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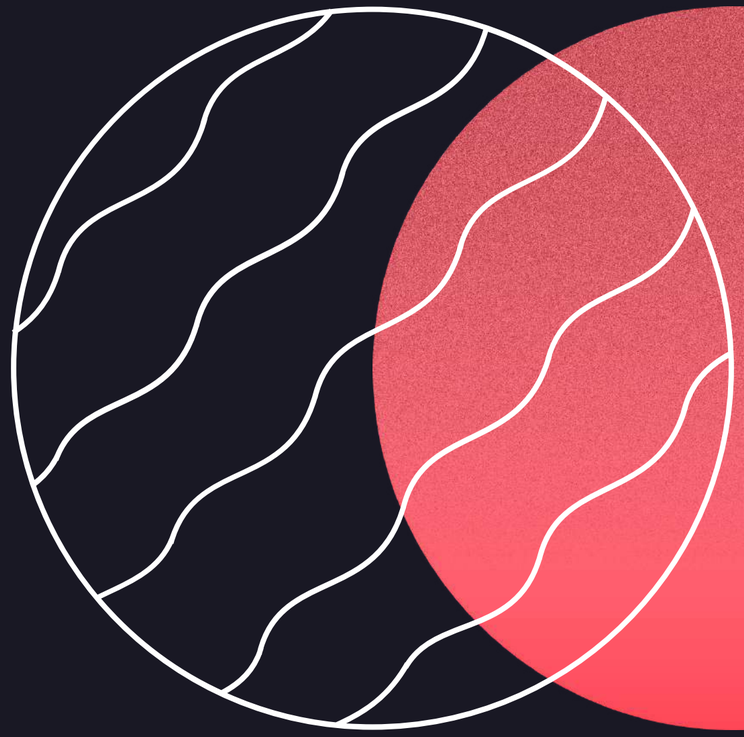

UNSW EDGE CONSTRUCTION LAW INTENSIVE

14 March 2023

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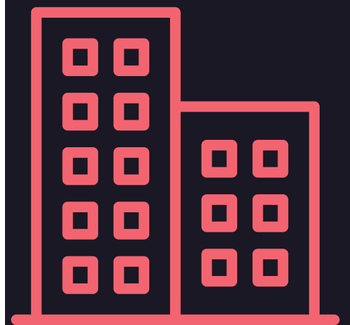
1. stabbing the purpose - all classes of buildings are covered.

2. s 4 defines the type of "work"

3. s 36(1) defines the type of “building”

Roberts v Goodwin Street Development Pty Ltd [2023] NSWCA 5



Provisions to note in DBP Act 2020(NSW).

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- S 39 the duty is non-delegable. What does this mean? is it non-apportionable?

- s 41 - limitation periods under limitation Act 1969 and EPAA apply.

Section 39

Duty must not be delegated

- A person who owes a duty of care under this Part is not entitled to delegate that duty.

Section 41

1. The provisions of this Part are in addition to duties, statutory warranties or other obligations imposed under the Home Building Act 1989, other Acts or the common law and do not limit the duties, warranties or other obligations imposed under that Act, other Acts or the common law

2. This Part does not limit damages or other compensation that may be available to a person under another Act or at common law because of a breach of a duty by a person who carries out construction work.

3. This Part is subject to the Civil Liability Act 2002.

Note

Actions under this Part are subject to applicable limitation periods established under the Limitation Act 1969, and section 6.20 of the Environmental Planning and Assessment Act 1979 which relates to civil actions relating to certain work.

The statutory duty of care is apportionable: *Boulus Constructions Pty Ltd v Warrumbungle Shire Council (No 2)* [2022] NSWSC 1368 at [61] and applied in *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2023] NSWSC 116 at [29].

However, the person owing the non-delegable duty of care is vicariously liable for the actions of their independent contractor: *Woodhouse v Fitzgerald* [2021] NSWCA 54 at [100], [102]; 104 NSWLR 475

A PLAINTIFF CANNOT RECOVER MORE THAN HE OR SHE HAS LOST

The Compensation Principle

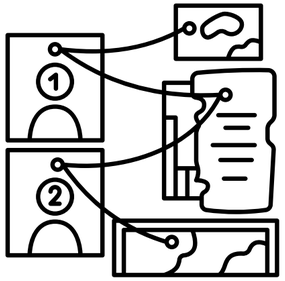
The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed: *Haines v Bendall* (1991) 172 CLR 60 at 63.

Also applies to ACL damages: *Mills v Walsh* [2022] NSWCA 255 at [117].

Onus of Proof – The Plaintiff has the onus to prove the prima facie case
Evidentiary Burden - Upon the Plaintiff establishing the prima facie case, the evidentiary burden shifts to the Defendant

Provisional Presumptions and Burdens – relevant facts or circumstances can raise a “presumption” or make a “prima facie” case.

In the case of the failure of a party bearing the evidentiary burden only, the direct evidence of the party with the onus of proof can be more readily accepted and inferences in his or her favour may be more confidently drawn: *Jones v Dunkel* [1959] HCA 9; 101 CLR 298.



RELIANCE DAMAGES - RECOVERY OF WASTED EXPENDITURE

Expenditure is "wasted" if the promise in reliance on which it was made is not performed.

Wasted expenditure includes any detrimental change of position by the plaintiff in reliance upon the defendant's promise.

Onus on the defendant show the value of any benefit derived from the wasted expenditure is brought to account: *Mills v Walsh* [2022] NSWCA 255 at [138].

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123 259 932 V CESSNOCK CITY COUNCIL [2023] NSWCA 21

Relevant Principles as to when a plaintiff may claim to recoup its wasted expenditure

1. If a plaintiff is unable or does not undertake to demonstrate whether or to what extent the performance of a contract would have resulted in a profit then the presumption arises that the plaintiff will be able to recover its “wasted” expenditure.

2. The evidentiary burden is then upon the defendant to show that the plaintiff would not have recouped its expenditure had the contract been performed.

3. Any benefit received by the plaintiff will be offset.

4. The reliance interest is the quantum of the net detriment.

123 259 932 V CESSNOCK CITY COUNCIL [2023] NSWCA 21

Notes:

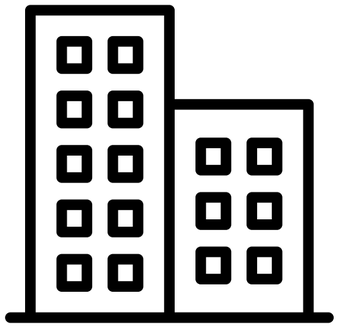
- It is not a precondition to the presumption that the plaintiff first establish that it is “impossible” to prove expectation damages.
- Termination of the contract by the innocent party is not invariably a precondition to recovery of reliance damages.

SEE ALSO *LEEDA PROJECTS (ACN 072 077 171) V YUN ZENG* (2020) 61 VR 384 WHERE A BUILDING PROJECT WAS DELIVERED LATE.

Reliance damages in the form of wasted expenditure in the form of Owners Corporations' fees, service charges and council rates during the delay period awarded.

NOT the rental value of the property.

Special leave was refused.



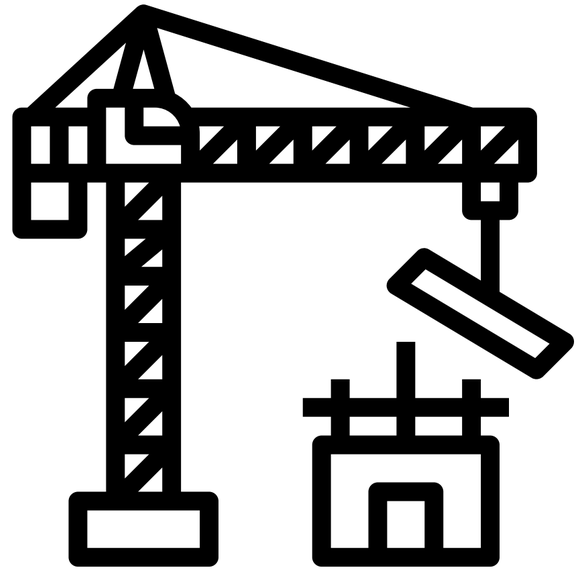
Note that in a “no transaction” case, the plaintiff bears the onus of establishing that it has suffered loss by showing that what it has received is worth less than what it has paid: see *Mills v Walsh* [2022] NSWCA 255 at [138].

Mills had succeeded on a s 18 ACL “no transaction” case but had not proved the damage suffered.

Cappello v Hammond & Simonds NSW Pty Ltd [2021] NSWCA 57.

Owners' claim for a diminution in value of the home at the time of delivery vs the notional date of delivery as promised was rejected.

Fungibles vs Real Property: *Morris v Leaney* [2022] NSWCA 95 at [87].



The claim for damages for anxiety, disappointment and distress was not allowed in *Cappello* at [88] – [91]. Such damages are not recoverable in an action for breach of contract unless you are dealing with a Scenic Tours scenario and the object of the contract is to provide enjoyment, relaxation or freedom from molestation.

Cf with damages for mental distress, vexation and inconvenience which may be recoverable in a tortious claim or an ACL misrepresentation claim where a plaintiff has suffered inconvenience and mental distress: *Archibald v Powlett* [2017] VSCA 259 at [64]

Or where the plaintiff has suffered physical discomfort or inconvenience: *Archibald v Powlett* [2017] VSCA 259 at [63].

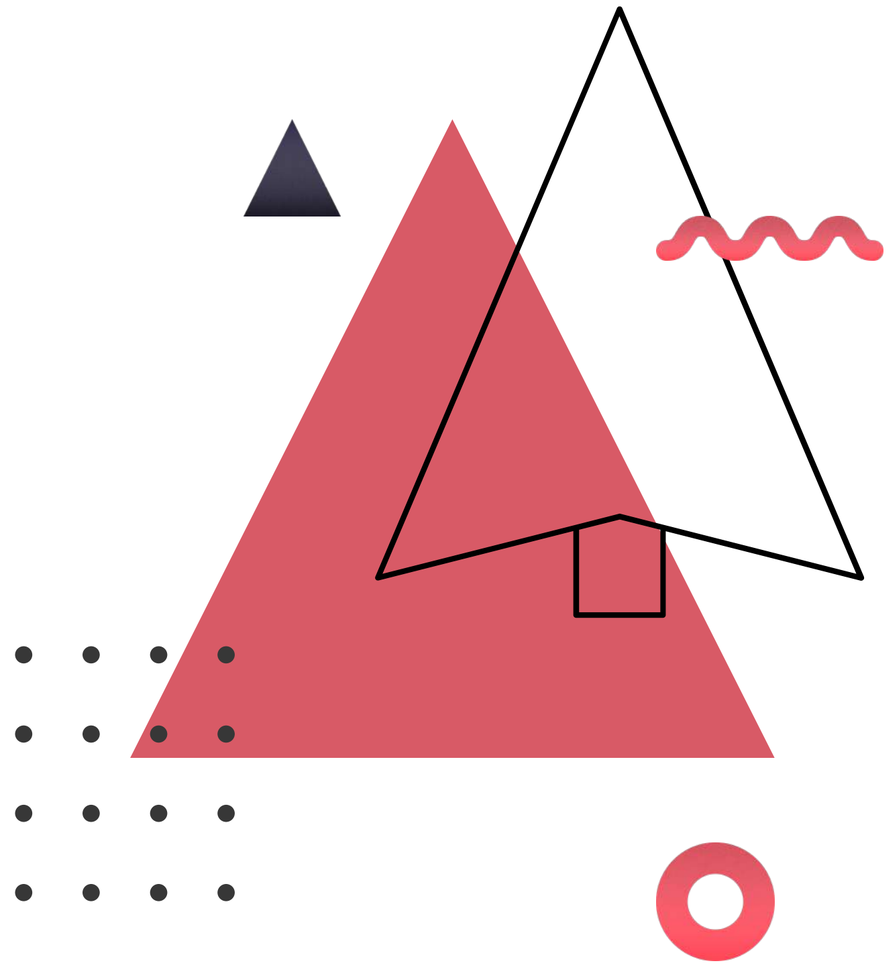
THE PREVENTION PRINCIPLE IS A RULE OF CONSTRUCTION

- In the absence of clear words, a contractual entitlement upon a particular event will not be enlivened if the event came about through breach of the party seeking to rely on it.
- No man can take advantage of his own wrong.
- A man cannot enforce against another a right arising from his own breach of contract or breach of duty.

The rule only applies to the extent of undoing the advantage gained by the wrongdoer where that can be done and not to the extent of taking away a right previously possessed.

No one shall gain a right by his own wrong. Not that if he has a right, he shall lose it, or the power of exercising it, by a wrong done in connection with it.

A party in breach of contract may be precluded from relying on a contractual entitlement arising from the breach, but will not be precluded from relying on a contractual entitlement which does not arise from the breach.



Re mitigation and the avoided loss principle:

see *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd* [2005] NSWCA 443 at [44] and referred to in obiter in *Harold R Finger & Co Pty Ltd v Karellas Investments Pty Ltd* [2016] NSWCA 123 at [242].

The avoided loss principle applies where the innocent party in fact gained a compensating advantage.

The guilty party bears the burden of proving that loss had been avoided and the extent to which it had been avoided there must be proof of an actual benefit and what the benefit was.

The innocent party then has the evidentiary burden of rebutting the avoided loss once there is evidence of compensation advantage.

Consider betterment which is a form of compensating advantage.