Court of Appeal
Supreme Court
New South Wales

Medium Neutral Citation:	**Roberts v Goodwin Street Developments Pty Ltd [2023] NSWCA 5**
Hearing dates:	8 November 2022
Date of orders:	10 February 2023
Decision date:	10 February 2023
Before:	Ward P at [1]; Kirk JA and Griffiths AJA at [80]
Decision:	Appeal dismissed with costs
Catchwords:	BUILDING AND CONSTRUCTION — Contract — Defects — Duty of care — Whether statutory duty of care under the Design and Building Practitioners Act 2020 (NSW) applies in relation to “boarding houses” — Meaning of “building work” — Meaning of “construction work” BUILDING AND CONSTRUCTION — Contract — Damages — Whether proper measure of damages to reversionary interest in property is the rectification of the damage or the diminution in value of the reversionary interest CIVIL PROCEDURE — Commercial List, Technology and Construction List — Procedure — List Statements — Where respondent failed to plead action on the case in trespass in List Statement — Whether denial of procedural fairness to determine the matter on that basis
Legislation Cited:	American Restatement (First) of Torts Civil Procedure Act 2005 (NSW) Community Land Management Act 1989 (NSW) Community Land Management Act 2021 (NSW) Conveyancing Act 1919 (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)

Home Building Act 1989 (NSW)
Interpretation Act 1987 (NSW)
Landlord and Tenant Act 1927 (UK)
Uniform Civil Procedure Rules 2005 (NSW)

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Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41
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Arthur Robinson (Grafton) Pty Ltd v Carter (1968) 122 CLR 649; [1968[HCA 9
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Baxter v Taylor (1832) 4 B & AD 71
BCEG International (Australia) Pty Ltd v Xiao [2022] NSWSC 972
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Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185; [2014] HCA 36
Bryant v Quinn [2022] NSWCA 163
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Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503; [2012] HCA 55
Cotterill v Hobby (1825) 107 ER 1133; (1825) 4 B&C 465
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State of South Australia v Simionato [2005] SASC 412; (2005) 143 LGERA 128
Stephens v The Queen (2022) 96 ALJR 871; [2022] HCA 31
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Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272; [2009] HCA 8
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Category: Principal judgment

Parties:

Daniel Roberts (Appellant)
Goodwin Street Developments Pty Ltd (Respondent)

Representation:

Counsel:
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NJ Kidd SC and RR Sud (Respondent)

Solicitors:
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File Number(s): 2022/00151935

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Decision under appeal **Court or tribunal:** Supreme Court of New South Wales

Jurisdiction: Equity – Technology & Construction List

Citation: [2022] NSWSC 624

Date of Decision: 19 May 2022

Before: Stevenson J

File Number(s): 2018/260981

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

Background

Daniel Roberts, the appellant, is a builder who operated through a company, DSD Builders Pty Ltd, which is now in liquidation. DSD was engaged by Goodwin Street Developments Pty Ltd (the respondent) under a building contract entered into on 10 July 2017 for the construction of student accommodation in Jesmond, NSW (the Contract), on land owned by the respondent (the Property). Work was well advanced when the parties fell out, DSD did no further work on the site after 2 March 2018.

The appellant then entered onto the Property and damaged the buildings and removed fixtures including doors, windows and stairs. On 19 March 2018, this damage was discovered by the respondent, which immediately terminated the Contract.

The respondent brought two claims against the appellant: first, that the appellant was liable in tort for deliberately causing damage to the Property; and second, that the appellant owed a statutory duty of care under s 37 of the *Design and Building Practitioners Act 2020* (NSW) (DBP Act) and was liable for a separate list of defects in the construction work. There was no dispute between the parties as to the costs to repair the damage under each claim.

As regards the first claim, the trial judge accepted that a trespass claim could not be made out as at the time of the damage, the respondent did not have exclusive possession of the Property. However, the respondent was successful in its alternative claim, which had not expressly been pleaded in terms, namely, that the tort could be characterised as an action on the case for injury to its interest in the reversion. On that basis, the primary judge upheld the claim for rectification costs.

The respondent was also successful at trial in its second claim under s 37 of the DBP Act.

On appeal, in respect of the first claim the appellant contended that the primary judge had: (1) denied the appellant procedural fairness by permitting the respondent during the hearing to recharacterise its claim in trespass as an action on the case (Ground 1) and (2) erred in measuring the damages for the tort claim on the basis of the cost to repair the damage, rather than the diminution in the value to the reversionary interest (Ground 2). It was accepted by the appellant that Ground 1 would fail if Ground 2 was not made out.

In relation to the second claim, the appellant contended that the trial judge had wrongly construed the DBP Act finding that it applied to boarding houses, being the category of building in question (Ground 3).

The Court (Kirk JA and Griffiths AJA, Ward P dissenting on Grounds 1 and 2, but agreeing on Ground 3) dismissed the appeal, and held as follows:

As to Ground (1):

1. The appellant's concession that this ground could not succeed if Ground 2 was not made out – which it is not – should be accepted: [157] (Kirk JA and Griffiths AJA).

2. In any case, attaching a different legal label to the respondent's claim did not alter the fact that the type of damages claimed was open to be claimed by it based upon the material facts outlined in its List Statement, and did not alter in any significant respect the nature of the claim made for rectification damages. It had been open to the appellant to apply for an adjournment if he could make out some prejudice, but no such application was made: [175]-[177] (Kirk JA and Griffiths AJA).

   Rodrigues v Ufton (1894) 20 VLR 539, considered.

3. To decide a case on a different basis than what the pleadings have stated would be a denial of procedural fairness: [66], [74] (Ward P, dissenting).

As to Ground 2:

1. Assessing damages in both tort and contract must remain flexible, because the award of damages is based on the circumstances of each case. Nevertheless, in certain types of case particular approaches to the assessment of damages have become accepted as to how the compensatory principle is to be given effect: [91]-[96], [120] (Kirk JA and Griffiths AJA).

   Arthur Robinson (Grafton) Pty Ltd v Carter [1968] HCA 9, (1968) 122 CLR 649; Chulcough v Holley [1968] ALR 274, (1968) 41 ALJR 336; Sharman v Evans [1977] HCA 8, (1977) 138 CLR 563; Evans v Balog [1976] 1 NSWLR 36; Gagner Pty Ltd (t/as Indochine Cafe) v Canturi Corporation Pty Ltd [2009 NSWCA 413, (2009) ALR 691; Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353, (2004) 136 LGERA 98, considered.

2. As in a contract claim, the prima facie approach to assessing damages for tortious damage to property when the owner has possession of the property, or soon will resume possession of the property, is by reference to the costs of repairing the damage to the property or the diminution in value to the property. The former is not merely a proxy of the latter. If the wrongdoer seeks to challenge the reasonableness of the aggrieved party's election between these measures, it bears the evidentiary burden of establishing unreasonableness: [97]-[115], [119]. In this case, the evidentiary burden lay with the appellant, as the party challenging the assessment of damages on the basis of rectification costs: [146]-[147], [151] (Kirk JA and Griffiths AJA).

> *Joyner v Weeks* [1891] 2 QB 31; *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* (2008) 166 FCR 494, [2008] FCAFC 38, considered.
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> *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, [2009] HCA 8; *Gagner Pty Ltd (t/as Indochine Cafe) v Canturi Corporation Pty Ltd* [2009] NSWCA 413, (2009) 262 ALR 691; *Evans v Balog* [1976] 1 NSWLR 36; *Minter v Eacott* (1952) 69 WN (NSW) 93, followed.
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> Abbahall Ltd v Smee [2003] 1 WLR 1472; Moss v Christchurch Rural District Council [1925] 2 KB 750; Cotterill v Hobby (1825) 107 ER 1133, 4 B & C 465; Jones v Llanrwst Urban District Council [1911] 1 Ch 393; Hanson v Newman [1934] 1 Ch 298, distinguished.

3. The appellant failed to discharge his evidentiary burden. If he wished to contest the respondent's election, he needed to take appropriate steps. This may have included raising the issue in his Technology and Construction List Response, adducing evidence in support of his position (if appropriate) and/or raising the matter in his written submissions below. He failed to take any of these steps: [147]–[151] (Kirk JA and Griffiths AJA).

4. Although the appellant did not advance an argument in the proceeding below to the effect that the respondent did not intend to reinstate the property (and that, therefore, reinstatement costs would not constitute an appropriate remedy), such an argument would fail, having regard to the indirect evidence contained in a valuation report indicating that the respondent did have such an intention: [153]-[155] (Kirk JA and Griffiths AJA).

When establishing whether one basis of assessing damages is more reasonable over the other, the plaintiff is required to demonstrate to the primary judge in a comparative exercise, that the cost of rectification is reasonable and not disproportionate to the diminution in the value of the reversion: [43] (Ward P, dissenting).

As to Ground 3:

1. The primary judge's conclusion that s 37 of the DBP Act applied as regards boarding houses was correct, albeit that the Court adopted different reasoning to his Honour.

2. The general definition of "building work" in s 4(1) of the DBP Act does apply to the further definition of "building work" in s 36(1), but only as regards the first topic addressed in the general definition (identifying the type of work undertaken), with the second topic (identifying what type of buildings that work is undertaken on) instead

being addressed by the definition of "building" in s 36(1). A boarding house falls within the definition of "building" in the *Environmental Planning and Assessment Act 1979* (NSW), thereby falling within s 36 of the DBP Act. Section 37 of the Act thus applied here: [230]-[232] (Kirk JA and Griffiths AJA, Ward P agreeing at [79]).

JUDGMENT

1 **WARD P:** This is an appeal from a decision of Stevenson J in the Technology & Construction List of the Equity Division (*Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022] NSWSC 624), in which his Honour found the appellant, Daniel Roberts, liable to the respondent, Goodwin Street Developments Pty Ltd, for damages on what is known as an action on the case (or trespass) for damage to the reversionary interest of the respondent in property located at Jesmond in Newcastle; and quantified the damage to the reversionary interest on the basis of the cost of rectification (rather than diminution in value to the reversionary interest). The primary judge separately and in addition thereto found the appellant liable for damages for breach of a statutory duty of care in relation to construction work carried out on the property.

Background

2 The appellant is the husband of the sole director of a building company, DSD Builders Pty Ltd (DSD), which is now in liquidation. On 10 July 2017, DSD entered into a building contract with the respondent for the construction of student accommodation (three residential boarding houses) at a site owned by the respondent in Jesmond, NSW (the Property), close to the campus of the University of Newcastle (see at [1]-[3] of the primary judgment).

3 The primary judge found (and this finding is not challenged by the appellant) that the appellant, although not a director of DSD, introduced himself as "the builder" in relation to the project; attended every site meeting at the Property between August 2017 and February 2018; and supervised the work performed at the Property (see at [133]-[137] of the primary judgment). At the time that the works commenced on site in July 2017, DSD had employed a licensed supervisor at the site (Mr Johnstone) but he left the employ of DSD about a month after works commenced and was not replaced.

4 In early 2018, there was a dispute between the respondent and DSD as to alleged defective building works and the progress of the works. On 2 March 2018, there was a site meeting between Mr Roberts, directors of the respondent and persons claiming to represent creditors of Mr Roberts, at which demands and threats were made by the creditors' representatives as to money allegedly owing to their clients. Later that day, the respondent issued a notice to DSD under the building contract requiring DSD to

remedy defaults in respect of defective works within ten working days (see at [8] of the primary judgment). The notice indicated that if the defaults were not so remedied the respondent might terminate the building contract.

5 It does not appear that there was any attempt to remedy the alleged defects. Indeed, DSD did no further work at the site after 2 March 2018.

6 The primary judge found (and again this finding is not challenged) that between 2 March 2018 and 19 March 2018, the appellant entered onto the Property and maliciously damaged the buildings there being constructed, including by making saw cuts through structural floor beams and wall structures; drilling holes in the valleys of gutters, walls, water and sewer pipes; rendering power cables unserviceable; pouring concrete into sewer pipes; making holes in internal wall sheeting, external cladding and ceilings; and removing fixtures such as doors, windows, stairs and skylights which had previously been installed there (see at [23]-[24]; [89]-[91] of the primary judgment).

7 On 19 March 2018, a director of the respondent attended the Property and observed substantial damage to the buildings. The matter was reported to the police. The respondent that same day terminated the building contract with immediate effect, thereby (and relevantly in terms of the claim in trespass as pleaded – see below) becoming entitled to take possession of the Property and exclude DSD therefrom (see at [11], [32] and [40] of the primary judgment).

Proceedings

8 Proceedings were commenced by the respondent in August 2018 against DSD. In April 2019, the appellant was joined as the second defendant to the proceedings (see the primary judgment at [12]).

9 In early 2021, DSD was the subject of a winding up order in insolvency and a liquidator was appointed to the company. The proceedings against DSD were stayed by operation of s 471B of the *Corporations Act 2001* (Cth) (see at [13] of the primary judgment). What then remained were the claims against the appellant.

10 As set out in the second further amended technology and construction list statement, the claims made against the appellant were: first, for damages for negligence pursuant to the extended statutory duty of care in Pt 4 of the *Design and Building Practitioners Act 2020* (NSW) (the DBP Act) (see at [36]-[40] of the second further amended construction list statement); and, second, for damages in trespass and conversion to the building works while the builder (DSD) was in possession of the building site (see at [41]-[45] of the second further amended technology and construction list statement). The respondent claimed around $300,000 for the cost of rectifying the defective works and around $586,000 for the cost of making good the damage caused to the site in March 2018 (see at [16] of the primary judgment).

11 The appellant did not give evidence at the hearing and did not call any expert witness or other evidence in relation to the quantum of the respondent's loss. The respondent adduced evidence, including expert evidence as to the existence and cost of repair of

the property damage and the existence and cost of repair of the defective works (none of which was challenged by the appellant).

12 The claim in conversion was not able to be maintained (and was abandoned at the hearing), as the respondent was not in possession of the Property at the relevant time (possession being the gist of an action in conversion). The primary judge found that DSD was contractually entitled to possession of the site until the building contract was terminated on 19 March 2018 and therefore as at the time the damage was done to the site, the respondent was not entitled to exclusive possession of the site (see at [40]-[41]).

13 Nor, strictly understood, was the claim in trespass able to be maintained (possession or the immediate right to possession being necessary for standing in a trespass to property claim). However, this difficulty as to standing appears only to have emerged (or been appreciated by the respondent) on the second day of the hearing (and it is the nub of the complaint the subject of the first of the grounds of appeal – see below). It is fair to say that this seems to be a product of the manner in which the claim was pleaded by the respondent (as a claim for "trespass to land" for malicious damage – see [41]; [43] of the second further amended technology and construction list statement), there being no reference to an action on the case in trespass for permanent injury to the respondent's reversionary interest; and the fact that the appellant did not in his list response raise any issue of standing in relation to the claim in trespass (simply asserting that he had not been on site at the development since February 2018 and otherwise denying the allegations at [41]-[45]) (see [14] of the list response) and articulating the issue as being whether he maliciously damaged the works and converted the materials, fixtures and fittings at the site the subject of the proceedings and, if so, what damages should be awarded (see at [B4] of the list response).

14 When the issue of standing to sue for trespass was raised in the course of oral submissions before the primary judge, there was some debate as to whether the claim as pleaded encompassed a claim for damages to the respondent's reversionary interest (i.e., what is known as an action on the case in trespass – see Fleming JG, *Fleming's Law of Torts* (Thomson Reuters, 10th ed, 2011) at [3.50]; *Rodrigues v Ufton* (1894) 20 VLR 539; *Loxton v Waterhouse* (1891) 7 WN (NSW) 98; *Rust v Victoria Graving Dock Co, and London and St Katharine Dock Co* (1887) 36 Ch D 113).

15 At T 92.16-44, there was an exchange between the primary judge and Counsel for the appellant in which complaint was made that an action on the case had not been pleaded; rather, the case had been brought against the appellant on the basis that the owner (the respondent) retained exclusive possession and therefore had the right to bring a claim against the appellant for trespass and conversion. Counsel for the appellant made clear (as implicitly recognised by the primary judge at [51] of the primary judgment) that the case against the appellant had changed and that the appellant had not come to court to meet a claim for damages for an action on the case and was not in a position to meet such a case because the measure of damages for an

action on the case was the quantum of the permanent injury caused to the reversionary interest and that an investigation into any diminution in the value of the reversionary interest had not been undertaken.

16 The appellant notes that no leave was sought by the respondent to amend the pleadings (the respondent here contends that an action on the case in trespass has been subsumed into the law of trespass and was thus encompassed within the pleaded case). The appellant maintained that an action on the case in trespass was a different cause of action to trespass; and that the appellant would be prejudiced if the respondent were permitted to run such a case in circumstances where it was not pleaded (on the basis that the measure of damages for an action on the case is potentially different from that in trespass).

17 The primary judge addressed the question of the respondent's rights as a reversioner from [42] of the principal judgment, saying that the implication of the appellant's submission (that any action in trespass or conversion lay with DSD) was that the respondent, as owner of the site, was without a remedy and commenting that this would be a strange result (see at [43]; [44]). His Honour went on to explain that, as reversioner, the respondent was entitled to bring an action on the case for trespass or an action "of trespass on the case" (citing *Beaudesert Shire Council v Smith* (1966) 120 CLR 145; [1966] HCA 49 (*Beaudesert*) at 152 per Taylor, Menzies and Owen JJ) if a trespass occurred resulting in permanent injury to the reversion or that would necessarily affect the reversioner's interest when the property falls into possession (see at [48] of the primary judgment). (Pausing here, the nub of the appellant's submission as put in oral submissions to the primary judge seems to have been not that the respondent was without a remedy, but that the respondent had not pleaded a cause of action for which it had standing; the complaint being that the appellant had not come to court to meet that unpleaded case.)

18 His Honour noted that permanent injury to the reversion in that context means "such as will continue indefinitely unless something is done to remove it" (see at [49] of the primary judgment) and that the malicious damage done to the Property (a few days before the reversion fell in) was thus "permanent" in the relevant sense (see at [50]).

19 His Honour noted (at [51]) the appellant's submission that the measure of damages of permanent injury to the reversion was the diminution in the value of the reversionary interest and that the appellant was not in a position to meet such a case; and that the respondent had not adduced any evidence of any diminution in value to its property – rather, its evidence was directed to the cost of repair.

20 The primary judge quoted at [52] the statement made in *Gagner Pty Limited v Canturi Corporation Pty Limited* (2009) 262 ALR 691; [2009] NSWCA 413 (*Gagner*) at [30] (per Campbell JA, Macfarlan JA and Sackville AJA agreeing) that 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". His

Honour then noted at [53] that if an injured party is entitled to regain possession of the reversion shortly after the damage has been done then 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 infliction of the damage (citing by way of example *Joyner v Weeks* [1891] 2 QB 31 (*Joyner*) and the observations of Finkelstein and Gordon JJ, her Honour then sitting in the Federal Court, in *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* (2008) 166 FCR 494; [2008] FCAFC 38 (*Bowen v Tabcorp*) at [9]-[10].

21 His Honour concluded that the appropriate measure in the present case was the reasonable cost of repairing the damage (see at [54]), about which there was no controversy (see at [55]), those costs being in the order of $586,000 (see at [25]).

22 As noted above, his Honour then turned to the evidence as to who caused the damage and found that the damage to the Property was done by the appellant (in company with other persons who had been identified by an employee of the company that had provided scaffolding services to the project) and thus found the appellant liable to the respondent in respect of the malicious damage to the Property, quantifying the respondent's loss by reference to the cost of rectifying the damage (see at [89]-[91]; [53]-[54] of the primary judgment).

23 In addition, his Honour found the appellant liable to the defendant for breach of the duty in s 37 of the DBP Act to exercise reasonable care to avoid economic loss by defects in or related to a building for which the work is done and arising from the construction work, with the respondent's loss being quantified by reference to the cost of rectifying the defective work (see at [138], [148]) being an amount of approximately $300,000 (see at [138], [141], [148]).

24 In so doing, the primary judge found that the phrase "building work" when used in Pt 4 of the DBP Act includes building work relating to a boarding house (which was the type of building being constructed at the Property) (see at [102]-[130] of the primary judgment).

Appeal

25 By his amended notice of appeal filed on 10 August 2022, the appellant raised various grounds of appeal, only three now being pressed:

A. The discretion miscarried

1. There was a miscarriage of the exercise of the discretion of the trial judge when his Honour permitted the respondent to bring a cause of action based upon an action on the case in trespass ([46] to [48] of the Primary Judgment) in circumstances where:

a. the trial judge did not apprehend that the respondent was seeking leave to run an alternative case in relation to the malicious damage that was not grounded upon the pleadings which had limited the causes of action to trespass and conversion (see [41] to [43] Second Further Amended Construction List Statement);

b. the respondent had not sought leave to amend their pleadings;

c. the trial judge did not order the respondent to amend its pleadings;

d. the trial judge did not apprehend that the appellant had made a forensic decision not to adduce any evidence in relation to malicious damage including any evidence in relation to quantification of damages on the basis of a diminution in value of the reversionary interest ([51] of the Primary Judgment);

e. the trial judge did not grant the appellant leave to adduce evidence in reply in circumstances where the appellant had not prepared any evidence in relation to loss of value of the reversionary interest;

f. by reason of subparagraphs 1. [sic; presumably ‘a’] to e. above, there was a denial of procedural fairness or natural justice.

B. Incorrect Measure of Damages

2. The trial judge erred in assessing damage to permanent injury to the reversionary interest on the basis of the cost of repair rather than a diminution in value to the reversionary interest ([54] of the Primary Judgment).

C. Error in Construction

3. The trial judge erred in construing “construction work” and “building work” in Part 4 of the *Design and Building Practitioners Act 2020* (NSW) to include boarding houses ([118] and [119] of the Primary Judgment) in that, on a proper construction of the term “building work”, boarding houses do not fall within the meaning of “building work”.

Determination

26 As the respondent maintains that the appellant’s ground 1 is dependent on ground 2 succeeding (that being the contention that the primary judge erred in assessing damages payable by the appellant by reference to the cost of repairing the damage that he caused, rather than by reference to the diminution in value of the respondent’s interest in the Property) and the appellant appeared to concede that if ground 2 did not succeed then ground 1 would also fail (AT 1.25-28), it is convenient to deal first with ground 2.

Ground 2 – Assessment of damages for trespass on the case

27 The appellant’s proposition in relation to ground 2 is that, in order to obtain the costs of rectification (on a claim for damages for permanent injury to the reversion) the respondent was required to prove that its desire to reinstate the Property was reasonable in the circumstances (the appellant citing *Evans v Balog* [1976] 1 NSWLR 36 (*Evans*) at 40 per Samuels JA, with whom Moffitt P and Hutley JA agreed; *Gagner* at [103]*; Port Stephens Shire Council v Tellamist Pty Ltd* (2004) 135 LGERA 98; [2004] NSWCA 353 at [199] per Santow JA, dissenting on the outcome; *State of South Australia v Simionato* [2005] SASC 412; (2005) 143 LGERA 128 at [92] per Besanko J

(his Honour then sitting on the Supreme Court of South Australia) Debelle and Nyland JJ agreeing; and *Hansen v Gloucester Developments Pty Limited* [1992] 1 Qd R 14 (*Hansen*) at 15-17 per Williams J, Shepherdson J agreeing).

28 The appellant contends that the respondent was required to establish that it intended to reinstate the property and that the cost of restoration was not disproportionate to any diminution in value given the nature of the property.

29 As to the first, the appellant says that there was no evidence of the desire to reinstate the Property (referring to evidence as to the cessation of construction works in early 2018) and that a valuation obtained of the Property in March 2019 assessed the value on three separate bases, one of which was a sale in its current condition.

30 As to the second, the appellant says that there is no evidence of the value of the Property prior to it being damaged and that, without such evidence, it is impossible to determine whether the cost of restoration is disproportionate to any diminution in value given the nature of the Property.

31 The appellant's complaint is thus that the primary judge did not undertake the exercise that was required to be undertaken; in that his Honour had to be satisfied that the cost of rectification was reasonable in the circumstances and that, to be so satisfied his Honour needed to have evidence both that the respondent intended to reinstate the Property and that the diminution in value to the Property as a result of the damage was not disproportionate to the cost of cure (AT 2.40-47); the foundation of the appellant's argument being that the compensatory principle is qualified by a notion of reasonableness.

32 The appellant notes that the Property was acquired on 19 May 2016 for $600,000; that the land was valued by the Valuer General on 1 July 2018 at $344,000; that the building contract was for the tendered price of $1,789,276; and that the total amount paid to DSD was $1,174,386.01, being approximately 65% of the total building price.

33 The 12 March 2019 valuation of the Property valued it in its incomplete state at $1.7 million (assessed on the basis that about 60% of the works had been completed with an *in situ* build value of $1,109,351).

34 The difficulty raised by this is that, on any view of things, the buildings were in an incomplete state at the time of the termination of the building contract and the cost of rectification of defective works was agreed to be about $300,000 but there does not appear to have been an assessment of the diminution in the value of the reversionary interest that was caused by the malicious damage (i.e., the difference in the value of the incomplete buildings with the defective works absent any malicious damage the value of the incomplete buildings with the defective works after the malicious damage had occurred). The nub of the appellant's complaint as to disproportionality is that it is

impossible on the evidence to assess whether the cost of rectification of the malicious damage is reasonable having regard to what the diminution in value of the reversionary interest was by reference to that malicious damage.

35 The appellant argues that, on the face of the valuation evidence, there would appear to be a disproportionality between the costs of rectification of the damage (being $586,000) and the value of the property in its damaged state being $1.7 million (see AT 11.27-37).

36 There was some debate as to where the onus lies in relation to the issue whether rectification costs are reasonable in the circumstances. As I understood the respondent's oral submissions, the respondent accepted that it was for the respondent to establish that rectification is a reasonable course to adopt (i.e., that the onus lies on a plaintiff to establish this) but that if a defendant seeks to contest that by arguing unreasonableness then it may have an evidentiary onus to establish that this is a situation falling within the "fairly exceptional circumstances" (to use the language in *Bowen v Tabcorp*) where the cost of rectification is disproportionate to the diminution in value of the reversion and should not be awarded (see AT 36.33-41). (Such concession is to my mind of some relevance when considering the conclusion reached by Kirk JA and Griffiths AJA on this issue – see below, though I accept as their Honours point out that the question of onus is a matter of law.)

37 The respondent maintains that his Honour's reasoning and conclusion (as to the claim by a reversioner for damage where trespass occurs occasioning permanent injury to the reversion) is correct, referring to *Shell Company of Australia Ltd v Bailey* [1980] WAR 233 (*Shell Company*) at 236 and 242, and *Beaudesert* at 152 where the High Court described such actions as "an action on the case for trespass" or "actions of trespass on the case".

38 The respondent points to cases where permanent injury to the reversion sounded in damages for the cost of repairing the damage caused (*Jones v Llanrwst Urban District Council* (1911) 1 Ch 393 (*Jones v Llanrwst*); *Alston v Scales* (1832) 9 Bing 3; *The Metropolitan Association for Improving the Dwellings of the Industrious Classes v Fetch* (1858) 5 CB(NS) 502; and *Baxter v Taylor* (1832) 4 B & AD 71) noting that the decision of Parker J in *Jones v Llanrwst* was applied by the Full Court of the Supreme Court of Victoria in *Birtchnell v Fred Walker and Co Pty Ltd* (1930) Argus LR 176 (at 177), where in substance, the damages awarded were for the cost of repairing the damage caused.

Reference is also made in this context to *Mayfair Property Company v Johnston* [1894] 1 Ch 508 at 516-520, where the entitlement to damages was in substance the cost of rectifying the damage to the land.

39 The respondent says that that approach to damages reflects the modern approach to damages where a building is damaged by tortious conduct. In cases involving tortious damage to a building, the cost of repair is an appropriate measure of damages, unless it is shown that it would be unreasonable for a plaintiff to repair the land (citing *Evans* at 39-40; *Hansen* at 15; and *Gagner* at [89]-[103] (and [30]-[31])).

40 The respondent says that the primary judge awarded damages by reference to an entirely appropriate measure of damages, being the cost of rectification of the damage to the Property that the appellant caused. It is said that there was no contention (much less evidence) that it would be unreasonable for the respondent to repair the damage to the Property maliciously caused by the appellant.

41 In response to a query as to where there was evidence of the diminution in value of the reversion, the respondent pointed (see at AT 40) to the March 2019 valuation of the Property; and argued (at AT 40.39-47) that:

> So one assesses the value as if the building were completed [$3.75 million], then one deducts from that cost of sales, gets net proceeds, then one deducts a profit and risk factor, then one deducts less development costs, including a provision allowance to attract a new builder and contingencies and so forth. So that there's an amount of $1.15 million which is the assessed cost to complete the development as observed by the valuer after the damage has been done, and after the items had been removed, as found by the trial judge, and the valuation assessment for land of this sort involves the assessed cost of completing the works so as to result in completed houses being deducted on a dollar for dollar basis.

42 The submission of the respondent was that the valuation methodology shows the cost to complete the works, including the cost to repair the damage that was done, and that the cost to repair the damage and replace the items that were taken from the buildings can in effect be deducted from the assessed value of the completed buildings. On that basis the respondent would say that, if the cost of rectifying the malicious damage was $586,000, then the cost of completion would be $1.15 million less the $586,000 (so that in the respondent's submission it can be concluded that the cost of rectifying the malicious damage was reasonable and not likely to exceed the diminution in value caused by that conduct (see AT 41.27-36)) and indeed it was suggested that the cost of rectification measure of damages might be less than the diminution in value of the reversion.

43 The difficulty, however, is that it does not appear that the primary judge was taken through such an exercise, and it is not apparent that there was a basis on which the diminution in value of the reversion was able to be or was assessed by the primary judge in determining whether the cost of rectification of the malicious damage was reasonable and not disproportionate to the diminution in the value of the reversion. That is hardly surprising in circumstances where the respondent came to court on the basis

that it was entitled to rectification costs based on what might be described as a standard trespass to land claim; not on the basis that it was claiming for damages to its reversionary interest in the land (an action on the case).

44 That, in essence, is the link between grounds 1 and 2. It is not disputed by the appellant that, in an appropriate case, the cost of rectification may be a relevant indicium of the diminution in value of the reversionary interest. However, the complaint that there was no evidence of that diminution in value is well-founded. While it may have been reasonable for the primary judge to infer from the evidence that the respondent intended to reinstate the Property before sale (and the valuation might well have been intended for a loan for that purpose), the difficulty is that the exercise of determining whether that cost was reasonable having regard to a comparison with the diminution in value of the reversionary interest cannot have been carried out in the absence of that diminution having been assessed.

45 On that basis, in my opinion ground 2 is made good. I have taken into consideration the reasoning of Kirk JA and Griffiths AJA for the contrary conclusion (see below). I accept that there is an evidentiary onus on a defendant seeking to argue unreasonableness as such, though as noted I understood the respondent to accept that it is for the plaintiff to establish that rectification was a reasonable course to adopt (see [36] above). In the absence of evidence from which one could assess the diminution or likely diminution in value of the reversionary interest, I am not persuaded that the respondent satisfied that onus in the present case.

Ground 1 – Denial of procedural fairness or natural justice

46 Turning back to ground 1, the appellant in written submissions appeared to put this as a *House v The King* error, invoking the principles relating to challenges to the exercise of a discretion by reason (see *House v The King* (1936) 55 CLR 499; [1936] HCA 40 at 505 per Dixon, Evatt and McTiernan JJ); i.e., where the primary judge: acted on the wrong principle; allowed extraneous or irrelevant matters to guide or affect him or her; mistook the facts; or did not consider some material consideration. In his written submissions, the appellant submits that the discretion of the primary judge miscarried (in the *House v The King* sense) by allowing the respondent to run an unpleaded alternative case of an action on the case in trespass. In oral submissions, however, it was accepted that the complaint here is as to an error of law – that being a complaint as to a denial of procedural fairness.

47 The appellant says that (as is historically correct) an action on the case in trespass is a separate cause of action to trespass; and the appellant complains that the primary judge did not grapple with the appellant's submission that the damage to the reversionary interest is usually quantified by the diminution in value to the land rather than on the basis of the costs of rectification (the latter being a guide to, but not necessarily conclusive evidence of, the diminution in the value of the reversion). In this regard, the appellant refers to Edelman JE, *McGregor on Damages* (Sweet & Maxwell,

21st ed, 2020) at [39-043]; *Hosking v Phillips* (1848) 154 ER 801; (1848) 3 Exch 168 (*Hosking*); *Cotterill v Hobby* (1825) 107 ER 1133; (1825) 4 B&C 465 (*Cotterill*); *Jones v Llanrwst* at 404; *Hanson v Newman* [1934] Ch 298 at 319 to 320 and 322 to 323 per Denning LJ, Singleton and Bucknell LLJ agreeing at 328; *Smiley v Townshend* [1950] 2 KB 311; *Jaquin v Holland* [1960] 1 WLR 258 and *Van Dal Footwear Ltd v Ryman Ltd* [2010] 1 WLR 2015.

48 Insofar as the primary judge relied upon *Joyner* and the observations of Finkelstein and Gordon JJ in *Bowen v Tabcorp* at [9]-[10] as to the measure of damages for an action on the case in trespass (see at [53] of the primary judgment), the appellant says that the cost of rectification is only a guide for calculating the diminution in the value of the reversion; it is not conclusive (citing [7.900] of Edgeworth B, *Butt's Land Law* (Thomson Reuters, 7th ed, 2017) (*Butt's Land Law*) where reference is made to *Graham v Markets Hotel Pty Ltd* (1943) 67 CLR 567; [1943] HCA 8 at 583, 587, 595; *Jones v Herxheimer* [1950] 2 KB 106; *Haviland v Long* [1952] 2 QB 80) and will not always be the appropriate measure of damage to the reversion. The appellant refers in this regard to [7.900] of *Butt's Land Law* where the author says, in the context of damages for breach of a covenant to repair, that reinstatement damages are only awarded in a relatively narrow range of cases.

49 The appellant says that, in assessing damage to the reversionary interest for breach of the covenant to repair, the proportionality between the benefit in fulfilment of the obligation and the cost of compliance is a relevant consideration (citing [10.13] in Croft C, Hay R and Virgona L, *Commercial Tenancy Law* (Lexis Nexis, 4th ed, 2017) referring to *Gimtak Pty Ltd v Cathie* [2001] VSC 88).

50 As to the applicable principles as to the quantification of damages for permanent injury to the reversionary interest, the appellant points to *Cotterill*; *Hosking* quoting Parke B at 182; and *Moss v Christchurch Rural District Council* [1925] 2 KB 750, in which damages were assessed on the basis of the diminution in value of the reversionary interest.

51 While the appellant accepts that the costs of cure is a relevant indicium of the proper measure of damages, the appellant's complaint is that he was prejudiced by the fact that the respondent only decided to run an (unpleaded) case based upon an action on the case in trespass on the second day of the hearing. The appellant says that there was no opportunity for him to file and serve valuation evidence quantifying the damage

to the reversion on the basis of a diminution in value; and that such evidence is an essential facet in the valuation of the damage to the reversionary interest. As a result, the appellant says that he has been denied procedural fairness.

52 The respondent argues that the prejudice claimed to have been suffered (namely, the lost opportunity to serve evidence quantifying the damage to the reversion on the basis of a diminution in value rather than cost of rectification) is illusory (on the basis that the primary judge was correct to apply the cost of rectification measure of damages by reference to the authorities considered in relation to ground 2 of the appeal).

53 In any event, the respondent says that the premise of appeal ground 1 (that the cause of action upheld by the primary judge was not pleaded) is a false premise. In support of that contention, reference is made to the following in the second further amended technology and construction list statement.

54 First, the identification in Part B (“Issues Likely to Arise”) that one such issue was whether the appellant maliciously damaged the works and converted materials, fixtures and fittings in March 2018 after the respondent issued a show cause notice, and what damages (including aggravated and exemplary damages) should be awarded for that conduct (see at B[15] of the second further amended technology and construction list statement). The appellant further noted that the appellant’s list response stated that the same issue was likely to arise.

55 Second, the contentions that: the building contract with DSD was entered into on 10 July 2017 (see at A[1]; C[36] of the second further amended list statement) and was terminated on 19 March 2018 (see at C[8]; C[36]); in the period from 10 July 2017 until 19 March 2018, the appellant supervised or otherwise had substantive control over the carrying out of the building work at the Property (see at C[36]); during DSD’s possession of the Site, the Property was maliciously damaged (see at C[21]); and the malicious damage was done by the appellant in the period from 2 March 2018 to 19 March 2018 (see at C[41]).

56 Third, the contentions that, in the premises, the appellant is liable to the respondent in trespass to land (see at C[43](a)); and the appellant is liable to pay damages to the respondent for the cost of rectifying the damage done to the Property (see at C[45](a)).

57 The respondent maintains that the second further amended technology and construction list statement pleaded facts that were clearly wide enough to include a claim that the malicious damage was done by the appellant, during DSD’s possession of the Property, in the 17 day period immediately prior to the building contract being terminated; and that, in those circumstances and because of that conduct, the appellant was liable to respondent as a trespasser to pay damages to the respondent for the cost of rectifying the damage done to the Property.

58 The respondent dismisses the appellant’s contention that the second further amended technology and construction list statement pleaded an action in trespass but did not plead an action on the case in trespass as being “an argument about semantics”. The respondent says that the cause of action of a reversioner sometimes described as

"action on the case in trespass" may equally aptly be described as an "action in trespass", noting that it was so described by the Full Court of the Supreme Court of Western Australia in *Shell Company* at 236 and 242.

59 In the circumstances, the respondent says that it was not necessary for the second further amended technology and construction list statement to use the words "action on the case in trespass" and that the facts pleaded in the second further amended technology and construction list statement and the use of the words "liable in trespass to land" are sufficient to include the claim that the primary judge upheld.

60 Further, the respondent says that the second further amended technology and construction list statement is not a pleading and it is noted that the Court's practice note prescribes that a List Statement should identify the grounds for the relief claimed without formality (Practice Note SC Eq 3 at [9]). The respondent says that therefore no issue of the primary judge allowing it to run an unpleaded cause of an action on the case in trespass arises.

61 In addressing this ground, it is relevant at the outset to note that, while commercial list statements and responses differ from pleadings in substance, they nevertheless stand in the place of pleadings in proceedings commenced in the Commercial List and Technology and Construction List.

62 In *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* (2018) 329 FLR 149; [2018] NSWCA 15, Bathurst CJ (with whom Beazley P (as Her Excellency then was) and Leeming JA agreed) opined that a commercial list statement and commercial list response stand in the place of pleadings in proceedings in the Commercial List of the Supreme Court. His Honour stated (at [260]) the following:

> 260. Proceedings in the Commercial List of the Supreme Court are commenced by summons and are governed by Practice Note SC Eq 3, which does not specifically refer to the filing of a reply to a commercial list response. If these proceedings were commenced by statement of claim, the filing of a reply would be permitted by r 14.4 of the Uniform Civil Procedure Rules 2005 (NSW) (the UCPR). Further, a "pleading" is relevantly defined in the dictionary to the UCPR to include "a statement of claim, defence, reply and any subsequent pleading for which leave is given". Although Part 14 of the UCPR does not directly apply in proceedings commenced by summons (see r 14.1), *a commercial list statement and a commercial list response stand in the place of pleadings*. *In circumstances such as the present case where a reply to the commercial list response was permitted, it would seem to me that such a reply forms a part of the pleadings*.
>
> [emphasis added]

63 In *Capello v Hammond & Simonds NSW Pty Ltd* [2021] NSWCA 57, Leeming JA (with whom Macfarlan and McCallum JJA agreed) opined (at [26]) that the "list statement" and "response to list statement" which identify issues in proceedings in the

Construction List in accordance with Practice Note SC Eq 3 stand in the place of pleadings. His Honour concluded that Pt 14 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) therefore applies to commercial list statements.

64 In *Swiss Re International SE v Simpson* (2018) 354 ALR 607; [2018] NSWSC 233 Hammerschlag J (as his Honour then was) noted at [34] that, while the commercial court "does not operate as one of strict pleading, it is also not one of no pleading".

65 In *BCEG International (Australia) Pty Ltd v Xiao* [2022] NSWSC 972, Rees J further noted at [369] that, even if Pt 4 of the UCPR is not applicable to commercial list statements and responses, parties to litigation in the Commercial List must still comply with the obligations in ss 56 to 58 of the *Civil Procedure Act 2005* (NSW), which require parties to articulate the issues clearly and precisely, such obligation continuing during trial (see also *Nowlan v Marson Transport Pty Limited* (2001) 53 NSWLR 116; [2001] NSWCA 346).

66 There is no reason to treat commercial list statements and responses in the Technology and Construction List any differently. Thus, by reference to the authorities considered below, the relief granted in proceedings in that List ought therefore be confined to the cause or causes of action pleaded in the list statement. To decide the case on a different basis would be a denial of procedural fairness.

67 The central role of pleadings was authoritatively expressed by the High Court in *Banque Commerciale SA., en liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279; [1990] HCA 11 (*Banque Commerciale*). At 286-7 Mason CJ and Gaudron J said (omitting citations) that:

> The function of pleadings is to state with sufficient clarity the case that must be met. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities.

68 Brennan J, as his Honour then was, at 288 expressed the principle in the following terms (omitting citations):

> When the pleadings bring the parties to the issue, the court's function is to determine that issue and to grant relief founded on the pleadings unless the parties are allowed to alter the issues at the trial without amendment of the pleadings (as to which, see the observations in *London Passenger Transport Board v Moscrop* (29). The rule is clearly laid down in the judgment of this Court in *Dare v Pulham* (30):

> Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial, the relief which may be granted to a party must be founded on the pleadings.

69 Procedural fairness requires that any relief granted is to be confined to that properly pleaded (see *Banque Commerciale* at 286-287; see also *Gould & Birbeck & Bacon v Mount Oxide Mines* (1916) 22 CLR 490; [1916] HCA 81 at 517 per Issacs and Rich JJ). Likewise in *Dare v Pulham* (1982) 148 CLR 658; [1982] HCA 70 at 664 it was said that "the relief which may be granted to a party must be founded on the pleadings".

70 Ipp JA noted in *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 73 NSWLR 653; [2008] NSWCA 206 (at [424]) that the rule that, in general, relief is confined to that available on the pleadings secures a party's right to a basic requirement of procedural fairness; and that, apart from cases where the parties choose to disregard the pleadings and to fight the case on additional issues chosen at the trial, the relief that may be granted to a party must be founded on the pleadings.

71 Where a judicial officer goes beyond the case that was pleaded and run at trial, there will be a denial of procedural fairness (see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 (*Farah*) at [132]-[133]; *Krnjulac v Lincu* [2015] NSWCA 367 at [12]-[23] per Bathurst CJ (Leeming JA and Emmett AJA agreeing). Indeed, in *Farah*, the Court held at [132] that:

> … It was unjust to the appellants to decide the respondent's appeal to the Court of Appeal on an independent ground which was never pleaded by the respondent, never argued by the respondent before the trial judge, and never argued by the respondent in the Court of Appeal. … The relevant part of the Court of Appeal's judgment would have come as a complete surprise to all parties. …

72 Such procedural unfairness can only be remedied by the Court raising with the parties the alternative basis upon which the case may be determined, so as to give the parties an opportunity to be heard (and, if appropriate, adduce evidence directed to that prospect) (see *South Western Sydney Local Health District v Gould* (2018) 97 NSWLR 513; [2018] NSWCA 69 at [70]-[73] per Leeming JA, with whom Basten and Meagher JJA agreed).

73 More recently, in *Bryant v Quinn* [2022] NSWCA 163 (*Bryant v Quinn*), a not dissimilar point arose.

74 In the present case, and accepting the informality of "pleadings" in the Technology and Construction List, the pleaded claim did not make clear that the complaint was as to permanent injury to the reversionary interest of the owner (the respondent). It is one thing to say that trespass in an action on the case might be subsumed into an overall category of trespass to land, but the causes of action are distinct and standing to sue in the present case was only for an action on the case for damage to the reversionary interest. The submission that an action on the case was pleaded notwithstanding the absence of reference to those words must be rejected. It was not for the appellant to trawl through the pleading in order to divine that, because there was a pleading that malicious damage was occasioned to the premises during a period in which DSD (not the respondent) had possession of the site, this must have been an action for damages

to the reversionary interest because a permanent injury had been occasioned to the reversion. The fact that it was not clear is demonstrated by the evident surprise it occasioned to the appellant's counsel at the hearing, there being a candid acknowledgement that this was not the case the appellant had come to court to meet.

75 True it is that there may be criticism of the list response for not raising the standing issue; and that the appellant may be said to have taken a forensic decision not to contest certain issues (as to damages) relying on what the primary judge himself considered (at least in the course of argument) would, if made good, be a "knock out point".

76 The difficulty here is that the appellant, having raised the pleading issue and having adverted to the prejudice that would be caused if the unpleaded alternative case were to be entertained (namely, that investigations had not been undertaken as to the value of any diminution in value of the reversionary interest – presumably in order to test comparatively whether there was disproportion between an award for the costs of rectifying the damage (which is what was claimed) and the diminution in the value of the reversion), was left in the position that there was no acquiescence in an expansion of the pleaded case and did not have the opportunity properly to address such an expanded case. True it is that the appellant did not seek an adjournment for that to be done; nor did the appellant on this appeal identify what evidence it might have adduced had that opportunity been extended to him.

77 Nevertheless, in circumstances where it cannot be said that evidence of the diminution in the value of the reversionary interest would not have been relevant (nor that such evidence might not have enabled an argument to succeed to the effect that the costs of rectification would not be the appropriate measure of damages in the present case) it cannot be said that the complained loss of opportunity is illusory. In those circumstances, accepting that Kirk JA and Griffiths AJA have on balance come to the opposite conclusion (see at [175]), and considering that the balance here is more finely drawn than in *Bryant v Quinn*, I have ultimately concluded, with respect, that there has been a denial of procedural fairness in the departure from the "pleaded" case. Accordingly, I consider that ground 1 is made good; and I would have remitted the matter for re-hearing on this aspect of the claim.

Ground 3 – Whether "building work" extends to boarding houses

78 I agree with Kirk JA and Griffiths AJA, for the reasons that their Honours have given, that ground 3 of the appeal should be rejected.

Orders

79 For the above reasons, I would have proposed that the appeal be allowed in part and the matter remitted to the Equity Division for re-hearing of the claim for damages for permanent injury to the respondent's reversionary interest in the Property the subject of this proceeding. Costs would have then fallen to be determined on the basis that the

appellant was partly successful on the appeal. As it is, having regard to their Honours' contrary conclusions on grounds 1 and 2, an order for the dismissal of the appeal with costs is the appropriate order to be made.

80 **KIRK JA and GRIFFITHS AJA**: Mr Daniel Roberts, the appellant, is a builder who operated through a company, DSD Builders Pty Ltd, which is now in liquidation. The company contracted with Goodwin Street Developments Pty Ltd, the respondent, to construct three residential boarding houses intended for use as university student accommodation on land owned by Goodwin. Work was well advanced when the parties fell out. DSD did no further work on the site after 2 March 2018, immediately following a site meeting. On 19 March 2018 a representative of Goodwin attended the building site and observed that substantial deliberate damage had been done to the buildings and that numerous items – including doors, windows and stairs – had been removed. Goodwin terminated the building contract that day.

81 Goodwin sued Mr Roberts in the Supreme Court. It had initially sued DSD, but later joined Mr Roberts. The claim against the company was stayed automatically after it went into liquidation. Goodwin made two types of claim against Mr Roberts:

(1) It sued him in tort with respect to the deliberate damage. The primary judge, Stevenson J, held that Mr Roberts had caused this damage. There was no dispute that the cost to repair the damage and replace the missing items was some $586,000. The respondent initially labelled the tort claim as a claim in trespass. The appellant submitted below that such a claim could not be made out in circumstances where, at the time of the damage, the owner did not have exclusive possession of the building site. The primary judge accepted that

submission, but then accepted the respondent's fallback submission that its claim could be treated as an action on the case. On that basis his Honour upheld the claim for the rectification/reinstatement costs.

(2) Goodwin sued Mr Roberts for a separate list of defects in the building work that had been undertaken. This claim was made pursuant to the statutory duty of care with respect to construction work arising under s 37 of the *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**). There was no dispute that the cost to rectify these defects was of the order of some $300,000.

82 The primary judge upheld both claims, and Mr Roberts was ultimately ordered to pay Goodwin the sum of $948,820.59 plus costs.

83 Mr Roberts appeals with respect to each of the two claims, raising three grounds of appeal:

(1) As regards the first claim, addressed to the deliberate damage, he alleges that there was a denial of procedural fairness by the primary judge in permitting Goodwin to characterise its claim as an action on the case in trespass, as opposed to a claim directly in trespass. However, it was conceded in argument that this ground could not succeed if the second ground was not made out.

(2) Also as regards the first claim, the appellant alleges that the primary judge erred "in assessing damage to permanent injury to the reversionary interest on the basis of the cost of repair rather than a diminution in value to the reversionary interest". This ground thus raises an issue about the assessment of damages for Goodwin's tort claim.

(3) As regards the second claim, directed to the building defects, he argues that the primary judge erred in construing the references to "construction work" and "building work" in relevant parts of the DBP Act as extending to work done on boarding houses. This ground turns on issues of statutory construction.

84 In our view none of the grounds is made out and the appeal should be dismissed with costs. It is appropriate first to address ground 2, then ground 1, followed by ground 3.

Ground 2 – Assessment of damages for injury to the reversionary interest

85 As noted, the appellant does not dispute that the amount awarded by the primary judge correctly reflected the costs of making good the damage to the property that he was found to have caused. Nor does he dispute that Goodwin was entitled to claim damages on an action on the case for damage to its reversionary interest in the land even though it was not in exclusive possession of the land at the time the damage was done: note eg *Rodrigues v Ufton* (1894) 20 VLR 539 at 543-546. What he disputes is whether those rectification costs represented the proper measure of compensation.

86 The appellant contends that the primary judge failed to grapple with his submission that the damage to the reversionary interest is usually quantified by the diminution in value to the land, rather than on the basis of the cost of rectification. The appellant acknowledges that it is possible for the cost of rectification to be a guide to the

diminution in the value of the reversion, but says the onus lies on the claimant to prove that awarding such an amount is reasonable, and that that involves showing both that the claimant actually intends to reinstate the property and that the cost of restoration is not disproportionate to any diminution in value. The appellant cites various authorities in support of these contentions.

87 On close examination, neither general principle nor the authorities cited by the appellant support his position. In the circumstances of the case there was an evidentiary onus on him to establish that awarding damages for the cost of reinstatement was unreasonable in all the circumstances. He did not discharge that onus. In any case, the evidence supports an inference that Goodwin intended to rectify the damage done to the buildings. We do not understand the respondent to have conceded that the appellant did not bear an evidential onus, although its submissions were not pellucidly clear on the point (for example, stating elliptically in address that "[w]hilst there may be an onus on the plaintiff to prove that it's reasonable to have the damages measured by reference to the cost of rectification, any question of unreasonableness is an onus on the defendant"). In any event, where the onus lay is a matter of law. Further, it was clear that the respondent submitted that insofar as there was any onus on it that onus was discharged on the evidence.

88 It is useful to start by referring to the reasons of the primary judge, then identifying the applicable principles, before turning to examine the authorities on which the appellant relies, then applying the law to the facts of the case.

The reasons of the primary judge

89 Given their central importance to ground 2, it is desirable to set out in full the pertinent part of the primary judgment (footnotes omitted):

> 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", if during that other person's possession of the property, a trespass occurs resulting in "permanent injury to the reversion", or that will "necessarily affect the reversioner's interest when the property falls into possession".
>
> 49 Permanent injury to the reversion in this context means "such as will continue indefinitely unless something is done to remove it".
>
> 50 The "injury" done on the site in this case was thus "permanent" in this sense.
>
> 51 Ms Chan [appearing for Mr Roberts] submitted that the measure of damages to permanent injury to the reversion is the diminution in the value of the reversionary interest 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.

> 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".
>
> 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.
>
> 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.

Applicable principles

90 The basal compensatory principle is well settled (*Haines v Bendall* (1991) 172 CLR 60 at 63; [1991] HCA 15; citations omitted):

> The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed.

91 There can be some differences in assessing such damages for contract and tort. For example, in contract it is relevant to take into account the fact that the parties have given consideration for the due performance of their respective contractual obligations and may have agreed in advance as to what is to occur in the event of a breach. However, the basic compensatory principle is the same for both.

92 In seeking to put the injured party in the same position account must be taken of what is reasonable. For example, in ***Arthur Robinson*** *(Grafton) Pty Ltd v Carter* (1968) 122 CLR 649; [1968] HCA 9, Barwick CJ said that: a compensation award "ought to be a fair and reasonable compensation for the injuries received" (at 656); this involves "moderation" and not "attempting a perfect compensation" (at 657); and the question "is not what are the ideal requirements but what are the reasonable requirements" of the injured person (at 661). In *Chulcough v Holley* (1968) 41 ALJR 336, at 338, Windeyer J said that a plaintiff "is only entitled to be recouped for such reasonable expenses as will reasonably be incurred as a result of the accident". And in *Sharman v Evans* (1977) 138 CLR 563, at 573; [1977] HCA 8, Gibbs and Stephen JJ referred to "[t]he touchstone of reasonableness". These statements are taken from personal injury cases but they manifest general principle.

93 The object of putting the claimant in the same position as if the wrong had not occurred may often "be achieved in different ways, and a proper assessment is determined by the circumstances of the case and by the overriding requirements of what is reasonable": ***Evans v Balog*** [1976] 1 NSWLR 36 at 39. In assessing what is

reasonable compensation to the particular claimant the court must bear in mind "what he was, what he now is, and how he is likely to meet his [injury]": *Arthur Robinson* at 656 per Barwick CJ.

94 In certain types of case particular approaches to the assessment of damages become accepted as to how the compensatory principle is to be given effect. Of course, and consistently with the statements just quoted, such conventional practices "must yield if the facts of the instant case require some different method to be adopted for assessing the appropriate amount of compensation": see ***Gagner*** *Pty Ltd (t/as Indochine Cafe) v Canturi Corporation Pty Ltd* [2009] NSWCA 413; (2009) 262 ALR 691 at [31] per Campbell JA, with whom Macfarlan JA and Sackville AJA agreed. To similar effect, in *Port Stephens Shire Council v* ***Tellamist*** *Pty Ltd* [2004] NSWCA 353; (2004) 135 LGERA 98 at [186], Santow JA (dissenting in the result) said that, in applying the compensatory principle "to the multifarious situations of tortious compensation, the Court must not be constrained by rigid or inflexible rules". His Honour added at [187] that such "rules and principles as the common law has developed to assess the damages of an injured party are not inflexible, and must always be applied with the overriding goal of compensation".

95 A conventional approach has developed with respect to compensating an owner for damage to realty. The issue often arises, and appears first to have arisen, in claims by landlords against tenants for breach of a lease conditions relating to the condition of the property (in particular a covenant to repair). It can also arise with respect to claims for breach of building contracts. As addressed below, the approach has also been applied to tort claims.

96 The primary judge invoked certain cases dealing with breach of a covenant to repair. One of those was ***Joyner*** *v Weeks* [1891] 2 QB 31. As the appellant acknowledged, that decision is authority for the proposition that the measure of damage for breach of a tenant's covenant to repair is in general the cost of rectification, at least when the issue arises at the end of the term of the lease. Fry LJ described this as the "ordinary prima facie rule" (at 45). This "rule" has been altered in the United Kingdom by s 18(1) of the *Landlord and Tenant Act 1927* (UK) (quoted below at [134]). It has similarly been altered in some parts of Australia, including this State: *Conveyancing Act 1919* (NSW), s 133A. That alteration does not undermine the significance of the common law authority in throwing light on application of the compensatory principle applicable to claims, whether in tort or contract, where that statutory alteration does not apply.

97 In ***Minter v Eacott*** (1952) 69 WN (NSW) 93 the Full Court of the NSW Supreme Court considered an action for nuisance by withdrawal of lateral support for land. KW Street CJ adopted a principle from the *American Restatement (First) of Torts*, §929, vol 4, p 660 that he paraphrased as follows (at 95; see similarly Owen J at 96 and Clancy J at 97):

> [T]he plaintiff has an election to claim as compensation the difference between the value of the land before the harm and the value after the harm, or he may claim the cost of restoration which has been or may be reasonably incurred. I think that due emphasis has to be given to that word "reasonably".

98 That language indicates that the claimant has a measure of choice as to how to frame the claim for compensation.

99 There is a helpful analysis of *Joyner* in the joint judgment of Finkelstein and Gordon JJ in *Bowen Investments Pty Ltd v **Tabcorp** Holdings Ltd* (2008) 166 FCR 494; [2008] FCAFC 38. In that case the tenant, Tabcorp, had altered without permission the foyer of the building it leased. The landlord sued for the cost of reinstating the foyer to its previous state. Their Honours pointed out at [10] that the proposition "firmly established" in *Joyner* is that if an action is brought at or near the termination of a lease, "the rule … is that the landlord is entitled to recover the cost of repairs". They approved Fry LJ's description of this as the "ordinary" or "prima face rule". The plurality then noted at [11] that the High Court had applied *Joyner* in *Graham v Markets Hotel Pty Ltd* (1943) 67 CLR 567, including by Latham CJ (with whom Rich J agreed), who said at 582 that:

> The general rule for assessing damages for breach of a covenant by a lessee to deliver up the demised premises in repair was settled by *Joyner v Weeks*, where it was held that the damages were the cost of putting the premises into the state of repair required by the covenant.

To similar effect, see at 586 per Starke J and at 593 per Williams J.

100 The plurality of the Full Court in *Tabcorp* also referred approvingly at [12] to the following statement by Tipping J in delivering the New Zealand Court of Appeal's decision in *Maori Trustee v Rogross Farms Ltd* [1994] 3 NZLR 410 at 420 (emphasis added):

> The rule in *Joyner v Weeks* is not an absolute rule. It is, however, the prima facie rule which will be applied **unless the lessee can show by sufficiently cogent evidence that in both the short and the long term the lessor will definitely suffer no loss or will suffer a loss which can definitely be assessed at less than the prima facie measure**.

101 The emphasised words suggest that, at least in a case in contract, the defendant carries an evidentiary burden in demonstrating that the cost of repair is not the appropriate measure for damages in a particular case.

102 The suggestion that there is an evidentiary onus on the party who challenges the reasonableness of an award of damages based on the cost of reinstatement or repairs is also implicit in the language of "prima facie" rule. That understanding is reflected later in the joint judgment in *Tabcorp* (emphasis added):

> 29 Speaking generally in cases of work done (or not done) or damage caused to property in breach of contract, the bases for assessing damages are: (a) the cost of reinstatement; or (b) the diminution in the value of the property due to the breach of contract. The correct measure is whatever is reasonable for the wronged party to recover. An assessment of what is reasonable in a particular case is not to be measured in purely economic terms: *Ruxley* [1996] AC at 353, 358-359, 360-361, 370-371. Personal preferences of a subjective nature are not irrelevant when choosing the appropriate measure of damage: *Atkins (GW) Ltd v Scott* (1991) *Construction Law Journal* 215 at 331; *Radford v De Froberville* [1977] 1 WLR 1262 at 1270-1273. This is especially so if the plaintiff's "predelictions" (the word used by Oliver J in *Radford* [1977]

> 1 WLR at 1271) are not excessive or extravagant: *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 312. See also *Black Creek Deer Farm Pty Ltd v ANZ* [1996] V ConvR 66,534 (54-549) at 66,541-66,542.
>
> 30 Put another way, we reject the view that objective reasonableness is to be determined solely from the viewpoint of an hypothetical rational economic actor. Such an approach would have the effect of subsuming the "cost of reinstatement" measure of damages within the "damage to the reversion" measure. That is to say, costs of reinstatement would generally be given only if there were a roughly equivalent diminution in value of the property caused by the wrongful conduct.
>
> 31 In our opinion **the respondent did not discharge the onus of displacing the prima facie method of calculating damages in this case**. …

103 It is implicit in the discussion at [30] that an approach based upon the cost of reinstatement is not merely a proxy for damage to the reversionary capital value. It is an open measure of compensation in its own right.

104 It appears that one argument made by Tabcorp in the Full Court was that the landlord had not established that it intended in fact to reinstate the property at the end of the lease. Rares J addressed this issue directly at [110]-[119], concluding that "Tabcorp should have pleaded, and carried the onus of proving, either that Bowen Investments did not genuinely intend to reinstate, or that reinstatement was unreasonable". Rares J did not agree with the plurality's orders, as he would have given a chance to make further submissions as to relief, but that difference is not material for current purposes. On this issue the plurality noted at [27] that the landlord had a "wish" to have the foyer restored. It is not clear if their Honours regarded this as sufficient to establish an intention to reinstate, or if they implicitly agreed with the view of Rares J. At the least it appears that their Honours regarded the claim as maintainable even in the absence of express evidence to the effect that the landlord was planning to reinstate the property.

105 On appeal to the High Court the majority judgment was affirmed: *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; [2009] HCA 8. The High Court did not comment on those parts of the Full Court judgments which are referred to above, but relevantly said as follows (emphasis added, citations omitted):

> [17] The Tenant stressed that in *Bellgrove v Eldridge* this Court pointed out that there was a qualification to the rule it stated in regard to damages recoverable by a building owner for the breach of a building contract. "The qualification ... is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt". The example which the Court gave of unreasonableness was the following:
>
> > "No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks."
>
> That tends to indicate that the **test of "unreasonableness" is only to be satisfied by fairly exceptional circumstances**. …
>
> [19] … The "qualification" referred to in the passage quoted above that the "work undertaken be necessary to produce conformity" meant, in that case, apt to conform with the plans and specifications which had not been conformed with. Applied to this case, the expression "necessary to produce conformity" means "apt to bring about conformity between the foyer as it would become after the damages had been spent in

> rebuilding it and the foyer as it was at the start of the lease". And the Landlord also correctly submitted that the requirement of reasonableness did not mean that any excess over the amount recoverable on a diminution in value was unreasonable.

106 The discussion at [17] implies that there is some onus on a defendant to displace a claim for rectification costs in the context at hand by establishing that it is unreasonable. And the discussion at [19] confirms that such a measure of damages is not a mere proxy for diminution in value. The High Court did not expressly address any issue relating to whether or not the claimant needed to prove an intention to reinstate.

107 This type of approach has also been applied in tort claims. As Campbell JA pointed out in *Gagner*, a negligence case, at [95], there is a:

> very close similarity between the way that the principles operate for a court to assess damages for a breach of contract consisting of or resulting in building work that is not in accord with the contract, and for a court to assess damages for tortious damage to property. In both situations, it must be reasonable to take remedial action before the cost of that remedial action is allowable as damages.

108 Some of the relevant principles in relation to tortious damage caused to real property were identified by Donaldson LJ in *Dodd Properties Ltd v Canterbury City Council* [1980] 1 WLR 433 at 456–7 (as approved eg in *Hansen v Gloucester Developments Pty Ltd* [1990] 1 Qd R 14 at 15):

> The general object underlying the rules for the assessment of damages is, so far as is possible by means of a monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach of contract. In the case of a tort causing damage to real property, this object is achieved by the application of one or other of two quite different measures of damage, or, occasionally, a combination of the two. The first is to take the capital value of the property in an undamaged state and to compare it with its value in a damaged state. The second is to take the cost of repair or reinstatement. Which is appropriate will depend upon a number of factors, such as the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the true measure of damage. If he reasonably intends to continue to occupy it and to repair the damage, clearly the cost of repairs is the true measure. And there may be in-between situations.

109 That statement of principle is consistent with this Court's decision in *Evans v Balog*, where it was argued with respect to a claim made both in tort and contract that the claimant should not have been awarded the cost of reinstatement, as the damage to a family home was inconsequential when viewed against the redevelopment potential of the site in light of a rezoning. The argument was rejected. Samuels JA said that "it cannot be said that the normal measure of damages is the amount of diminution in the value of the land and improvements" and an "equally admissible measure is the cost of reinstatement and restoration" (at 39, with Moffitt P and Hutley JA agreeing). His Honour approved a statement in *McGregor on Damages* to the effect that the test as to which was the appropriate measure was the reasonableness of the claimant's desire to reinstate the property (at 40). He said that the issue of disproportion is not "always to be revealed by arithmetical comparison" and that while the cost to the defendant of the

competing measure of damages is "a significant factor", it is only one ingredient in assessing whether the plaintiff's claim is reasonable or not (at 40). In the case of the family home in question it was considered to be eminently reasonable to reinstate.

110 The limit of reasonableness may, depending on the circumstances, require some consideration of the advantages of reinstatement and any extra cost for the defendant in paying damages for reinstatement as opposed to damages calculated by the diminution in the value of the land (see *Evans v Balog* at 40 per Samuels JA, and *Gagner* at [103]–[107] per Campbell JA). Hence it is sometimes said that a plaintiff may have the cost of restoration provided that it is not disproportionate to the diminution in value (*Public Trustee as Administrator of Estate of the late John Andrew McDonald v Hermann* [1968] 3 NSWR 94 at 111 per Isaacs J and *Tellamist* at [199] per Santow JA). In some cases allowance may need to be made for matters such as betterment: see by analogy ***Walker Group Constructions*** *Pty Ltd v Tzaneros Investments Pty Ltd* (2017) 94 NSWLR 108; [2017] NSWCA 27 at [193]–[207] per Bathurst CJ, with whom Beazley P and Gleeson JA agreed; note also *Tabcorp* in the High Court at [24]-[25].

111 The issue of reasonableness thus may involve consideration of the point of view of both the claimant and the defendant: note *Keddel v Regarose Pty Ltd* [1995] 1 Qd R 172 at 180. But, as Campbell JA said in *Gagner* at [105], the "only interest of the defendant that bears upon the question of whether rectification work is reasonable is a financial one". In contrast, the preferences of the claimant are relevant, as the plurality stated in the Full Federal Court in *Tabcorp* at [29]. That ultimately reflects the general principle that, as Barwick CJ put it in *Arthur Robinson*, it is relevant to consider "what [the claimant] was, what he now is, and how he is likely to meet his [injury]".

112 That statement by Barwick CJ might be taken to suggest that a claimant bears some onus to establish what they intend to do. The appellant might also call in aid other statements in the cases, such as Samuels JA referring in *Evans v Balog* to "the reasonableness of the plaintiffs' desire to reinstate the property" (at 40, quoted *McGregor on Damages*), or Donaldson LJ referring in *Dodd Properties* to the view that which measure of damages "is appropriate will depend upon a number of factors, such as the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions" (as quoted above at [108]).

113 More directly, the appellant relied on a decision of the South Australian Full Supreme Court in *State of South Australia v Simionato* [2005] SASC 412; (2005) 143 LGERA 128 to seek to argue that, at the least, a claimant bears an onus to establish an intention to reinstate the property if they are claiming reinstatement damages. The case relevantly concerned a claim in tort for damage done to a house by the planting of trees on a neighbouring property. Besanko J, speaking for the Court, said the following:

> [92] … The position has now been reached where the court will award the higher cost of the reinstatement of the property if the claimant's intention to reinstate the property is reasonable in the circumstances. Relevant factors to the question of what is reasonable include the claimant's desire to reinstate the property, the difference between the diminution in value and the cost of reinstating the property, any unique features of the property, and the availability of comparable properties (McGregor on Damages (17th ed, 2003), [34–001]–[34–018]). …

> [95] Applying these principles to the facts of this case leads to the conclusion that the third respondent should be allowed the diminution in value and not the rectification costs. The third respondent bought the property as an investment property. At no stage has she expressed a wish to live on the property. There is very little evidence from the third respondent as to her intentions with respect to the property. She did not give evidence that she wished to repair the property or of the reasons why she would wish to do that. She did not give evidence of a desire to retain the property or of the reasons why she would wish to do that. This Court on appeal should not draw inferences as to those matters.

114 The evidence in that case established that "the carrying out of rectification work will add no value to the land" (at [89]). In context, the case can be understood as one in which the Court was persuaded on the evidence as a whole that awarding the costs of rectification work was not reasonable. But the statements at [95] might be taken to suggest that the claimant bore some evidentiary onus to establish an intent to rectify the damage done. If so, we would respectfully regard that as an overstatement. It is significant that this decision predates *Tabcorp*. Nor do we consider the statements referred to at [112] above to require such an outcome.

115 There is no dispute that the onus of proof to establish an entitlement to be awarded particular damages rests on the claimant. Nevertheless, the decisions discussed above – especially *Joyner*, *Minter v Eacott* and *Tabcorp* (and the cases there discussed) – confirm that there is a conventional practice that, at least when a property owner has possession or shortly is to resume possession of the land, they have a prima facie entitlement to claim the costs of restoring a property from the consequences of a breach of contract or a tort. That entitlement is subject to the usual limit of reasonableness. It is for a defendant to displace that conventional entitlement if it is claimed. If the basis for asserting unreasonableness is that the claimant has no intention to reinstate, then the defendant has an evidentiary onus on that point. So, too, if reinstatement damages are said to be unreasonable because they are disproportionate to the loss of capital value.

116 An analogy may be drawn with personal injury cases. It is commonplace for damages to be awarded for various ways in which the claimant's injuries may be addressed or managed – such as costs for various types of medical or nursing treatment, for alterations to their home, for disability aids, and so forth – which a court will award even in the absence of positive evidence from the claimant (or their guardian) that all such treatments and aids will be availed of. It is typically presumed that that will occur, in the absence of anything to suggest to the contrary. So too here, the very making of a claim for reinstatement costs implies that there is an intention to reinstate (assuming that the claim is not explained on some other basis).

117 In *Gagner* Campbell JA addressed a circumstance in which rectification costs might be awarded even where there was no simple intention to rectify, in the sense that the damage caused by the defendant's breach was to be fixed as part of some broader project of changing the property. His Honour said at [106]:

> The cost of making good is merely one way of putting a dollar figure on the damage that the plaintiff has suffered, for the purpose of carrying through the compensatory principle. There are circumstances, of which the present is one, when the fact that

> money has not been spent on the precise items that would need to be acquired to restore property to its pre-damage condition does not prevent the cost of acquiring those items being the appropriate way of giving effect to the compensatory principle.

118 That statement illustrates that there can be an entitlement to rectification costs even if there is no intention to spend those particular amounts on rectifying the particular damage. The point made there illustrates that it is too simplistic to assert that a claimant must establish an intention to rectify so as to justify the amount claimed.

119 In summary, what relevantly emerges from the case law is the following:

(1) A claimant suing for damage to real property – caused by a breach of contract or a tort – has some choice as to how their claim for damages is quantified. The two leading possibilities, at least when a property owner has possession or shortly is to resume possession of the land, are seeking the costs of rectification of the consequences of breach or seeking the diminution in value of the property. There may be other possibilities, reflecting the fact that it is the compensatory principle which ultimately governs, and that adjusts to all the circumstances of the case.

(2) Rectification/reinstatement damages are not merely a proxy for loss of capital value of the property. Being awarded the cost of rectification is prima facie reasonable. It is not generally necessary for the claimant to put on evidence that the cost of rectification is not disproportionate to any diminution in value, in the absence of the issue having been raised with evidentiary support by the defendant. Nor is it generally necessary for the claimant positively to establish an intent to reinstate. Such an intention is implicit in the making of the claim.

(3) Because there is an overall limitation that the damages awarded must be reasonable in all the circumstances, it is open for a defendant to seek to persuade the court that the costs of reinstatement should not be awarded. In the context outlined there is at least an evidentiary onus on the defendant to make out that such costs are unreasonable. The costs might be unreasonable because there is no actual intent to reinstate, or in some cases it may be that there is such a disproportionality to the diminution of capital value that to award rectification costs would be unreasonable.

120 There are dangers in seeking to state hard rules, for assessment of damages always depends on the particular facts of the case. But at least in a case such as the present, where the owner resumed possession immediately upon learning of the tortious conduct, the respondent did not need to lead positive evidence establishing its intent to reinstate the property in the absence of the appellant having pointed to evidence suggesting it had no such intention. Nor did the respondent need positively to establish that its reinstatement claim was not disproportionate to the diminution in capital value caused by the breach.

121 It is true that none of the cases referred to above was a case involving an action on the case for permanent injury to a reversioner's interest. Before considering the appellant's specific arguments to the effect that, in such a case, the proper measure of damages is

diminution in value, it is worth noting that, as a matter of principle, there is no obvious reason why the position should be any different when the plaintiff is a reversioner. If the position is the same whether the claim is in trespass, in negligence, or in nuisance (the latter two historically being actions on the case) or for breach of a building contract, or for breach of a covenant to keep in good repair, it would be odd if the sole exception was where the claim was brought by a reversioner for permanent injury to the reversion.

122 If the result is simply to be justified by older cases, then the position can only be characterised as little more than an historical accident. It was once asserted that diminution in value was the only available measure of damages for injury to land: see, eg, *Jones v Gooday* (1841) 8 M & W 146; 151 ER 985. In Mayne's *Treatise on Damages* – the forerunner to McGregor's text – this was the position adopted in the first to eleventh editions. The twelfth edition, of 1961, was the first to be written by McGregor. It was in the twelfth edition that the position was revised. The learned author surveyed the authorities and noted their inconsistencies. He then wrote (at [742] on 637):

> From these meagre authorities no firm statement can be made. The difficulties arise from the fact that the plaintiff may want his property in the same state as before the commission of the tort but the amount required to effect this may be substantially greater than the amount by which the value of the property has been diminished. It is submitted that the test should be the reasonableness of the plaintiff's desire to reinstate the property; this would be judges in party by the advantages to him of reinstatement in relation to the extra cost to the defendant in having to pay damages for reinstatement rather than damages calculated by the diminution in value of the land.

123 It is not clear why this reasoning is not equally applicable in respect of an action on the case for permanent injury to the reversion. Indeed, in that same edition, in the section on plaintiffs with limited interests in land (at 642-644), McGregor does not, at least expressly, contend that the old position should continue to obtain but only with respect to reversioners, which is apparently how the appellant reads the modern edition of McGregor (as to which, see [129] and following below).

124 What is important, however, is that, as the change from the eleventh to twelfth editions of the text indicates, the law has moved in the direction of adopting a more flexible approach to the assessment of damages in cases concerning injury to land. In Australia, for causes of action other than an action on the case for permanent injury to the reversion, it is now firmly established that the plaintiff has an election between the different measures of damages, subject to a test of reasonableness. It would be anomalous to treat the action on the case for permanent injury to the reversion as frozen in time when the law around it has changed. This is especially so when the change in question is itself no mere accident, but manifests principled development.

Cases and texts invoked by the appellant

125 The appellant invoked various cases – mainly from the United Kingdom – along with certain texts to seek to undermine the general principles distilled above. In deference to the appellant's argument these will be addressed in some detail. The appellant's

attempt does not succeed in undermining the principles extracted from the cases just discussed.

126 The appellant sought to rely on [39-043] in JE Edelman, *McGregor on Damages* (21st ed, 2020, Sweet & Maxwell). Assuming that the appellant's reference to [39-043] is correct, it is difficult to see how that passage assists. It refers to two "modern" cases in which damage to a reversionary interest has been measured, but neither case advances the appellant's position. The first case is ***Abbahall** Ltd v Smee* [2003] 1 WLR 1472. There, the respondent failed to maintain the roof of her property (which also included the first and second floors of a building). This created the danger of masonry falling onto visitors and also resulted in water seeping into the ground floor premises which were owned by the appellant. The appellant had let the premises to a Mr Pattinson, who in turn had sublet it to another person. Upon the appellant commencing proceedings claiming that the respondent owed it a duty of care which entitled it to recover the whole of the cost of the repairs, the respondent disputed the claim inter alia on the basis that she owed no duty to the appellant because it was a mere reversioner. By the time the case came before the Court of Appeal, the respondent had accepted that she owed the appellant a duty of care and the only issue was the assessment of damages (the primary judge having ordered the respondent to pay only one quarter of the cost of the repairs). It does not appear to have been in dispute that the appropriate measure of damages in the case was the cost of repair. The Court made orders requiring both the appellant and respondent to each bear half of that cost. The case turned very much on its own facts.

127 The second case is ***Irontrain** Investments Ltd v Ansari* [2005] EWCA Civ 1681. It involved broadly similar circumstances to those in *Abbahall*. Irontrain Investments Ltd was the proprietor of premises on both the ground and upper floors of a building. Those premises were all let to other persons. Mr Ansari was the lessee of another flat in the building (Flat 3), situated on the second floor of the building. One of Irontrain Investments' flats on the ground floor (Flat 1) suffered water damage owing to two separate leaks in Mr Ansari's flat. A portion of Flat 1 was rendered uninhabitable. The lessee first withheld a portion of rent for a few months and then moved out entirely. Flat 1 was not rented out for approximately two years thereafter and, in the meantime, Irontrain Investments Ltd incurred expenditure in putting Flat 1 into a lettable condition. Irontrain Investments Ltd commenced proceedings against Mr Ansari, claiming damages on the alternative bases of breach of contract and tort both for lost rent and in respect of the expenditure incurred for repair works on Flat 1. Subject to some minor modifications to the primary judge's allowance for damages under both these heads, the Court of Appeal upheld the award of damages in both respects.

128 Reference was made in *Irontrain* at [38]–[40] to the Court of Appeal's earlier decision in *Ehlmer v Hall* [1993] 1 EGLR 137, which involved a claim for damages in negligence where the claimants had a reversionary interest in the damaged property. Significantly,

Nolan LJ (who gave the leading judgment) held there that the general principle of common law to the effect that a reversioner can recover only in respect to its reversionary interest was not a rule of universal application.

129 The appellant may have intended to refer to [39-041] and [39-042] of *McGregor on Damages* which, for convenience, are as follows (footnotes omitted):

> [39.041] Reversioners, on the other hand, may only recover damages to the extent of the injury to the reversion. Most of the cases are indeed concerned only with the prior question of whether the reversion had been injured, for without an injury to the reversion no action lies, and establish that permanent physical damage to the land, as by the destruction of houses or the cutting down of trees, is generally necessary to create such an injury. There are, however, some few cases which bear directly on the assessment of damages. In the old case of *Bedingfield v Onslow*, where trees were cut down, it was held the reversioner could recover the value of the timber, the tenant being entitled only to damages in respect of the shade, shelter and fruit. In *Mayfair Property Co v Johnston*, where the defendant had encroached upon the claimant's land in setting the foundations of a new wall, the damages awarded to the claimant, a reversioner, were based on the cost of removing the encroachment. The other cases concern the destruction of houses. In *Hosking v Phillips*, where the claimant's house, which stood on land he had leased to a third party, had been destroyed by the defendant, the proper measure of damages was held to be the amount by which the selling price of the claimant's reversion had been reduced. "The reversion", said Parke B:
>
>> "… is rendered less valuable, because, instead of the house and land, the claimant had the land alone without the house", and the question was "how much less the land was worth."
>
> In *Moss v Christchurch RDC*, where the claimant's cottage, which he had let, was almost completely destroyed by fire caused by the defendant, the measure of damages awarded was the diminution in the value of the claimant's reversion.
>
> [39.042] The fullest consideration of the damages recoverable by a reversioner, however, appears in the complex situation presented in *Rust v Victoria Graving Dock Co*. The claimant, the owner of a building estate, sued the defendant in respect of damage caused by a flood to, inter alia, houses erected by builders under building leases. Although admitting that none of the flood damage would last to the end of the leases, the claimant put forward a contention which is best stated in the words of Cotton LJ who said:
>
>> "When a man buys land for the purpose of letting it out on building leases the usual course is, that when some of the houses are built and the ground rent is secured, he sells the reversion, or, according to a common expression, sells the ground rent, in order to raise money to go on with the speculation. It is said that, this being so, any depreciation in the selling value of the ground rents is a ground for giving damages to the reversioner."
>
> This contention of the claimant was rejected, because, as Cotton LJ said:
>
>> "On the general rule he cannot get any damages for any wrongful act of the defendants unless the damage is one which will endure and be continuing when the reversion becomes an estate in possession. Now sale is not the natural way of dealing with a reversion, and if it were admitted that every wrongful act which lessens its selling value gives the reversioner a right to damages, the general rule I have mentioned that a reversioner can only recover damages for permanent injury, would entirely be done away with. The argument for the claimant would be forcible if it could be established that this was a regular understood business, and that ground rents and reversions only existed in a case like this for the purpose of bringing them into the market as recognised saleable articles, to be dealt with as any other saleable article would be."

But no such recognised trade or business had been made out.

130 Those passages refer to various authorities, including the following (to which the appellant also made separate reference in his written submissions):

(1) ***Hosking** v Phillips* (1848) 154 ER 801; 3 Exch 168, in which the proper measure of damages in a case where the defendant destroyed the claimant's house (which stood on land leased to a third party who had, shortly before the act complained of, given up possession of the land to the defendant without, however, assigning his interest) was held to be the amount by which the selling price of the claimant's reversion had been reduced. Baron Parke said at 182 that the reversion is "rendered less valuable, because, instead of the house and land, the [claimant] had the land alone without the house", and the question therefore was "how much less the land was worth". It is significant to note that *Hosking* related to the demolition of an existing structure on the land and there was no possibility of the structure being rebuilt, simply because the land had been compulsorily acquired by a railway company for the expansion of a railway system.

(2) *Moss v Christchurch Rural District Council* [1925] 2 KB 750, where the claimant's cottage (which was leased to another person) was almost completely destroyed by a fire caused by the defendant, the measure of damages was held by Salter J to be the diminution in the value of the claimant's reversion. It may be significant that there was no evidence of the monetary value of the house either before or after the fire. Justice Salter was evidently troubled by this state of affairs because his Honour referred to the possibility that, in some cases, the true measure of damages is less than the cost of replacement, and there are other cases where the measure of damage may be far greater (such as where irreparable damage is done to an historic building). The case should be confined to its particular facts.

(3) ***Rust** v Victoria Graving Dock Co* (1887) 36 Ch D 113, in which it was held that the claimant (the owner of a building estate) was not entitled to damages where the defendant caused damage to the claimant's building estate by causing a flood which damaged houses which had been erected under building leases. Cotton LJ said at 132 that the claimant was not entitled to damages for any wrongful act of the defendants unless the damage would "endure and be continuing when the reversion becomes an estate in possession". *Rust* does not stand for any general proposition that diminution in value is the only appropriate measure of damages for a case involving damage to a reversionary interest.

131 The decision in *Cotterill v Hobby* (1825) 107 ER 1133; 4 B & C 465, upon which the appellant also relied, has little relevance. The plaintiff there (who had a reversionary interest in land) brought a case against the defendant where the defendant had cut and carried away branches from trees growing on the plaintiff's land. Significantly, the plaintiff adduced no evidence of the value of the branches and only nominal damages

were awarded. The case does not stand for the proposition that damages in such a case will only be assessed on the basis of the diminution in value of the reversionary interest.

132 The same can be said regarding another authority relied upon by the appellant, *Jones v **Llanrwst** Urban District Council* [1911] 1 Ch 393. The plaintiff there was the owner of land (and had only a reversionary interest in that land) opposite a river into which the defendant emptied sewage. The plaintiff commenced proceedings claiming that the use of the river to dispose of sewage was a nuisance to him and his property and prejudicially affected its value, and that the deposit of sewage along his frontage constituted a trespass on his property. Parker J accepted that the plaintiff could not sue in trespass and instead spoke of a claim alleging permanent injury against the reversion (at 404). However, the case says nothing about the appropriate measure of damages in respect of such a claim. That is because, as his Honour observed at 411 "[t]he plaintiff does not ask for damages if I grant an injunction; and in my opinion an injunction is, under all the circumstances, the appropriate relief".

133 Similarly, ***Hanson** v Newman* [1934] 1 Ch 298, which is also relied upon by the appellant, provides little if any support for his position. There, the plaintiffs (who had a reversionary interest in the relevant property) brought a claim of breach of covenant against the defendant, the lessee of the property, after he failed to carry out covenants in the lease as to painting and repairing the property. At first instance, the Master held that the correct measure of damages was the diminution in value of the reversionary interest calculated as at the date of forfeiture of the lease. The defendant unsuccessfully claimed that he was entitled to "set off" the sum of damages by the difference between the value of the reversion as at the date of forfeiture and the value of the reversion expectant on the expiration of the lease term if the lease had not been forfeited. Luxmoore J noted at 300 that, at general law, "a landlord could recover by way of damage at the termination of his term the actual cost of executing the repairs required to fulfil the covenant".

134 However, as referred to above, s 18(1) of the *Landlord and Tenant Act 1927* (UK) (the **1927 Act**) as in force at the time stated that "[d]amages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease … shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement …". At 302 Luxmoore J described the effect of the legislation (a characterisation which was expressly endorsed on appeal at 305 per Lawrence LJ):

> What the section provides for is that the damages for breach of covenant on the termination of a lease are not to exceed the amount by which the value of the reversion, whether immediate or not, in the premises is diminished owing to the breach of such covenant or agreement; that is, you take the value of the reversion as it is with the breach – the value of the property which has reverted as it is subject to the breach –

> and you take it as it would be if there were no breach, and you provide that the amount of damage shall not exceed the amount by which the value of the property repaired exceeds the value of the property unrepaired.

135 It is evident, however, that the measure of damages by reference to the diminution of value of the reversion took its character from the particular statutory context and, relatedly, the particular cause of action. The Court(s) did not suggest that the measure of damages is ordinarily to be determined by the diminution in the value of the reversion. Rather, while accepting that the cost of repair was the appropriate measure at general law, Luxmoore J noted that statute now qualified that proposition and the maximum allowable damages had to be assessed by reference to the diminution in the value of the reversion. Furthermore, the only real dispute between the parties in *Hanson* was as to the time(s) at which damages should be assessed, in respect of which the Court found in favour of the plaintiffs. *Hanson* is not a contested case about *how* to measure damages.

136 Section 18(1) of the 1927 Act also provided the framework for another authority relied upon by the appellants, *Smiley v Townshend* [1950] 2 KB 311. The only dispute there concerned the time(s) at which damages should be assessed. Denning LJ stated at 319: “I take it from authorities which this court is not at liberty to disregard that the proper measure of damage is the difference in value of the reversion at the end of the lease between the premises in their then state of unrepair and in the state in which they would have been if the covenants had been fulfilled”, citing *Hanson*. At 323, Singleton LJ stated that the “decision must depend on the interpretation of s 18” and that “it seems to me that this court is bound by that which was said in *Hanson v Newman*”.

137 This statutory provision also figured prominently in another of the appellant’s authorities, *Jaquin v Holland* [1960] 1 WLR 258. Ormerod LJ described at 260 the effect of s 18 as being that:

> whatever may be found to be the cost of doing the repairs rendered necessary by the failure of the tenant to observe his covenant for repair, the damages which the landlord is entitled to recover shall be limited to the diminution in the value of the reversion of the premises.

138 The fact that the statutory context had a significant impact on the measure of damages is also made clear in Devlin LJ’s judgment at 264–5. Devlin LJ stated that, as a first step in a dispute at the end of a tenancy about a failure to comply with a covenant of repair, “clearly the first thing that has to be done is to draw up a list of the work that it is necessary to do in order to put the premises into good and tenantable repair”. In applying that principle to the facts of that case, his Lordship noted that surveyors engaged for both parties drew up lists of dilapidations and quantified the estimated cost of the repairs to be involved. His Lordship then stated at 265:

> Having ascertained the amount of work that it is necessary to do … and having put a figure on it, that does not necessarily conclude the matter, because section 18 of the Landlord and Tenant Act, 1927, provides that the damages are not to exceed the

> amount, if any, by which the value of the reversion in the premises is diminished. So that one has to go on to inquire to what extent the value of the reversion has been diminished.

139 Another of the appellant's authorities, *Van Dal Footwear Ltd v Ryman Ltd* [2010] 1 WLR 2015, also illustrates the application of s 18(1) of the 1927 Act. Moreover, it deals more with a dispute about the final quantum of damages awarded as opposed to the correct measure of damages.

140 The appellant also relied on [7.900] in Brendan Edgeworth, *Butt's Land Law* (7th ed, 2017, Thomson Reuters), an excerpt of which is reproduced below (footnotes omitted):

> At common law, a landlord's damages for breach of a tenant's covenant to repair differ according to whether the landlord brings action before or after the lease ends. Where the action is brought while the lease is current, the measure of damages is the diminution in the value of the reversion caused by the tenant's failure to perform the covenant. This is not the same as the cost of carrying out the repairs; that cost is a guide in calculating the diminution in the value of the reversion, but it is not conclusive. In particular, reinstatement damages are awarded only in a relatively narrow range of cases – namely, where the tenant has so damaged or modified premises as to render them unlettable at the conclusion of the lease …
>
> Where the landlord brings an action after the lease has ended, the measure of damages is the sum required to put the premises into the state of repair in which the tenant ought to have kept them, assuming only that the landlord has in fact suffered loss from the breach. A further qualification on the landlord's claim is that the repair must have been a reasonable course for the landlord to adopt.

141 The appellant relied upon this text for the proposition that the cost of rectification is only a guide to calculating the diminution in the value of the reversion and it is not conclusive. Yet it is notable that the reference to the cost of rectification being a "guide" in calculating the diminution in the value of the reversion relates specifically to an action for breach of a tenant's covenant to repair which is brought **while the lease is current**. This is then contrasted in the next passage to the position where the landlord brings an action **after** a lease has terminated. That situation is more akin to the circumstances here, where the damage occurred shortly before the plaintiff terminated the building contract and the reversion had fallen in. The proceedings were commenced after those events occurred.

142 The appellant also submitted that the author of *Butt's Land Law* said at [7.900], in the context of discussing a landlord's damages for breach of a tenant's covenant to repair, that reinstatement damages are only awarded in a relatively narrow range of cases. That statement is directed to when a landlord brings an action before a lease ends which is unlike the position here.

143 It is appropriate to say something more about three authorities which are cited at [7.900] in *Butt's Land Law*.

(1) *Graham v Markets Hotel Pty Ltd* (1943) 67 CLR 567 deals with the equivalent NSW provision to s 18(1) of the 1927 Act (ie s 133A of the *Conveyancing Act*). Starke J stated, "[i]n some cases the cost of repairs may measure the damage to the reversion, but that is not true in all cases … The true inquiry is the extent

to which the marketable value is injured by the breach of covenant …" (at 587). It is difficult to see why those observations apply where, as here, the statutory provision is inapplicable.

(2) *Jones v Herxheimer* [1950] 2 KB 106 is another case concerning s 18(1) of the 1927 Act. After referring to a few earlier authorities, Jenkins LJ stated at 116–17:

> We find nothing in the earlier authorities to justify the conclusion, as a matter of law, that in no case and in no circumstances can the fact that repairs are necessary, and the cost of those repairs, be taken as at least prima facie evidence of damage to the value of the reversion and of the extent of such damage. There must be many cases in which it is in fact quite obvious that the value of the reversion has, by reason of a tenant's failure to do some necessary repair, been damaged precisely to the extent of the proper cost of effecting the repair in question. …

(3) *Haviland v Long* [1952] 2 QB 80 also involved s 18(1). Somervell LJ described the intention behind the Act (at 82):

> What is plain is that, as the facts show, this is not the type of case for the purpose of which the law was altered, as it was altered by section 18(1) of the Act of 1927. This is a case where the building is still required in substantially the same form and where the repairs which the tenant failed to do have to be done in order to put the building into a state which will enable it to be used in the manner in which it is required at present to be used; whereas the Act was passed to meet primarily a case where the building was going to be pulled down or turned to some different purpose, so that the repairs were not required and the sum which the landlords recovered under the covenant would not be expended in whole or in part on the repairs covered by the covenant.

144 None of these three cases support the appellant's position.

145 The appellant also submitted that, in assessing damage to the reversionary interest for breach of a covenant to repair, the proportionality between the benefit in fulfilment of the obligation and the cost of compliance is a relevant consideration, citing Clyde Croft, Robert Hay and Luke Virgona, *Commercial Tenancy Law* (4th ed, 2017, LexisNexis) at [10.13]. He added that this is reinforced by the fact that s 133A of the *Conveyancing Act* was enacted to overcome the principle in *Joyner*, such that damages for breach of a covenant to repair in NSW is now limited by the diminution in the value of the reversionary interest. This submission has little or no force in the circumstances here where it is not suggested that s 133A has any application.

Application of principles in this matter

146 In the particular circumstances of this case, the issue ultimately turns on which party carried the evidentiary onus below in relation to the issue of whether the cost of rectification was the appropriate measure of damages. The parties were unable to direct the Court's attention to any authorities which are directly in point on this question. We have referred above to authorities which support the conclusion, both in contract and tort settings, that the party who disputes the reasonableness of an award of damages based on the cost of reinstatement or repair in a case such as the present carries an evidentiary onus.

147 Consistently with that view, there are several features of the circumstances of this case which point to Mr Roberts bearing an evidentiary onus if he wished to displace the plaintiff's claim for damages based upon the costs of rectification. It is significant that, in

this case, the respondent made clear in its Second Further Amended Technology and Construction List Statement (**Statement**) that it sought against Mr Roberts the cost of rectifying the damage he did to the Property and the cost of replacing the converted materials, fixtures and fittings. Implicitly, the plaintiff asserted that this was the reasonable measure of damages in the particular circumstances. If Mr Roberts wished to contest that assertion, he needed to take appropriate steps, including by raising the issue in his Technology and Construction List Response (**Response**) and, if appropriate, adducing evidence in support of his position. He failed to take either of these steps. Indeed, in [4] of his Response Mr Roberts said that if he maliciously damaged the Property (which he denied), an issue would then arise as to "what damages should be awarded in connection with that conduct". If Mr Roberts' position was that the appropriate measure of damages was diminution in value and not rectification costs as sought by the plaintiff, he should have said so and taken appropriate steps in support of his position. His failure to do so is not excused by the fact that elsewhere in the Statement the plaintiff described its claim against Mr Roberts as being (relevantly) "in trespass to land".

148 Nor was the matter adequately raised by Mr Roberts in his written submissions below. Mr Roberts' pre-hearing outline of submissions dated 6 April 2022 were silent on the appropriate measure of damages. The Statement of Issues which was annexed to that outline effectively repeated Mr Roberts' Response. It identified as an issue whether Mr Roberts maliciously damaged the Property and, if so (which he denied), "what damages should be awarded in connection with that conduct".

149 In Goodwin's outline of closing submissions dated 12 April 2022, it contended that for the actual damage to the buildings resulting from the trespass to land, "the cost of repair is an appropriate measure of damages, provided the repair of the damage is reasonable", citing inter alia *Evans v Balog* and *Hanson*. Mr Roberts' outline of closing submissions dated 12 April 2022 was silent on the appropriate measure of damages, apart from the limited reference to the matter in the same Statement of Issues as referred to at [148] above (which was also attached to those submissions).

150 As will shortly emerge in considering ground 1 of the appeal, the issue of the appropriate measure of damages was raised in the course of the oral hearing and was the subject of post-hearing supplementary written submissions by both parties.

151 The appellant's argument that it was incumbent upon the respondent to establish that it intended to reinstate the Property and it failed to do so, and further that the costs of rectification were disproportionate, should thus be rejected. These arguments go to whether or not the respondent's claim was reasonable. The appellant bore an evidentiary onus on the point which he failed to discharge. He pointed to no evidence indicating that, despite its claim, the respondent did not intend to rectify the damage to the property that he was found to have caused. Nor did he point to any evidence

sufficient to meet an evidentiary onus indicating that the costs of rectification were so disproportionate to the diminution of the capital value of the property as to render the claim for those costs unreasonable.

152 Unlike the position in *James v Hutton* [1950] 1 KB 9 (as referred to by the plurality of the Full Court in *Tabcorp* at [16]), this is not a case where there was evidence which indicated that the plaintiff had no intention of repairing the damage to the Property (see also the discussion by Bathurst CJ in *Walker Group Constructions* at [186]–[192] and in particular at [187] in the context of a breach of building contract case).

153 It is notable that the appellant did not contend below in his Response or any of his oral or written submissions (including the post-hearing supplementary written submissions) that the respondent had to establish that it intended to reinstate the Property.

154 In any case, and even if the appellant were permitted to raise the argument for the first time on appeal, there is evidence that it did have such an intention, having regard to the contents of the Valuation Report dated 12 March 2019 of the Property which was in evidence below. Although the evidence is indirect it suffices to make out the point. The Valuation Report refers to the owner of the Property (being the respondent) having plans to offer some or all of the 33 individual student accommodation rooms for separate sale. The premise of that statement was that the building project would be completed by Goodwin. Although the valuation was commissioned by the Commonwealth Bank of Australia (**CBA**), the respondent is identified as the client and it is stated that it was aware of the proposed valuation. The Valuation Instruction also provided the contact details for Mr Jeff Stokes, who was a director of the respondent. It may reasonably be inferred that the valuer contacted Mr Stokes concerning the respondent’s intentions.

155 The Valuation Instruction refers to the Property being “still under construction, with completion having been delayed by a dispute with the builder” and that a valuation was sought “as is with land and current improvements on completion on one line, and 33 company titled rooms”, which is consistent with an intention by the respondent to complete the construction. In the Valuation Synopsis, the valuer noted that the valuation was prepared for submission to the CBA and might be relied upon for first mortgage finance purposes. Two of the three valuations in the Valuation Report were on the basis that the Property would be “fully completed and that all necessary approvals allowing occupancy of the property have been issued”. The third valuation was directed to the Property being sold in its current condition. It appears, however, that this was not the primary option because, as noted above, the valuation was prepared for the purposes of first mortgage finance and the valuer recommended the Property “as suitable security for first mortgage finance purposes …”.

156 For all these reasons, the appellant has not established any appellable error in relation to the primary judge’s finding that the appropriate measure of damages was the reasonable cost of repairing the damage to the Property.

Ground 1 – Denial of procedural fairness

157 Counsel for Mr Roberts stated at the outset of her opening address on the appeal that if Mr Roberts failed on ground 2, he would necessarily fail on ground 1. That concession should be accepted.

158 For completeness, however, it is desirable to explain why ground 1 should independently be rejected. This is because, on one view, the claim of procedural unfairness turns not only on the issue of the appropriate measure of damages, but also on an issue arising from the plaintiff's description in its Statement of its claim against Mr Roberts relevantly being for "trespass to land" and not an action on the case.

159 In order to demonstrate why there was no procedural unfairness, it is necessary to describe at a little length how these issues emerged in the proceeding below. The trial was conducted on the basis of Technology and Construction List Statements and Responses as opposed to formal pleadings. Ward P has set out relevant caselaw at [62]-[65] which stands for the proposition that, while such statements and responses differ in substance, they nevertheless stand in the place of pleadings in the present proceedings. Regard must also be had to other relevant circumstances affecting the conduct of a particular trial in the Technology and Construction List.

160 The respondent's case against the appellant was expressly said in its Statement to be based on trespass and conversion (with the latter dropped at the hearing). The respondent claimed in the Statement that Mr Roberts was liable to it "in trespass to land". It was stated at [45] of the Statement that the claim for damages was for the cost of rectification and replacing the materials maliciously damaged or stolen (ie not diminution in value).

161 As noted above, in his Response, the appellant denied that he maliciously damaged the Property and said that there was an issue as to "what damages should be awarded in connection with that conduct" if his denial was not accepted. No issue of the respondent's standing to claim in trespass was raised in the Response. Mr Roberts effectively denied the allegations against him.

162 We have summarised above at [147]-[149] how the relevant issues were dealt with in the parties' pre-hearing written submissions and their closing written submissions. It is necessary then to describe how the issues arose in closing oral addresses below.

163 At the commencement of his oral address, when asked by the primary judge what the respondent had to show for trespass, Mr Kidd SC said that even if his client did not have exclusive possession at the time of the breach it did not matter because "as the reversioner [ie Goodwin] in circumstances where the trespass, because there was conduct on the site outside of the permission, caused permanent injury to the reversion …". Mr Kidd referred to ***Shell*** *Company of Australia Ltd v Bailey* [1980] WAR 233 at 236 per Lavan SPJ and the statement there that a landlord cannot maintain an action in trespass against a person entering demised premises during the occupation of a tenant *unless such trespass results in permanent injury to the reversion* (citing *Alston v Scales*

(1832) 131 ER 515; 9 Bing 3 and ***Birtchnell*** *v Fred Walker & Co Pty Ltd* [1930] 36 Argus LR 176). Mr Kidd SC also referred to Brinsden J's comments in *Shell* at 242–243 and the statement that a landlord has no right to sue a third party for trespass *unless he is able to prove permanent injury to his reversionary interest*.

164 Mr Kidd submitted that the respondent did not need its claim for conversion and then added that the cost of repair in relation to the damage caused by the trespass resulting in injury to the reversion included in effect the full cost of buying and installing the removed items. Most of Mr Kidd's closing submissions were directed to the claim for damages for the defective building.

165 In her closing oral address, Ms Chan, for Mr Roberts, commenced with a submission that a claim in respect of the respondent's reversionary interest had not been pleaded and that she was "taken a bit by surprise by it". She then said that, "in direct answer to [Mr Kidd's] point that the owner may sue on the reversionary interest, that is true, your Honour, *but it is not a claim in trespass*, and [Hodges] J made that clear in the case of *Rodrigues v Ufton* [(1894) 20 VLR 539]". Ms Chan reiterated that the claim that had been pleaded prior to closing oral submissions "has always been that [the respondent] enjoys the right to exclusive possession over the whole of the property even during the duration of the construction contract" (referring to [21] of the Statement).

166 When the primary judge asked Ms Chan whether *Shell* was wrong, she said that it was distinguishable. She then added that the respondent could sue for damage caused by a trespass where it did not have exclusive possession, but "it is not an action in trespass, it's an action on a case". Ms Chan emphasised that her client had come to meet claims of trespass and conversion and that the case had then changed. She submitted that "[t]he damages are different because the damages for an action on a case is the quantum of the permanent injury that has been caused to the property". Ms Chan said she did not know what that might be "and it's not an investigation that we have undertaken". The primary judge remarked that if damages in respect of the permanent injury may not be the same as the cost of repair, that might be a "knock out point".

167 In oral submissions after the luncheon adjournment, Ms Chan referred the Court to *Beaudesert Shire Council v Smith* (1966) 120 CLR 145; [1966] HCA 19 in support of her submission that an action on the case is a different cause of action to one in trespass. She submitted that "suing on the reversionary interest is a different cause of action to an action in trespass and what has to be valued is the damage, the permanent injury to the reversionary interest" and that "it may be that the proper measure of damages might be a diminish [sic] in value" but that she had not had time to fully research it. She said that "the cause of action is not a cause of action in trespass, and also an inquiry will have to be made as to exactly what the permanent injury to the reversionary interest is". Ms Chan added that it cannot be said "that the damages in an action on the case of trespass is the same inquiry as in relation to an action in trespass" and that the measure of damages "may be the diminution in value, but it may not be the

cost of rectification". It was at this point that the primary judge said that he would hear what Mr Kidd had to say in reply but would invite both parties to provide post-hearing supplementary written submissions on the issue.

168 In his oral reply on the matter, Mr Kidd submitted that the claim in the Statement "is precisely the type of claim which the Full Court of the Supreme Court of Western Australia [in *Shell*] described that is open to a person where trespass results in permanent injury to the reversion". He confirmed that the claim for damages was the cost of repairing the malicious damage. Mr Kidd submitted that there was no need to use the words "action on a case", relying on *Shell*. He said that it was a Technology and Construction List Statement and not a pleading, and that the relevant action on a case is one involving a trespasser causing damage to improvements on the land. Further, Mr Kidd submitted that, "the cost of repair is an appropriate measure of damages, provided the repair of the damage is reasonable". He conceded that there is a degree of flexibility and that, in some cases, the cost of repair may be unreasonable and unfair in exceeding the diminution in value.

169 The respondent's post-hearing supplementary written submissions below repeated its core contention that "the cost of repair is an appropriate measure of damages, provided the repair of the damage is reasonable", citing inter alia *Evans v Balog*. It was submitted that Mr Roberts' malicious damage to the buildings was plainly permanent injury within the meaning of an action in trespass brought by a reversioner for injury to the reversion.

170 In his post-hearing supplementary written submissions, the appellant submitted as follows:

(1) A landlord's cause of action for damages to the reversionary interest "has not been subsumed into an action in trespass but remains an action on a case for trespass". The difference was said to be that a trespass is actionable per se, whereas an action on the case requires evidence of loss and, where a reversioner was not in possession, "the damage which needs to be shown is permanent injury to the reversion".

(2) He did not "dispute that there has been a permanent injury to the land by reason of the 'malicious damage'".

(3) Cases like *Evans v Balog* should be distinguished because the damage there was to a "possessory interest", not a reversionary interest and that in an action for damages to the reversion, the nature of the reversioner's damage was "some diminution in the value of their land", citing Parker J in *Llanrwst* at 404, who described it as "injured and depreciated in value". On the distinction between

cost of reinstatement as being a separate measure of damages to damage to the reversion, reference was made to the plurality judgment of Finkelstein and Gordon JJ in *Tabcorp* at [29].

(4) What had to be established was "the true value of the reversionary interest both before and after the alleged tort" and that although the respondent's evidence below on the quantum of costs of repair was unchallenged, that is not the measure of damages on an injury to the reversion basis. Instead, relying upon authorities such as *Tabcorp* and *Smiley*, he submitted that there had to be valuation evidence to assess the quantum of the injury to the reversion. It was submitted that because Mr Roberts had not come to defend an action on the case for trespass, he had not served any valuation evidence. This meant that he was prejudiced if the respondent was allowed to bring its case for damage to its reversionary interest on the basis of an action on the case in trespass.

171 The respondent provided supplementary written submissions in reply. In response to Mr Roberts' reliance on Parker J's statement in *Llanrwst*, it submitted that there was no finding there that depreciation in the value of the property was the proper measure of damages in an action for injury to the reversion caused by trespass and that damages were not determined there because an injunction was granted. Instead reliance was placed on *Birtchnell*, *Mayfair Property Co v Johnston* [1894] 1 Ch 508 at 516–520 and *Gagner* at [30]–[31].

172 In the context just outlined, having regard to the way in which the case was conducted below, the appellant was not denied procedural fairness. He had full notice that damages were sought against him on the basis of the costs of rectification. As addressed above with respect to ground 2, that measure of damages was available.

173 Relevantly, the respondent's claim against Mr Roberts was described in the Statement as "in trespass to land". Consistently with the terminology in *Shell*, this description was sufficiently broad in the circumstances of this case to include an action on the case involving damage to a reversionary interest. Such claims are sometimes labelled "actions of trespass on the case": eg *Beaudesert Shire Council v Smith* (1966) 120 CLR 145 at 152; [1966] HCA 49. A broad analogy might be drawn with the situation in *Coleman v Seaborne Pty Ltd* [2007] NSWCA 60, where this Court held there was no procedural unfairness in a case involving a claim alleging quantum meruit which was pleaded without identifying whether the claim was for contractual or restitutionary quantum meruit. The following observations by Hodgson JA in that case at [49] (with whom Tobias JA agreed) are apposite to the circumstances here:

> It can be said that the respondent's claim was not particularised as clearly as it should have been, and it can also be said that no amendment had been sought to the statement of claim to increase the amount claimed; and in those circumstances, where the appellants' counsel suggested that the appellants suffered some surprise and prejudice, this might have justified an adjournment if it had been sought from the

> referee. An adjournment was not sought and the matter proceeded to conclusion. In those circumstances, in my opinion, the claim of want of procedural fairness cannot be made out.

174 As Ward P has pointed out, there is room to criticise both parties for not raising the relevant issues more clearly in the Statement and Response respectively. On balance, however, the appellant was not denied procedural fairness.

175 Even if a different legal label should have been attached to the respondent's claim, that did not alter the fact that the type of damages claimed was open to be claimed by it based upon the material facts outlined by it in the Statement. A change to the legal label would not have altered in any significant respect the nature of the claim for rectification damages made by the respondent. In *Rodrigues v Ufton* (1894) 20 VLR 539 a similar issue arose, Hodges J saying at 546:

> Forms of action are gone, but while the forms of action are gone, and trespass as a form of action is gone, parties may so state their case in their pleadings as to show the damage claimed is damage for a trespass. In the pleadings in this case it certainly looks like an action of trespass, but the whole dispute between the parties was unmistakeable, and if it be necessary to alter the pleadings in any way I think I ought to allow such amendment.

176 It appears that Mr Roberts' legal team prepared his case on the basis that the claim against him must fail in law because the plaintiff did not have exclusive possession when the damage occurred. This may be the reason why Mr Roberts did not adduce any valuation evidence which might have supported his claim that the correct measure of damages was diminution of value. But as has been emphasised above, Mr Roberts did not raise this issue prior to his closing address below. Moreover, it was open to him to apply for an adjournment if he could make out some prejudice, but no such application was made.

177 As explained above, Mr Roberts carried an evidentiary onus if he wished to challenge the reasonableness of the respondent's claim for damages based on the cost of rectification. It would appear that a forensic choice was made by Mr Roberts and his legal advisors to conduct his defence on the basis that the claim for damages in trespass was doomed because the respondent was not in exclusive possession. Mr Roberts was on clear notice that the respondent sought the costs of rectification as the measure of damages. This was made explicit in the Statement. Mr Roberts' failure to put in issue the reasonableness of that measure of damages cannot be attributed to any procedural unfairness.

178 For these reasons, and taking account of the appellant's concession, ground 1 should also be rejected.

Ground 3 – Whether "building work" extends to boarding houses

179 Ground 3 of the amended notice of appeal suggests that the primary judge erred in construing "construction work" and "building work" in s 36, within Pt 4 of the DBP Act, as including boarding houses. The appellant contends that boarding houses do not fall within the phrase "building work", properly construed.

180 The primary judge aptly described s 36 as a "labyrinthine provision", adding that it appeared to have been drafted so as to make comprehension of it as difficult as possible (at [101]). That complexity reflects the parliamentary history of the DBP Act, which it is necessary to examine in some detail.

181 In our view the conclusion of the primary judge was correct, although our reasons and construction differ somewhat from his Honour's. This ground should thus be rejected.

182 In what follows we address the following:

(1) the key provisions and the competing constructions;

(2) the legislative history of the relevant provisions and the mischief to which Pt 4 of the DBP Act was directed;

(3) relevant principles of construction;

(4) the proper construction of ss 36 and 37.

The key provisions and the competing constructions

183 Part 4 of the DBP Act is headed "Duty of care". There have been no amendments to the relevant provisions since its enactment, save to change references to the *Community Land Management Act 1989* (NSW) to the 2021 replacement Act of the same name.

184 Pursuant to s 2 of the DBP Act, Pt 4 commenced operation immediately on assent being given to the Act, which occurred on 10 June 2020. So did Pt 1, which contains the definition provisions of the Act. However, s 2 provided that other key parts of the Act would not commence until 1 July 2021, and other aspects on a day appointed by proclamation. The regulations accompanying the Act, the Design and Building Practitioners Regulation 2021 (NSW), was not published until 9 April 2021, commencing operation on 1 July 2021 (pursuant to cl 2). Parts 1 and 4 of the Act thus commenced over a year before the regulations, and significant other parts of the Act, commenced.

185 The operative provision in Pt 4 is s 37, which imposes the statutory duty of care. Importantly, Pt 4 of the Act has retrospective operation, pursuant to cl 5 of Sch 1 of the Act. It extends to construction work carried out before the commencement of the Part as if the statutory duty of care was owed by the person who carried out the construction work to the owner of the land and to subsequent owners when the construction work

was carried out. That retrospective operation is subject to the limit that the economic loss in question must first became apparent within the 10 years immediately before the commencement of s 37, or on or after the commencement of that section.

186 The significance of s 36 lies in the definitions therein which inform the proper construction of s 37. Those provisions, which are at the heart of the appeal on this ground, provide as follows:

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.

(3) In this Part, a reference to the ***owner*** of land includes—

(a) if the land is subject to a strata scheme under the *Strata Schemes Management Act 2015*, the owners corporation constituted for the scheme, or

(b) if the land is subject to a community scheme, precinct scheme or neighbourhood scheme within the meaning of the *Community Land Management Act 2021*, the association for the scheme.

(4) In this Part, a reference to a person who carries out construction work includes a reference to a person who manufactures, or is a supplier (within the meaning of the *Building Products (Safety) Act 2017*) of, a building product used for building work.

(5) The regulations may—

(a) prescribe additional work that is construction work for the purposes of this Part, and

(b) exclude work from being construction work for the purposes of this Part.

(6) The regulations may exclude persons from being owners for the purposes of this Part.

37 Extension of duty of care

(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.

(2) The duty of care is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of the land.

(3) A person to whom the duty of care is owed is entitled to damages for the breach of the duty as if the duty were a duty established by the common law.

(4) The duty of care is owed to an owner whether or not the construction work was carried out—

(a) under a contract or other arrangement entered into with the owner or another person, or

(b) otherwise than under a contract or arrangement.

187 The definition of "building" in s 1.4(1) of the *Environmental Planning and Assessment Act 1979* (NSW), as referred to in s 36(1), is as follows:

building includes part of a building, and also includes any structure or part of a structure (including any temporary structure or part of a temporary structure), but does not include a manufactured home, moveable dwelling or associated structure within the meaning of the *Local Government Act 1993*.

188 The statutory duty of care in s 37 applies with respect to a person who carries out "construction work". That notion, which is defined (only) in s 36(1), is defined in various ways by reference to "building work". That term is itself defined in s 36(1), in an inclusive way. Those definitions in s 36 only apply for the purposes of Pt 4. But, critically, the term "building work" is the subject of a general definition earlier in the Act in s 4, expressed to apply for the purposes of the DBP Act. That definition is as follows:

4 Building work

(1) For the purposes of this Act, ***building work*** means work involved in, or involved in coordinating or supervising work involved in, one or more of the following—

(a) the construction of a building of a class or type prescribed by the regulations for the purposes of this definition,

(b) the making of alterations or additions to a building of that class or type,

(c) the repair, renovation or protective treatment of a building of that class or type.

(2) The regulations may—

(a) prescribe additional work that is building work for the purposes of this Act, and

(b) exclude work from being building work for the purposes of this Act.

(3) In this Act, a reference to a building (including a building as defined in Part 4) includes a reference to part of a building (including a building element).

189 This definition of "building work" addresses two topics: identifying the type of work undertaken, and identifying what type of buildings that work is undertaken on. The type of work that is encompassed is: construction of a building; making of alterations or

additions to a building; and the repair, renovation or protective treatment of a building. As to the type of building, that is not defined in the section itself. Rather, insofar as the Act generally is concerned, that content is to be provided by the regulations.

190 Clause 12 of the regulations provides as follows:

> **12 Prescribed classes or types of building—building work**
>
> For the purposes of section 4(1) of the Act, definition of ***building work***, a building is prescribed if the building, or a part of the building, is a class 2 building.
>
> Example—
>
> The Act and this Regulation apply to a mixed-use building comprising class 2, class 3 and class 6 buildings, including the building's class 3 and class 6 building parts.

191 Clause 13 then identifies certain types of work which are excluded from being "building work", for example "work that is carried out as exempt development, other than waterproofing".

192 It was not in dispute that the three buildings at issue here were "boarding houses", which do not fall within a class 2 building as referred to in cl 12 of the regulations, and nor do they fall within "residential building work" within the meaning of the *Home Building Act 1989* (NSW), as included in the definition of "building work" in s 36(1). That meant that if the notion of "building work" was understood in the way defined in s 4(1), as extended by the inclusion of "residential building work" within the meaning of the *Home Building Act*, then Pt 4 of the Act did not apply to the buildings at issue here. The respondent's claim based on the Act would, then, fail.

193 The core dispute relates to whether and how the general definition of "building work" in s 4(1) applies to the inclusive definition of "building work" in s 36(1). There were four constructions raised in the course of the appeal:

(1) The appellant's primary submission was that the definition of "building work" in s 4 did apply in full to the further definition of that term in s 36(1), such that boarding houses were not encompassed by Pt 4.

(2) The appellant initially raised an alternative construction to the effect that the reference to "includes" in the definition of building work in s 36(1) should be understood as "means", such that the definition *only* applied to residential building work within the meaning of the *Home Building Act*. That submission was abandoned in the course of oral address. That abandonment was not surprising given that the usage of "includes" in the definition stands in contrast to other

definitions in s 36(1) which use the word “means”: note *Obeid v Australian Competition and Consumer Commission* (2014) 226 FCR 471, [2014] FCAFC 155, at [50]-[53]. This construction need not be considered further.

(3) The construction adopted by the primary judge (at [111]-[130]) – and the primary construction advocated by the respondent on appeal – was that the general definition in s 4(1) has no application to Pt 4 of the Act.

(4) A construction raised in the course of argument, and supported on a secondary basis by the respondent, was that the general definition in s 4(1) did apply to the further definition of “building work” in s 36(1), but only as regards the first topic addressed in the general definition (identifying the type of work undertaken), with the second topic (identifying what type of buildings that work is undertaken on) instead being addressed by the definition of “building” in s 36(1).

194 There are reasonable arguments that can be made for each of the first, third and fourth constructions. In our view, it is the fourth construction which best makes sense of the text, context and purpose of the relevant provisions. On that construction, boarding houses were encompassed within “building work”.

The legislative history and the relevant mischief to which Pt 4 is directed

195 The DBP Act was enacted in part as a response to a February 2018 report, commissioned by the “Building Ministers’ Forum”, by Professor Peter Shergold and Ms Bronwyn Weir, entitled “Building Confidence — Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia”. As the Minister’s second reading speech in the Legislative Assembly acknowledged, the legislation was enacted in the context of broader public concerns about building defects highlighted by, for example, the much publicised cases of widespread and serious defects in the Mascot Towers and Opal Tower buildings in Sydney. The DBP Act sought to address some of the problems by requiring various design and building practitioners (including engineers) to be registered and to comply with various regulatory requirements.

196 It is also apparent from the debates in the Legislative Council, and from the Minister’s speech in the Legislative Assembly when the Bill was returned there after amendment in the Legislative Council, that Pt 4 of the Act specifically sought to overturn the effect of the High Court’s decision in ***Brookfield** Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185; [2014] HCA 36: see Legislative Council Hansard, 2 June 2020 per Mr David Shoebridge MLC at 64-65, per the Minister for Finance and Small Business, the Hon Damien Tudehope at 66, and per the Hon Adam Searle MLC at 66; see also Legislative Assembly Hansard, 3 June 2020 per the Minister for Better Regulation and Innovation, Mr Kevin Anderson at 2331. The High Court held in *Brookfield* that the builder of strata-titled serviced apartments owed a duty of care to the registered proprietor and property developer, but not to the respondent owners corporation. In brief, the effect of the decision was that a builder’s duty of care to avoid

economic loss resulting from latent defects in a property stopped with the first purchaser, absent special cases involving vulnerability (such as a plaintiff's incapacity or limited capacity to protect itself from economic loss arising from a builder's conduct).

197 The legislative history of the Act is complicated. The DBP Bill was introduced into the Legislative Assembly on 23 October 2019 by Mr Anderson, the Minister for Better Regulation and Innovation. Provisions relating to the proposed statutory duty of care were set out in Pt 3 of the first print of the DBP Bill. It was not originally proposed that the Part would have retrospective operation. The proposed duty of care was imposed by cl 30, while various relevant definitions were set out in cl 29, as follows:

> **29 Definitions**
>
> (1) In this Part— …
>
> ***building*** means a building of a class or type prescribed by the regulations.
>
> ***construction work*** means building work and the preparation of regulated designs and other designs for building work. …
>
> (2) In this Part, a reference to ***building work*** applies only to building work relating to a building within the meaning of this Part. …
>
> (4) The regulations may—
>
> > (a) prescribe additional work that is construction work for the purposes of this Part, and
> >
> > (b) exclude work from being construction work for the purposes of this Part. …
>
> **30 Extension of duty of care**
>
> (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.
>
> (2) The duty of care is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of the land. …

198 Various preliminary matters were set out in Pt 1 of the original DBP Bill. They included definitions for the purposes of the Bill generally. The term "building work" was defined in cl 4 of the Bill in terms which are the same as those enacted in s 4 of the Act (save only that cl 4(3) was updated to refer to Pt 4 rather than Pt 3, after the statutory duty of care provisions became Pt 4).

199 Thus, at this time, the definition of both "building work" in cl 4 (applying to the Bill generally) and "building" in cl 29 of Pt 3 (applying only to Pt 3) operated by reference to foreshadowed regulations. There was no further definition of "building work" in Pt 3.

200 In his second reading speech in the Legislative Assembly the Minister described cl 30 as imposing a statutory duty of care on people who carry out construction work. He explained that this duty was owed to certain categories of owner, saying as follows (Legislative Assembly Hansard, 23 October 2019 at 1663, emphasis added):

> This means that owners of property will be receiving protections that are owed to them against any kind of defect that arises from construction work and will be properly safeguarded under this law. The duty deliberately does not extend to owners who are developers or large commercial entities, as the Government considers these entities to be sufficiently sophisticated and able to contractually and financially protect their commercial interests. The bill sets out that construction work means building work, regulated designs and other types provided for building work. But it is also

> futureproofed so that the regulations may prescribe or exclude certain types of construction work if it is determined appropriate. **While the regulations have not been finalised, it is envisaged that the duty of care will apply to construction work in a building that is a class 1, 2, 3 and 10 under the Building Code of Australia**.
>
> Therefore, houses, multi-unit residential buildings and **other buildings such as boarding houses**, hostels, backpackers' accommodation, residential parts of hotels, motels or schools **will all obtain the duty of care provided for under this bill**—that is, people will be protected where they live or intend to live or reside. Clause 30 also sets out the specifics of the duty. It is important to note that the duty of care is owed to each owner and subsequent owner of the land on which the construction work is or was carried out and whether it was carried out under a contract or other arrangement with the owner or a previous owner. Therefore, the duty would be owed, for example, to the owners corporation of a strata scheme and its members and to other owners who may not have been owners at the time the construction work was carried out.

201 It is relevant to note the Minister's unequivocal stated intention that the duty of care would apply to boarding houses.

202 During the course of the subsequent second reading debate in the Legislative Assembly the Minister noted that various changes would be made to Pt 3 of the DBP Bill following public consultation (Legislative Assembly Hansard, 13 November 2019 at 1615). He said that to ensure that the provision applied as intended, the proposed duty of care would apply retrospectively to classes 1, 2, 3 and 10 of the Building Code of Australia (**BCA**) or a building containing those classes. It may be interpolated here that the BCA classifies buildings and structures by reference to the purpose for which they are designed, constructed or adapted to be used. Relevantly, class 1(b) applies to "a boarding house" with specified characteristics. It is common ground that the boarding houses the subject of these proceedings fall within class 1(b).

203 The DBP Bill was passed by the Legislative Assembly in November 2019, as amended on the Government's motion. The following features of the DBP Bill at that time should be noted:

(1) The definition of "building" in cl 4 of Pt 1 still depended upon the regulations.

(2) The definitions provision in Pt 3 was now in cl 30, and "building" was defined to mean a building in class 1a, 1b, 2, 3, 10a, 10b or 10c of the BCA (thus including boarding houses) or a building of another class or type prescribed by the regulations. Thus, rather than simply wait for the regulations to define the scope of the buildings to which the duty of care applied, certain buildings were specifically identified within cl 30 as falling within that scope by reference to classes of building in the BCA.

(3) The term "construction work" was defined in cl 30(1) as meaning, inter alia, "building work", but there was no separate definition of "building work" in Pt 3.

(4) However, it was made clear in cl 30(2) that, in Pt 3, a reference to "building work" applied only to building work relating to a building within the meaning of the Part. That provision – which had been in the original Bill as cl 29(2) – remained the same throughout the legislative process, and was enacted as

s 36(2). The provision manifests an intent that the buildings to which Pt 3 (later Pt 4) applied may not be the same as the types of buildings addressed in other parts of the legislation.

(5) The duty of care itself was imposed by cl 31. Provision was made for Pt 3 to operate retrospectively where the loss first became apparent within a period of six years immediately preceding the commencement of cl 31 (see Sch 1, Pt 2, cl 5).

204 The Bill then went to the Legislative Council where it was debated on 19 November 2019. There was then a long gap until 2 June 2020 – not least because of the start of the Covid-19 pandemic – when the debate resumed. During that hiatus there were extensive consultations and negotiations which led to a desire for further amendments to expand Pt 3.

205 For present purposes it is sufficient to note the following remarks by Mr David Shoebridge MLC in moving some amendments proposed by The Greens to the duty of care provisions (Legislative Council Hansard, 2 June 2020 at 65, emphasis added):

> I turn now to briefly discuss the various amendments. 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.** Amendment No. 3 **extends the definition of "construction work"** for the purpose of this duty of care to include supervising, coordinating and project managing or otherwise having substantive control over the carrying out of any work.

206 Those three amendments were all made to the definitions clause in Pt 3 (now s 36 in Pt 4), and were as follows:

> [Amendment no 1:]
>
> > ***building*** has the same meaning as it has in the *Environmental Planning and Assessment Act 1979*.
>
> [Amendment no 2:]
>
> > ***building work*** includes residential building work within the meaning of the *Home Building Act 1989*.
>
> [Amendment no 3 – insert into the definition of “construction work” the following:]
>
> > (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).

207 The Government accepted these amendments (amongst others).

208 On 3 June 2020 the Bill as amended was returned to the Legislative Assembly, where the amended version was passed. The Minister referred in the Assembly to the Government working co-operatively with Mr David Shoebridge MLC and gave the Government’s support to those amendments which “collectively clarified the operation of the duty of care protections in the bill”. After stating that the Bill was always meant to be about class 2 residential buildings (defined in the BCA as “a building containing 2 or more sole-occupancy units each being a separate dwelling”), the Minister said that the Government was not in a position to oppose both The Greens and Labor “moving to

expand the duty of care to **all classes of buildings**" (Legislative Assembly Hansard, 3 June 2020 at 2331, emphasis added). By necessary inference this included class 1b buildings.

209 The effect of these amendments was that the definition of "building work" in Pt 4 was expanded from the general definition of that term so as to include residential building work within the meaning of the *Home Building Act*. Another effect was to remove from the definition of "building" any dependency upon the foreshadowed regulations. Rather, it was given a particular meaning for the purposes of the Part, being that contained in the *Environmental Planning and Assessment Act*.

210 In addition, the retrospectivity period was extended from six to ten years. Further, Pt 4 was to commence immediately upon assent to the Bill, even though other parts would not commence until later. The Minister described this as a "sensible amendment [which] is consistent with the Government's intention to commence these important protections without delay".

Relevant principles of construction

211 There was little dispute about the principles of statutory construction to be applied here. The parties accepted that the Court was required to focus on the text, construed in context and taking account of the relevant purpose sought to be achieved: see eg ***Alcan*** *(NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 at [47]; ***R v A2*** (2019) 269 CLR 507; [2019] HCA 35 at [32]-[37].

212 Sections 33 and 34 of the *Interpretation Act 1987* (NSW) are pertinent. The former provision states that, in interpreting a statutory provision, a construction that would promote the purpose or object underlying the Act (whether that purpose is explicit or implicit) shall be preferred to a construction that would not promote that purpose or object. The general effect of the latter provision is to permit the Court to refer to some extrinsic materials in ascertaining the purpose or object underlying an Act and then to confirm that the ordinary meaning of the text was intended. However, s 34 does not permit resort to such materials for the purpose of departing from the ordinary meaning of the text unless either the meaning of the provision to be construed is ambiguous or obscure or in its ordinary meaning leads to a result that is manifestly absurd or unreasonable: see *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416 at 420; [1986] HCA 74. Unsurprisingly, the parties did not dispute that the meaning of ss 36 or 37 of the DBP Act was ambiguous on the issue at hand.

213 The Court should also be mindful of the following observations in ***Saeed*** *v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 at [31] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ:

> Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.

214 The appellant gave some emphasis to that principle. The importance of not losing sight of the text must constantly be borne in mind. But it does not mean that courts ignore extrinsic materials, nor that they do not take account of the mischief to which the provisions in question were addressed. That point was made by Kiefel CJ and Keane J in *R v A2*, just after having referred to *Alcan* and *Saeed* amongst other cases (footnotes omitted):

> [36] These cases serve to remind that the text of a statute is important, for it contains the words being construed, and that a very general purpose may not detract from the meaning of those words. As always with statutory construction, much depends upon the terms of the particular statute and what may be drawn from the context for and purpose of the provision.
>
> [37] None of these cases suggest a return to a literal approach to construction. They do not suggest that the text should not be read in context and by reference to the mischief to which the provision is directed. They do not deny the possibility, adverted to in *CIC Insurance Ltd v Bankstown Football Club Ltd*, that in a particular case, “if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance”. When a literal meaning of words in a statute does not conform to the evident purpose or policy of the particular provision, it is entirely appropriate for the courts to depart from the literal meaning. A construction which promotes the purpose of a statute is to be preferred.

215 That passage echoes McHugh JA’s observations in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424:

> Once the object or purpose of the legislation is delineated, the duty of the Court is to give effect to it in so far as, by addition or omission or clarification, the relevant provision is capable of achieving that purpose or object. Where the court can see the purpose of a provision from an examination of its terms, little difficulty should be met in giving effect to that purpose. The days are gone when judges, having identified the purpose of a particular statutory provision, can legitimately say, as Lord Macmillan said in *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637 at 641, of the means used to achieve the purpose: “The legislature has plainly missed fire”. Lord Diplock, in an extra judicial comment on that decision has said, that “if … the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed”: “The Courts As Legislators”, *The Lawyer and Justice* (Sweet & Maxwell) (1978) at 274.

216 Of course, as the High Court has emphasised in recent times, it is always necessary to come back to the text when identifying the correct construction: see eg *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39].

217 In this case, given the inter-relationship between ss 36 and 37, it is also relevant to recall the general principle that definitions are not to be treated as though they are substantive provisions. Thus, in *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628 at 635; [1966] HCA 74, Barwick CJ, McTiernan and Taylor JJ said:

> The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense – or are to be taken to include certain things which, but for the definition, they would not include. Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way. As was said by Sutherland (*Statutes and Statutory Construction*, 2nd ed., vol. 2, p. 687),

> "Such definitions can, in the nature of things, have no effect except in the construction of the statutes themselves".
>
> Consequently the effect of the Act and its operation in relation to dividends as defined by the Act must, we think; be found in the substantive provisions of the Act which deal with "dividends".

218 Also relevant here is s 6 of the *Interpretation Act*, which provides that "[d]efinitions that occur in an Act or instrument apply to the construction of the Act or instrument except in so far as the context or subject-matter otherwise indicates or requires". In other words, the statute may be taken to otherwise provide, such that a general definition is construed not to apply in a particular context within the statute.

Sections 36 and 37 of the DBP Act construed

219 The central issue that divides the parties is what types of buildings are subject to the statutory duty of care provided for in Pt 4. That issue depends on whether and, if so, how the general definition of "building work" in s 4(1) of the Act applies having regard to the further specific definition of that notion in s 36(1). The primary judge considered that the general definition did not apply at all. In all the circumstances that is a reasonably open construction. However, in our view it is not the construction which best reflects the applicable principles of construction and resolves the tensions within the Act.

220 His Honour thought it significant (at [113]) that different Parts of the DBP Act commenced at different times, and he considered that the statutory regime only operated coherently if the s 4 definition of "building work" applies to those Parts of the DBP Act which commenced on 1 July 2021 (ie Pts 2, 3, 5–9) and not to Pt 4, which commenced on 10 June 2020 with retrospective operation (as did Pt 1). There is some force to this point. It is notable that Pt 4 commenced immediately, whereas the definition of "building work" in s 4(1) could not operate of itself until a regulation was made to identify the types of building to which it applied. The regulations were not in fact made until some time later, and it may be inferred that, at the least, it was understood that a delay in making the regulations was a real possibility. In the Minister's original second reading speech in the Legislative Assembly he referred to the fact that the regulations had not been finalised (as quoted above at [200]).

221 However, any delay in making the regulations would not deprive the definition of "building work" of all practical effect in the context of Pt 4. That is so because given that the further definition of "building work" in s 36(1) states that that notion, in Pt 4, includes residential building work within the meaning of the *Home Building Act*, there was at least *some* content provided for the term in s 4 (for the purposes of Pt 4 only) regardless of when the regulations were made. Regardless of when the regulations were made, "building work" for the purposes of Pt 4 included, from the beginning, residential building work within the meaning of the *Home Building Act*.

222 Nevertheless, it creates uncertainty for any provision to have immediate effect but with only partially delineated content, let alone one which applies with retrospective effect. The content was only partially delineated because, beyond the inclusive reference to

the definition in the *Home Building Act*, it remained to be filled out by the regulations. It is relevant to take account of what the reasonable expectations of the public would be with respect to the extent of retrospective operation of a law: see *Stephens v The Queen* (2022) 96 ALJR 871; [2022] HCA 31 at [33]. Here, those reasonable expectations favour a construction promoting greater certainty in the application of Pt 4. Complete certainty is not possible, because on any view the regulations may affect the scope of the work to which Pt 4 applies. That is so because s 36(5) of the DBP Act provides that the regulations may add or subtract to the type of work that is included as "construction work" for the purposes of the Part. It is that term of "construction work" which is the subject of the statutory duty in s 37. Even so, although complete certainty is not possible, it remains the case that one relevant construction factor is to increase certainty. Here, that militates against the construction supported by the appellant to the effect that the statutory definition of "building work" in s 4(1) applies without qualification to the further definition of that term in s 36(1), because that leaves the scope of the buildings to which Pt 4 applies substantially at large, save for the extent to which the definition of residential building work in the *Home Building Act* applies.

223 A further important factor militating against the appellant's construction is the significance of the definition of "building" in s 36(1) of the DBP Act, both as a matter of text and purpose. With respect to text, it is relevant that s 36(2) provides that "[i]n this Part, a reference to ***building work*** applies only to building work relating to a building within the meaning of this Part". As the primary judge noted at [116], the reference to "building" in that section must be understood in terms of the definition of "building" in s 36(1), which refers in turn to the broad definition in the *Environmental Planning and Assessment Act*. As noted above at [203(4)], this provision did not change over the course of the parliamentary process, which suggests that it was always envisaged that the types of building to which the duty in Pt 4 applied may be different from those the subject of building work in other parts of the DBP Act. Section 36(2) supports a conclusion that the issue of the type of building to which Pt 4 applied (being the second of the issues addressed in the definition of "building work" in s 4(1)) was always intended to be the subject of distinct articulation, separate from any regulations made addressing the issue generally for the purposes of s 4(1).

224 The effect of the limitation in s 36(2) is that, for the purposes of Pt 4, the statutory duty of care is limited to building work relating to a "building" within the meaning of Pt 4. The type of "building" to which Pt 4 applies is exhaustively defined there by reference to the meaning of that term in the *Environmental Planning and Assessment Act*.

225 That understanding gains significant support from the parliamentary process in relation to Pt 4. It is apparent that both Mr Shoebridge, in moving amendments to the Bill in the Legislative Council, and the Government in accepting them, considered that the effect of the amendments was to expand the coverage of Pt 4. Those amendments included inserting the two specific definitions of "building" and "building work" for the purposes of Pt 4. Mr Shoebridge said that in light of the amendments the "duty of care applies to all

buildings", and the Minister in the Legislative Assembly referred to "expand[ing] the duty of care to all classes of buildings". That parliamentary intention would be defeated on the appellant's construction.

226 Furthermore, that was from a starting point where, prior to the expansionary amendments made in the Legislative Council, the Minister had referred to the Bill applying to boarding houses in any event (see above at [200]). In that context it would be surprising if Pt 4 was construed so as not to apply to boarding houses, as the appellant submits.

227 The appellant contends that the statutory duty imposed by s 37 is effectively displaced in the case of a boarding house because a boarding house is not a "dwelling" for the purposes of the *Home Building Act*. The appellant says that this is significant because "building work" is defined in s 36(1) as including "residential building work" within the meaning of the *Home Building Act*, and that term is defined in turn by reference to the notion of a "dwelling", which is further defined in terms which expressly exclude boarding houses: see cll 2 and 3 of Sch 1 of the *Home Building Act*.

228 Merely because a boarding house is not a "dwelling" for the purposes of the *Home Building Act* does not have the effect, however, of taking a boarding house outside the scope of s 37. That is because the definition in s 36(1) of "building work" is not an exhaustive definition. Rather, the reference to "residential building work" within the meaning of the *Home Building Act* simply makes clear that such work constitutes "building work" for the purposes of s 36(1). But there is room left for other work relating to a building to qualify as "building work". In effect, this aspect of the appellant's argument presupposes that the word "includes" in the definition of "building work" in s 36(1) should be read as "means". Yet that is the alternative construction put in the appellant's written submissions which was rightly abandoned in the course of argument.

229 A matter that weighs against the construction adopted by the primary judge is that it leaves open the question of *what type of work* (as opposed to what type of buildings) are encompassed by the notion of "building work" in Pt 4. On his Honour's construction it appears that issue is to be answered by reference simply to the ordinary meaning of the words. Whilst that is an open construction, it might be thought to be surprising that the issue was intended to be left at large given the careful definition in s 4(1), which is broadly consistent (as regards the type of work) with the definition of "residential building work" in the *Home Building Act*.

230 That consequence is avoided if the fourth construction noted above at [193] is adopted, such that the general definition in s 4(1) does apply to the further definition of "building work" in s 36(1), but only as regards the first topic addressed in the general definition (identifying the type of work undertaken), with the second topic (identifying what type of buildings that work is undertaken on) instead being addressed by the definition of "building" in s 36(1). That is the construction which best gives effect to the text, context and purpose of the relevant provisions. It reduces the uncertainty as to the

retrospective operation of Pt 4. It takes full account of the definition of “building” in s 36(1) and the provision made in s 36(2). In so doing, it acknowledges that the mischief to which Pt 4 was directed involved a broader class of buildings than for other parts of the Act, and that this included boarding houses. It does not completely disapply the general definition of “building work” in s 4(1), and in that way makes clear what type of work is encompassed by the notion of “building work”.

231 The appellant suggested that it would be artificial to apply the general definition in s 4(1) in this way, given the extent to which that general definition depends upon filling out by regulation. There is some force to that point, but no construction here is straightforward. Adopting the fourth construction gives some effect to the fact that s 4(1) commences with the words “[f]or the purposes of this Act”, which on its face includes Pt 4. Further, it addresses the issue of what type of work is encompassed by “building work” within Pt 4, where it appears unlikely that the Parliament intended that to be left to ordinary meaning.

232 In this case, as noted, it is common ground that each of the boarding houses falls within class 1b of the BCA. The parties did not dispute that a boarding house is a “building” within the meaning of the *Environmental Planning and Assessment Act*, and thus within the meaning of that term in s 36(1). Nor is it disputed that the type of work undertaken fell within the types of work identified in the definition of “building work” in s 4(1). Accordingly, the statutory duty of care applied here.

233 For these reasons, ground 3 of the appeal should be rejected.

Conclusion

234 None of the three grounds of appeal have been made out. The appeal should be dismissed, with costs.

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