counsel:
N J Kidd SC (Plaintiff)
L Chan with A Lim (Second Defendant)

Solicitors:
Richard Green Construction Lawyers (Plaintiff)
CCS Legal (First Defendant)
Ai Strategic Lawyers (Second Defendant)

File Number(s): 2018/260981

JUDGMENT

- 1 The plaintiff, Goodwin Street Developments Pty Ltd is the owner of land in Jesmond, New South Wales, located close to the campus of the University of Newcastle.
- 2 On 10 July 2017, Goodwin entered into a building contract with the first defendant, DSD Builders Pty Ltd, to construct three residential boarding houses, intended for university student accommodation, on the site.
- 3 DSD, now in liquidation, was a company whose sole director, Ms Angela Sendjirdjian, was the fiancée (and later wife) of the second defendant, Mr Daniel Roberts.
- 4 Goodwin alleges that Mr Roberts was the representative of DSD who negotiated the building contract with Goodwin, that Mr Roberts administered the building contract on behalf of DSD and controlled the carrying out of the construction work on the site on behalf of DSD.
- 5 At the time the works commenced in July 2017, DSD employed a licensed supervisor at the site, Mr Stuart Johnstone. However, when Mr Johnstone left the employment of DSD in late August 2017, he was not replaced and, Goodwin contends, the work was thereafter supervised only by Mr Roberts.

- 6 In early 2018, disputes arose between Goodwin and DSD relating to defective building works and the progress of the works (among other matters).
- 7 On 2 March 2018, there was a “site meeting” between Mr Roberts, directors of Goodwin, including Mr Jeffrey Stokes, and persons claiming to represent creditors of Mr Roberts. At this meeting, the creditors’ representatives made demands and threats concerning money allegedly owing to their clients by Mr Roberts. I return to this below.
- 8 Later on 2 March 2018, Goodwin served a Notice to Remedy Defaults on DSD pursuant to the building contract.
- 9 DSD did no further work at the site after 2 March 2018.
- 10 On 19 March 2018, Mr Stokes attended the site and observed substantial damage to the buildings on the site and that doors, windows, stairs and other items that had previously been installed in the buildings were missing. Mr Stokes reported the matter to the police.
- 11 Also on 19 March 2018, Goodwin served a notice on DSD terminating the building contract with immediate effect.
- 12 Goodwin commenced these proceedings against DSD in August 2018. Mr Roberts was added as a second defendant on 11 April 2019.
- 13 In early 2021, DSD was ordered to be wound up in insolvency and a liquidator was appointed. The proceedings against DSD have been stayed since that time by operation of s 471B of the *Corporations Act 2001* (Cth).
- 14 What remains to be determined are the claims made by Goodwin against Mr Roberts.
- 15 Goodwin claims that Mr Roberts:
 - (a) caused the damage to the buildings that Mr Stokes observed on 19 March 2018 and removed the materials, fixtures and fittings that had been incorporated into the buildings that Mr Stokes then observed were missing; and
 - (b) carried out “construction work” on the site for the purposes of s 37 of the *Design and Building Practitioners Act 2020* (NSW) (the “DBP Act”) and acted in breach of his statutory duty of care under s 37 of that Act to avoid economic loss caused by

identified defects in the buildings on the Land arising from that construction work.

- 16 Goodwin claims some \$586,000 from Mr Roberts on account of the first claim, being the cost of making good the damage caused to the site in March 2018; and some \$300,000 from Mr Roberts being the cost to rectify the building defects. There is no dispute about these figures.
- 17 Mr Roberts did not serve an affidavit and did not give evidence in response to Goodwin's claims.

Decision

- 18 I find that Mr Roberts did cause the damage and did remove the material the subject of Mr Stokes's observations.
- 19 I find that Mr Roberts did carry out "construction work" for the purposes of s 36 of the DBP Act and acted in breach of his duty of care under s 37 of that Act.
- 20 Accordingly, Mr Roberts is liable to pay Goodwin the cost of making good the damage and the cost to rectify the defects.

The damage caused at the site in March 2018

- 21 There is no dispute that between 2 and 19 March 2018 *someone* maliciously damaged the development works at the site, and removed materials, fixtures and fittings.
- 22 The damage and the removed items are described in an Excel spreadsheet prepared by Mr Todd Corbett, a quantity surveyor who was also the contract administrator of the project.
- 23 The damage included:
 - (a) circular saw cuts through structural floor beams and wall structures;
 - (b) drill holes in all the valleys of the roofing iron box gutters;
 - (c) concrete inserted in the tops of the sewer pipes;
 - (d) drill holes in wall, water and sewer pipes;
 - (e) power cables rendered unserviceable;
 - (f) internal wall sheeting damages with hole punctures;
 - (g) holes punched into external cladding and ceilings; and

- (h) damaged bathroom waterproofing.
- 24 The items missing included:
- (a) most internal doors and some external aluminium doors;
 - (b) most sliding glass windows;
 - (c) internal stairs; and
 - (d) skylights.
- 25 As I have said, there is no dispute that the cost to repair the damage and replace the missing items is in the order of \$586,000.

Goodwin's standing to sue for trespass

- 26 It is Goodwin's case that this damage was caused by Mr Roberts.
- 27 Goodwin alleges that Mr Roberts is, relevantly, "liable to Goodwin in trespass to land".
- 28 Goodwin claims that Mr Roberts "is liable to pay damages to Goodwin for the cost of rectifying the damage done" to the works and "for the cost of replacing the converted materials, fixtures and fittings".

Was Goodwin entitled to exclusive possession of the Land at the time the damage was done and items removed?

- 29 Mr Kidd SC, who appeared for Goodwin, submitted that Goodwin had, at the relevant time, a right to exclusive possession of the site and was thereby entitled to bring proceedings for trespass.¹
- 30 Consideration of whether, at the relevant time, Goodwin was entitled to exclusive possession of the site requires consideration of the terms of the building contract between Goodwin and DSD.
- 31 In Item 3 of Schedule 1 of the contract, under the heading "Contract Information", it was stated that Goodwin would not "remain in occupation" of the site.
- 32 The contract also provided that:
- (a) Goodwin give to DSD "possession of the site in accordance with this contract"² within 10 working days of specified events;³

¹ Referring to the observations of Barrett J in *Georgeski v Owners Corporation – Strata Plan 49833* (2004) 62 NSWLR 534; [2004] NSWSC 1096 at [39]-[43] and [91]-[95].

- (b) DSD commence works within 10 business days of “being given possession of the site”,⁴
- (c) from the time that DSD was given “possession of the site” until the date on which the architect issued a notice of practical completion,⁵ DSD bear the “risk of loss, or damage to” the works;⁶
- (d) DSD give Goodwin “access on reasonable terms to the site”⁷ including access “at any time to inspect the works”,⁸ and
- (e) if Goodwin terminated DSD’s engagement under the relevant provisions of the contract, Goodwin “may take possession of the site and exclude [DSD] from it”.⁹

33 The contract provided that if, contrary to the situation here, Goodwin did “remain in occupation” then the reference in these provisions to “possession” would be replaced with the words “access to”.¹⁰

34 The contract thus made reference both to the concepts of “occupation” and to “possession”. Goodwin was not to be in “occupation”; and was to give DSD “possession”.

35 Morling J considered a contract containing similar provisions in *Concrete Constructions (NSW) Pty Ltd v Australian Building Construction Employees’ and Builders’ Labourers’ Federation*¹¹ and concluded:

“In my opinion these provisions should be construed as giving exclusive possession of this site to the applicant while it is constructing the building upon it. Common sense dictates that a builder of a large commercial building in the centre of Sydney must of necessity be given exclusive possession of the building site. This is not to say, of course, that the proprietor might not stipulate that, although having exclusive possession of the site, the builder shall permit restricted access to other persons.”¹²

36 Nonetheless, Mr Kidd submitted that “what was granted under the Building Contract was a contractual right for DSD to occupy the Site during the Building

² Clause A4.1(c).

³ Clause F1.1.

⁴ Clause A2.1(a).

⁵ That had not been done when the damage was done to the building.

⁶ Clause D1.4(a).

⁷ Clause F2.1(a).

⁸ Special Conditions – Schedule 2a.

⁹ Clause Q3.1.

¹⁰ Owner Occupier Special Conditions – Schedule 2b.

¹¹ (1988) 83 ALR 385; [1988] HCA 485.

¹² At 391.20.

Contract for the purpose of carrying out the works”¹³ but that this was “not a right to exclusive possession”; and that Goodwin “remained entitled to exclusive possession”.

37 Mr Kidd pointed out that whereas the contract in this case obliged Goodwin to give DSD “possession” of the site, the corresponding provision in *Concrete Constructions* provided that “the builder shall, upon the proprietor making the site available to him, have *legal possession* of the site for the purpose of carrying out his obligations under this agreement ...” (emphasis added).¹⁴

38 I see that as being a distinction without a difference.

39 Mr Kidd did not otherwise explain how his submission could be reconciled with the terms of the contract to which I have referred.

40 DSD remained contractually entitled to possession of the site until Goodwin terminated the contract on 19 March 2018 and thereby became entitled to retake possession of the site pursuant to the provision to which I have referred at [32(e)] above.

41 In those circumstances, I think Ms Chan, who appeared with Dr Lim for Mr Roberts, was correct to submit that, at the time the damage was done to the property, Goodwin was not entitled to exclusive possession of the site.

Goodwin’s rights as a reversioner

42 In those circumstances, Ms Chan submitted:

“Until the contract was terminated, [Goodwin] did not have an immediate right to possession. [Goodwin] therefore has no cause of action in trespass or conversion for any of the events prior to 19 March 2018. Any action in trespass or conversion lies with [DSD].”

43 The implication of Ms Chan’s submission is that as DSD took no action in relation to the trespass while it did have exclusive possession, Goodwin, as the owner of the site, is without a remedy.

44 That would be a strange result.

45 It does not, in my opinion, reflect the correct legal position.

¹³ Emphasis in Mr Kidd’s submission.

¹⁴ At 391.

- 46 Although Goodwin did not have exclusive possession of the site at the time the damage was done to its property in March 2018, it was a reversioner by reason of the fact it would, in due course (whether because the works were completed or because it exercised entitlement to retake possession) become entitled to exclusive possession of its property.
- 47 In the circumstances that existed when the damage was done, Goodwin was in a position very shortly to obtain exclusive possession of the site and thus fall into possession of the reversion. It did so a number of days later, on 19 March 2018, when it terminated the building contract, and re-took possession.
- 48 A reversioner, including a lessor who has leased its property to a lessee, or an owner who has temporarily given another (such as a builder) exclusive possession of its property, is entitled to bring “an action on the case for trespass” or an action “of trespass on the case”,¹⁵ if during that other person’s possession of the property, a trespass occurs resulting in “permanent injury to the reversion”,¹⁶ or that will “necessarily affect the reversioner’s interest when the property falls into possession”.¹⁷
- 49 Permanent injury to the reversion in this context means “such as will continue indefinitely unless something is done to remove it”.¹⁸
- 50 The “injury” done on the site in this case was thus “permanent” in this sense.
- 51 Ms Chan submitted that the measure of damages to permanent injury to the reversion is the diminution in the value of the reversionary interest¹⁹ and that she was not in a position to meet such a case. In any event, Goodwin had not adduced evidence of any diminution in value to its property. Rather, its evidence was directed to the cost of repair.

¹⁵ *Beaudesert Shire Council v Smith* (1966) 120 CLR 145 at 152; [1966] HCA 49 (Taylor, Menzies and Owen JJ).

¹⁶ For example, *Shell Company of Australia Ltd v Bailey & Drysdale* [1980] WAR 233 at 236.20 (Lavan SPJ) and at 242.50 (Brinsden J).

¹⁷ *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287; cited in *De Gruchy v The Owners – Units Plan No 3989* [2020] ACTSC 65 (McWilliam AsJ).

¹⁸ *Jones v Llanrwst Urban District Council* (1911) 1 Ch 393 at 404 (Parker J); applied by the Full Court of the Supreme Court of Victoria in *Birtchnell v Fred Walker & Co Pty Ltd* (1930) Argus LR 176 at 177 (Mann, McArthur and Lowe JJ).

¹⁹ Pointing to authorities such as *Smiley v Townshend* [1950] 2 KB 311 per Denning LJ at 319-320 and the observations of the Full Court of the Federal Court in *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* (2008) 166 FCR 494; [2008] FCAFC 38 at [9]-[11] (Finkelstein and Gordon JJ).

52 However, the fundamental objective of an award for damages in tort is to provide “that sum of money which will put the party who has been injured ... in the same position as he would have been in had he not sustained the wrong for which he is now getting his compensation or reparation”.²⁰

53 If, as here, the injured party is entitled to regain possession of the reversion shortly after the damage was done, the cost of repairs will better represent that “sum of money” than may be the case where the injured party is not able to retake possession for a lengthy period following the infliction of the damage.²¹

54 I am satisfied that the appropriate measure of Goodwin’s loss for the damage done to the property is the reasonable cost of repairing the damage.

55 As I have said, there is no controversy about what that reasonable cost is.

Did Mr Roberts cause the damage?

56 To prove that it was Mr Roberts who caused the damage to and removed items from the site, Goodwin relies on the evidence of Mr Stevo Konjarski.

57 Mr Konjarski is a scaffolder and leading hand employed by Star and Sons Group Pty Ltd, a company that provided scaffolding services to the project.

58 Mr Konjarski’s affidavit was short and in the following terms:

“2. I was at the 10 Goodwin Street, Jesmond site ... on or about 15 March 2019 with two other workers employed by Star and Sons. We were at the Site on that day to dismantle some scaffold that had been erected on the last house in the row of houses.

3. I know Daniel Roberts ... from my previous dealings with him at [the] Site. I also knew him from other jobs in and around the Newcastle area.

Damage to Buildings

4. While I was on Site on or about 15 March 201[8] I observed Roberts doing the following damage to the buildings (houses) at the Site ...:

a. Filling up the plumbing pipes and toilets inside the building closest to Goodwin Street with concrete and some glue or something that set hard.

b. Detach the [timber] stairs from all of the floors that were fitted in all of the buildings on the Site and the unit (closest to Goodwin Street)

²⁰ Gagner Pty Ltd t/as Indochine Cafe v Canturi Corporation Pty Ltd [2009] NSWCA 413 at [30] (Campbell JA; Macfarlan JA and Sackville AJA agreeing), citing Livingstone v Rawyards Coal Co (1880) 5 App Cas 25 at 39 (Lord Blackburn).

²¹ For example, Joyner v Weeks [1891] 2 QB 31 and the observations of Finkelstein and Gordon JJ in Bowen v Tabcorp at [9]-[10].

Roberts load them into a vehicle a Ford one tonner and take them away from the Site.

c. Detach skirting boards, doors and tiles from the building and load them into a vehicle a Ford one tonner and take them away from the Site.

d. Take out the moving half of the windows, out of their frame, from the front building (closest to Goodwin Street) and load them into a vehicle a Ford one tonner and take them away from the Site.

e. Put holes in the walls in the front building, on the top floors only, where it's very difficult to reach them to fix them."

59 Ms Chan submitted that Mr Konjarski's evidence was "unreliable, highly improbable and ought not to be accepted".

60 I am conscious of the restraint I should exercise in forming a view about the credibility of a witness based on the witness's demeanour when giving evidence. Giving evidence is a stressful, alien experience for most people. I have in mind Atkin LJ's familiar aphorism that "an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of the evidence with known facts, is worth pounds of demeanour".²²

61 I must weigh my impressions as to demeanour "carefully against the probabilities" and "examine whether the disputed evidence is consistent with the incontrovertible facts".²³

62 Here, Mr Konjarski's evidence is "consistent with the incontrovertible acts" in as far as there is no dispute that *someone* caused the damage to the site of which Goodwin complains. But otherwise, there are no "known facts" by reference to which Mr Konjarski's recollection may be tested.

63 Mr Konjarski said the reason he was at the site on the day in question was that he was removing scaffolding from the rear of the three buildings on the site and that he needed to speak to Mr Roberts from time to time to obtain instructions about that process. Ms Chan drew attention to photographs taken on 13 March 2018 which showed no scaffolding on the site and compared those with photographs taken on 19 February 2018 "where there is still scaffolding" on the building nearest the road and submitted that "the Court may draw the inference

²² Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co [1924] 20 Ll L Rep 140 at 152.

²³ Goodrich Aerospace Pty Ltd v Arsic (2006) 66 NSWLR 186; [2006] NSWCA 187 at [27] (Ipp JA; Mason P and Tobias JA agreeing).

that all of the scaffolding was removed in the period between 19 February and 13 March 2018". However, the photographs taken on 13 March 2018 were taken by Mr Corbett's staff after the works had been damaged. They were tendered by Goodwin to show that damage. There was thus no evidence as to the state of the scaffolding that contradicts Mr Konjarski's evidence.

64 In cross-examination, Mr Konjarski both qualified and added to the account he gave in his affidavit.

65 The most significant addition Mr Konjarski gave to his affidavit account was to state that Mr Roberts did not act alone. Mr Konjarski said "he had other people with him" who Mr Konjarski identified as "his partner, and also his accountant". Mr Konjarski said that all three of these people were involved in the removal of items from the site, and the loading of them into a vehicle parked on the street adjacent to the site.

66 Ms Chan criticised the reliability of this evidence from Mr Konjarski. However, he gave this evidence in response to Ms Chan's question as to whether Mr Roberts was present "alone".

67 That evidence unfolded this way:

"Q. And do you remember what time of the day it was when you saw Mr Roberts – that you say you saw Mr Roberts?

A. I saw Mr Roberts in the morning, in the afternoon, he was there all day.

Q. He was there all day; and he was alone?

A. No.

Q. Where do you say in your affidavit that you saw Mr Roberts with anyone else on about 15 March 2018?

A. Yeah, I did see him. Yeah, he had other people with him.

Q. Who did he--

A. Seshai was with him, his partner, and also his accountant was with him. I'm not sure of his name.

Q. So, his business partner and his accountant were with him?

A. Yes, they were.

Q. Right, and what is it that you say that Mr Roberts was driving?

A. He was – he was driving his M3 BMW.

Q. He was his M3 BMW--

A. Yes.

Q. --and he was on site with his business partner and his accountant?

A. Yes.

Q. And, do you recall what Mr Roberts was wearing?

A. A pair of jeans and a shirt.

Q. Anything else?

A. Not - not - normally dressed good, normal he was all the time.

Q. Did you say hello to Mr Roberts?

A. Yes.”

- 68 In the course of cross-examination, Mr Konjarski qualified and confined his account of what he observed Mr Roberts to do.
- 69 Ultimately, Mr Konjarski’s account was that he saw Mr Roberts, in the company of his business partner and accountant:
- (a) fill up one plumbing pipe in the house closest to Goodwin Street with cement or glue in a powdered form;
 - (b) detach stairs from the second building and relocate the detached stairs into a one tonne ute; which “the accountant” then drove away from the site;
 - (c) detach doors from the three buildings on the site and load them into the one tonne ute;
 - (d) detach windows from the front building and load them into the one tonne ute; and
 - (e) put holes in the walls in the front building.
- 70 Mr Konjarski said he saw the “accountant” drive the laden one tonne ute away from the site.
- 71 The same type of damage (cement poured in pipes and holes in the walls) and removal of items (stairs, doors and windows) that Mr Konjarski alleged he had seen Mr Roberts engage in was also observed by Mr Stokes and Mr Corbett when they attended the site on 19 March 2018, and had been observed by members of Mr Stokes’s staff earlier, on 13 March 2018.
- 72 Thus, Mr Konjarski’s evidence as to what he saw is consistent with that other unchallenged evidence.

- 73 As I have said, Ms Chan criticised Mr Konjarski's evidence and submitted that he was an unreliable witness whose evidence should not be accepted.
- 74 Ms Chan pointed to the fact that Mr Konjarski could not be certain as to precisely on what date he attended the site, and that there were the discrepancies between his affidavit account and his evidence in cross-examination that I have described, particularly as to the presence of Mr Roberts's "business partner" and "accountant", the "accountant's" role in driving the one tonne ute away from the site and the more limited account given by Mr Konjarski as to what he allegedly saw Mr Roberts do.
- 75 Ms Chan also pointed out that there was bad blood between Mr Konjarski and Mr Roberts. Mr Konjarski readily agreed that it was his position that Mr Roberts owed him some \$66,000 and that in July 2021 he had entered a plea of guilty to a charge of assaulting Mr Roberts.
- 76 But Mr Konjarski gave this evidence without hesitation, and appeared to me to be very confident as to the accuracy of his recollection. The evidence he gave was about matters in respect of which he could not be mistaken. He was either telling the truth or giving evidence he knew to be false.
- 77 The conduct of Mr Roberts, as described by Mr Konjarski, was serious indeed. To accept it, I must have an "actual persuasion" of the mind that it is probably correct, bearing in mind the gravity of the matters alleged.²⁴
- 78 As I have mentioned, Mr Roberts did not give evidence. Accordingly, I may infer that Mr Roberts's evidence will not have assisted his case.²⁵
- 79 It does not necessarily follow that I should accept Mr Konjarski's evidence. However, as Mr Roberts has not given evidence, and as no explanation has been offered for his absence from the witness box, I may more comfortably draw such inferences, adverse to his interest, as are otherwise available.

²⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2; [1938] HCA 34 (Dixon J); and see s 140(2) Evidence Act 1995 (NSW).

²⁵ *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8.

Motivation

80 As I have mentioned, on 2 March 2018, Goodwin served on DSD a notice pursuant to the building contract alleging that DSD had failed to meet identified “substantial obligations” under the contract and requiring that those matters be remedied.

81 Within an hour of the delivery of that notice, Mr Roberts wrote to Mr Stokes:

“This letter is a total lie.

We requested an extension of time and we did not suspend the works for one day.

This is fictitious, this is an attempt to avoid paying monies due for works performed.”

82 Mr Roberts was clearly unhappy with Goodwin’s decision to serve the 2 March 2018 notice. That provides some, although I accept slender, evidence of a matter that may have motivated Mr Roberts to behave in the manner described by Mr Konjarski.

More likely the 2 March 2018 “site meeting” attendees?

83 Ms Chan submitted that it was more likely that the damage done to the site was caused by one or other of the persons who attended the 2 March 2018 “site meeting” to which I have referred.

84 On 3 March 2018, Mr Stokes wrote to Senior Constable Michael Rowe about what had occurred at the “site meeting”. There is also in evidence what purports to be a transcript of a recording of a 30 minute conversation involving, among others, Mr Stokes, two other representatives of Goodwin, Mr Dale Dawson and Mr Nigel Archer, and three men each unidentified but described as a “money lender”.

85 Mr Stokes emailed a transcript of the “site meeting”, and some “still shots of the guys” to Senior Constable Rowe:

“Please find as requested the written transcript of the first video from our meeting on the building site at 10 Goodwin Street Jesmond ..., and the still shots of the three guys (the big guy with the sun glasses on, was referred to as Big Joe) from the video shown to you at 1:30pm Friday 2nd March 2018 at the Waratah Police station. As discussed with you on Friday from the meeting at the building site we have learnt that our builder Daniel Roberts of DSD Builders Pty Ltd (Director of the company is his wife Angela Edith Sendjirdjian) have borrowed money to fund their building company start up business from

money lenders. Daniel and Angela have been enjoying the money, Daniel drives a new \$250,000.00 sports BMW they just had a fancy holiday overseas in January and now that we are enforcing our contractual rights to have building defects corrected at the building site Daniel cannot afford to pay for the corrections. He has stopped paying his money lenders and they are trying to collect from anyone that they think will give it to them using intimidation. The intimidation includes:

- They know all our names and have our home addresses.
- The Lebanese people, that are owed the money are from Sydney and they are bad guys that do not care if they go to gaol.
- If the money is not paid they will be visiting our homes next week kicking our doors in and demanding the money.
- They are experienced at doing this they have cut fingers off people before at a construction site in the [H]unter [V]alley.
- Pay us a \$100,000.00 and we will leave you alone for now.

As you can see from the video the still shots of the 3 guys and the transcript we believe that we have merit for being concerned.

Please contact us in relation to this matter, and provide us with the event number so we know it has been initiated in the police system.”

86 Evidently, the Police were unable to take any action in relation to the matters the subject of Mr Stokes’s report to Senior Constable Rowe.

87 I cannot see upon what basis I could infer that one or more of the three “money lenders” who attended the 2 March 2018 “site meeting”, or their agents or associates, caused the damage to the site of which Goodwin complains.

88 For one thing, according to the transcript of the “site meeting” the threat that was made during the meeting was that if Mr Roberts did not pay the “money lenders” the amount said to be due, they would “just get a 30 tonne dozer and ... just doze the [expletive deleted] lot”. That is not what happened.

Conclusion

89 Having observed Mr Konjarski in the witness box, and having regard to all the other circumstances I have set out above, I do have an actual persuasion of the mind that Mr Konjarski was telling me the truth as to what he observed on the day in question.

90 I feel more readily able to come to that conclusion, in circumstances where Mr Roberts did not give evidence to dispute Mr Konjarski’s account.

91 Accordingly, I find that the damage to Goodwin's property was done by Mr Roberts, in company with the other persons who Mr Konjarski identified, and that he is liable to pay Goodwin the cost of repairing the damage.

Exemplary damages?

92 Mr Kidd submitted, although ultimately with not great enthusiasm, that I should also order that Mr Roberts pay exemplary damages to Goodwin on the basis of the "reprehensible" or "high-handed" or "outrageous" nature of Mr Roberts's conduct.²⁶

93 Mr Kidd pointed out that exemplary damages had been awarded in cases involving the tort of trespass to land.²⁷

94 Mr Kidd did not make a submission as to the amount of exemplary damages that should be made.

95 I am not persuaded that I should make an order for exemplary damages. The Court's mark of its disapproval of Mr Roberts's conduct will be adequately made by an order that Mr Roberts pay the cost of the repairs and interest on that amount.

Mr Roberts's alleged breach of statutory duty of care

96 Goodwin claims that Mr Roberts was a person who carried out "construction work" within the meaning of s 37 of the DBP Act and that Mr Roberts acted in breach of his duty to exercise reasonable care to avoid economic loss caused by defects in the building of the site arising from the construction work.

97 Section 37(1) of the DBP Act is in the following terms:

"(1) A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects—

(a) in or related to a building for which the work is done, and

(b) arising from the construction work."

Does the statutory duty of care arise in relation to a boarding house?

98 The building constructed on the site was a boarding house.

²⁶ See, *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; [1966] HCA 40 and the discussions of Menzies J at [13], Owen J at [6],[8] and Taylor J at [9],[15].

²⁷ For example, *Pollack v Volpato* [1973] 1 NSWLR 653 (Reynolds JA; Hutley and Bowen JJA agreeing).

99 Ms Chan submitted that the statutory duty of care under s 37(1) of the DBP Act does not extend to “construction work” carried out on a boarding house.

100 For the reasons that follow, I do not agree.

101 Resolution of the question involves consideration of the labyrinthine provision of s 36 of the DBP Act. The section appears to have been drafted so as to make comprehension of it as difficult as possible.

102 Section 36 provides, relevantly:

“36 Definitions

(1) In this Part—

association means an association within the meaning of the *Community Land Management Act 2021*.

building has the same meaning as it has in the *Environmental Planning and Assessment Act 1979*.

building product has the same meaning as in the *Building Products (Safety) Act 2017*.

building work includes residential building work within the meaning of the *Home Building Act 1989*.

construction work means any of the following—

- (a) building work,
- (b) the preparation of regulated designs and other designs for building work,
- (c) the manufacture or supply of a building product used for building work,
- (d) supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in paragraph (a), (b) or (c).

owner of land means any of the following—

- (a) every person who jointly or severally or at law or in equity is entitled to the land for an estate of freehold,
- (b) for a lot within a strata scheme, the owner of a lot within the meaning of the *Strata Schemes Management Act 2015*,
- (c) for a development lot or neighbourhood lot within a community scheme, the proprietor in relation to the lot within the meaning of the *Community Land Management Act 2021*,
- (d) every person who jointly or severally or at law or in equity is entitled to receive, or receives, or if the land were let to a tenant would receive, the rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession or otherwise,
- (e) other persons prescribed by the regulations for the purposes of this definition.

owners corporation means an owners corporation constituted under the *Strata Schemes Management Act 2015*.

(2) In this Part, a reference to **building work** applies only to building work relating to a building within the meaning of this Part. ...”.

103 As can be seen, the definitions in s 36(1) incorporate by reference definitions from five other Acts: the *Community Land Management Act 2021* (NSW), the *Environmental Planning and Assessment Act 1979* (NSW), the *Building Products (Safety) Act 2017* (NSW), the *Home Building Act 1989* (NSW) and the *Strata Schemes Management Act 2015* (NSW).

104 Such a drafting technique, evidently used to achieve some kind of uniformity between the various statutes, renders construction of the section fiendishly difficult.

105 Two of the Acts whose definition has been incorporated by reference, the *Environmental Planning and Assessment Act 1979* (NSW) (the “EPAA”) and the *Home Building Act 1989* (NSW) (the “HBA”) are relevant here.

106 When introducing the amendments which gave effect to the current definitions of “building” and “building work” contained in the DBP Act, Mr David Shoebridge, moving “The Greens amendments”, stated:

“Amendment No. 1 provides that the duty of care applies to all buildings and includes a definition of “building” for the purpose of the duty of care and that “building” has the broad meaning of “building” in the Environmental Planning and Assessment Act. Amendment No. 2 makes clear that the duty of care extends to building work, including residential building work within the meaning of the Home Building Act. This amendment will ensure that the duty of care amendments will have broad coverage, which is the intent.”²⁸

107 The duty under s 37 is in respect of “construction work”. In order that work be “construction work” it must, relevantly here, be “building work”.

108 Thus, s 36(1) defines “construction work” to mean, relevantly, either:

- (a) “building work”; or
- (b) “supervising, coordinating, project managing or otherwise having substantive control over” carrying out of any, amongst other things, “building work”.

²⁸ New South Wales Legislative Council, Parliamentary Debates (Hansard), 2 June 2020 at 63.

109 “Building work” is defined, generally, in s 4 of the DBP Act to mean, relevantly, “... the construction of a building of a class prescribed by the regulations for the purposes of this definition”.

110 Regulations have been promulgated under s 4 of the DBP Act: Design and Building Practitioners Regulation 2021 (NSW). Mr Kidd and Ms Chan agreed, albeit for different reasons, that this regulation does not affect the meaning of “building work” for present purposes.

111 Mr Kidd submitted that, on the proper construction of the DBP Act, the definition of “building work” in s 4 has no application to Pt 4 of the DBP Act.

112 I agree.

113 Part 4 of the DBP Act commenced on 10 June 2020, when the DBP Act was assented to. It is given retrospective operation by cl 5 of Sch 1 of the DBP Act. On the other hand, Pts 2, 3 and 5 to 9 of the DBP Act did not commence until 1 July 2021,²⁹ which was the same date on which the Design and Building Practitioners Regulation commenced. As Mr Kidd submitted, the statutory regime can only be seen to operate coherently if the s 4 definition of “building work” is interpreted as applying to the parts of the DPB Act that commenced on 1 July 2021, but not applying to Pt 4, which commenced on 10 June 2020 with retrospective operation.

114 That interpretation is confirmed by the fact that, as I have set out, s 36(1) contains its own definition of “building work” expressed to be that applicable “in this Part”: that is, in Pt 4 of the DBP Act. This definition is qualified by s 36(2) of the DBP Act.

115 Thus, s 36(2) provides that:

“In this Part,³⁰ a reference to ***building work*** applies only to building work relating to a *building* within the meaning of this Part.” (Bolded emphasis in original; italics emphasis added.)

116 The underlined reference to “building” must be a reference to the definition of “building” in s 36(1) which states that “building” “has the same meaning as it has” in the EPAA.

²⁹ Section 2(2) of the DBP Act.

³⁰ Being Pt 4 of the DBP Act, titled “Duty of care”.

117 “Building” is defined in s 1.4 of the EPAA as including:

“[P]art of a building, and also includes any structure or part of a structure ... but does not include a manufactured home, moveable dwelling or associated structure within the meaning of the *Local Government Act 1993* [(NSW)].”

118 A boarding house is a “building” within that definition.

119 Thus, by reason of the operation of s 36(2) and the definition of “building” in s 36(1), Pt 4, including s 37, applies to “building work”, and thus “construction work”, in relation to a boarding house.

120 Despite s 36(2) stating that “building work” is “only” such work “relating to a building within the meaning of this Part”, s 36(1) defines “building work” as also including “residential building work” for the purposes of the HBA.

121 Thus, as I have set out above, s 36(1) provides that:

“**[B]uilding work** includes residential building work within the meaning of the *Home Building Act 1989* [(NSW)]”. (Emphasis in original.)

122 It is hard to see what this adds to the effect of Pt 4. As I have said, s 36(2) provides that in Pt 4 a reference to “building work” applies “only” to “building work” relating to a “building” within the meaning of this Part: that is, as defined in the EPAA.

123 The effect of the definition of “building work” in s 36(1) is to *include* in “building work” so defined, “residential building work” within the meaning of the HBA.

124 The effect appears to be that to the extent that “residential building work” under the HBA is also work relating to a “building” as defined in the EPAA, it comes within the ambit of Pt 4 of the DBP Act. Whether any practical consequence flows from this is hard to fathom.

125 For present purposes, Ms Chan’s point was that under the HBA “residential building work” means, relevantly, work involved in “the construction of a dwelling”,³¹ but that under the HBA a “dwelling” does not include “a boarding house”.³²

126 But it does not follow from this that work in relation to a “boarding house” is not “building work” for the purpose of Pt 4 of the DBP Act.

³¹ Section 2(1)(a) of Sch 1 of the HBA.

³² Section 3(3)(a) of Sch 1 of the HBA.

127 That is because the definition of “building work” in s 36 of the DBP Act is an inclusive, not an exclusive, definition. The fact that a “boarding house” is not a “dwelling” within the meaning of the HBA and thus that construction of a boarding house is not “residential building work” for the purposes of the HBA merely means that work in relation a boarding house is not for the purposes of the DBP Act “building work” by reason of any provision in the HBA, insofar as those provisions are incorporated by reference into Pt 4 of the DBP Act.

128 Ms Chan developed an elaborate argument that she described as a “write back” argument.

129 As best I understood it, the argument was to the effect that, by reason of the imperative terms of s 36(2) of the DBP Act, there is a tension between:

- (1) the provision in s 36(1) that for the purposes of the DBP Act “building” has the same meaning as it has in the EPAA (and therefore does *not* include a manufactured home or a moveable dwelling) on the one hand; and
- (2) the provision in s 36(1) that “building work” includes “residential building work” for the purposes of the HBA (which would, in very limited circumstances, include or “write back” work in relation to a manufactured home or moveable dwelling) on the other.

130 Assuming such a tension exists, and that the combined effect of s 36(2) and the definitions incorporated by reference by s 36(1) is to “write back” some work as “building work” that would otherwise be excluded, I cannot see how this has any bearing on the question of whether or not Pt 4 of the DPB Act applies to a boarding house.

Was Mr Roberts engaged in “construction work”?

131 Ms Chan accepted that the evidence showed that Mr Roberts had engaged in the “project management” of the construction on Goodwin’s site and thus engaged in “construction work” for the purposes of s 36(1) of the DBP Act to that extent.

132 However, the evidence shows that Mr Roberts did not only engage in “project managing” but that he also supervised DSD’s construction of the relevant project.

133 Mr Stokes gave unchallenged evidence that, at the outset of the works, Mr Roberts introduced himself as “the builder” of the project.

134 Mr Stokes gave this further evidence:

“10. I met Daniel Roberts together with the Contract Administrator Todd Corbett at regular meetings held at the Site, which Site meetings took place approximately every two or three weeks from August 2017 through to mid February 2018. ... Daniel Roberts was at every meeting, often alone and he was the only representative of the Builder who discussed building issues at those regular Site meetings.

11. Initially, Stuart Johnstone was the Builder’s nominated supervisor. Mr Johnstone ceased being the nominated supervisor in late August 2017 and he stopped attending the Site or having anything [to] do with the Contract works after about 5 September 2017.”

135 Further, Mr Corbett gave unchallenged evidence that:

“From around 11th July 2017 construction works were undertaken by [DSD] under the supervision of the second defendant Daniel Roberts.”

136 Mr Stokes and Mr Corbett gave evidence of numerous occasions on which they enquired of Mr Roberts about defects in the construction works and were given responses from Mr Roberts to the effect of “don’t worry about it’ll all be fixed”, “yeah we’ll get to it. Don’t panic about it all defects will be fixed” and “don’t worry about, it’ll get fixed”.

137 From these responses alone, in the absence of any evidence from Mr Roberts about this matter, I am comfortably able to draw an inference consistent with the other evidence to which I have referred that Mr Roberts was not only engaging in project management of the site but also in supervision of the construction.

138 He was therefore engaging in “construction work” for the purposes of Pt 4 of the DBP Act.

Were the defects caused by a want of care by Mr Roberts?

139 There is evidence that the following defects exist:

- (1) missing stormwater pipe;
- (2) exposed unsupported pier footing;
- (3) termite protection system not installed;
- (4) no recess for vanity;

- (5) external steel not hot dip galvanised;
- (6) internal steel not painted;
- (7) laundry window missing and incorrectly sized doors installed;
- (8) windows in bathrooms in incorrect places;
- (9) windows in kitchenette in incorrect places;
- (10) frame built on sewer pipe;
- (11) no step down from concrete slab;
- (12) black mould on timber frames;
- (13) loose bracing;
- (14) floor sheeting moves up and down;
- (15) wet area wall lining not fixed as required;
- (16) waterproofing to showers;
- (17) wrong board used on fascia;
- (18) brick retaining wall not waterproofed;
- (19) sliding door tracks not flush with floor;
- (20) beams not supported by piers;
- (21) damaged foil sarking;
- (22) air conditioning drains drip outside the building;
- (23) downpipe not fitted correctly – no sump and overflow;
- (24) inadequate flashings around windows and sliding doors;
- (25) wrong size reveals on window;
- (26) incorrect painting of window architraves;
- (27) downpipes from top roof drain into lower roof;
- (28) penetrations not sealed;
- (29) loose external wall linings;
- (30) missing insulation;
- (31) manholes sealed;
- (32) hallway too narrow;
- (33) loose tie down straps;
- (34) temporary formwork not removed;
- (35) inadequate clearances over doors and windows;
- (36) no sill framing support;
- (37) defective framing bolt;

(38) private certifier inspection approvals.

140 There is no dispute that this work was defective.

141 Nor is there any dispute that the cost of rectifying the defects is the figure of some \$300,000 to which I have referred at [16] above.

142 Mr Goodwin drew each of these defects to Mr Roberts's attention in writing.

143 Mr Corbett said in cross-examination that Mr Roberts:

“... continually told us right through the whole process, ‘don’t worry about that. I’ll fix it. Don’t worry about that. I’ll fix it. Don’t worry about that. I’ll fix it.’”

144 Mr Corbett also gave evidence, in relation to some particular defects, of Mr Roberts giving him an assurance that the defect would be “all fixed”.

145 As it was Mr Roberts that was project managing the construction on the site, and as the construction works were undertaken under Mr Roberts's supervision, the fact that the defects were not corrected despite Mr Roberts's assurances that “I’ll fix it” bespeaks his want of care in project managing and supervising the construction work.

146 It is true that there is no evidence pointing to a particular act that Mr Roberts engaged in in relation to these defects.

147 However, as I have mentioned, Mr Roberts did not give evidence in answer to Goodwin's claim, which enables me to more readily draw an inference that the defects that he constantly assured Goodwin he would “fix” were brought about by a want of care on his part in his project management and supervision of the work and thus his engagement in “construction work” for the purposes of s 36(1) of the DPB Act.

148 I therefore find that Mr Roberts is liable to pay damages to Goodwin for the cost of rectifying the defects.

Conclusion

149 The parties should confer and agree on the orders necessary to give effect to these reasons, including as to costs.

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