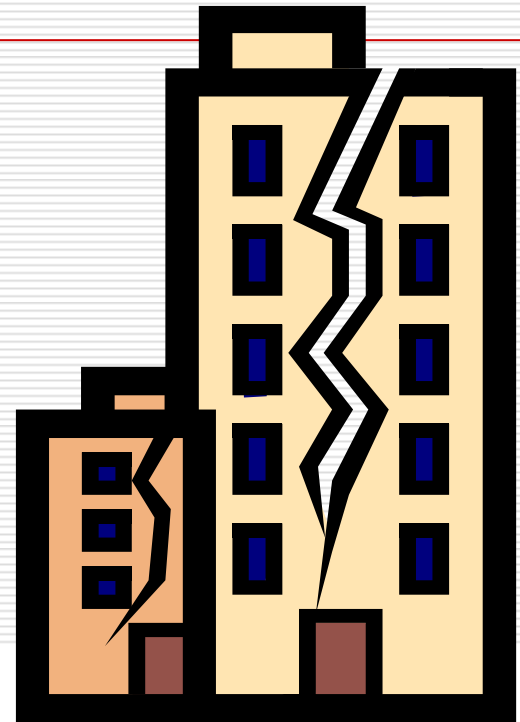


Defective work damages after *Tabcorp v Bowen Investments*: A construction law cul de sac or contract law Broadway?

Research Workshop

16 March 2009

Matthew Bell



MELBOURNE LAW SCHOOL

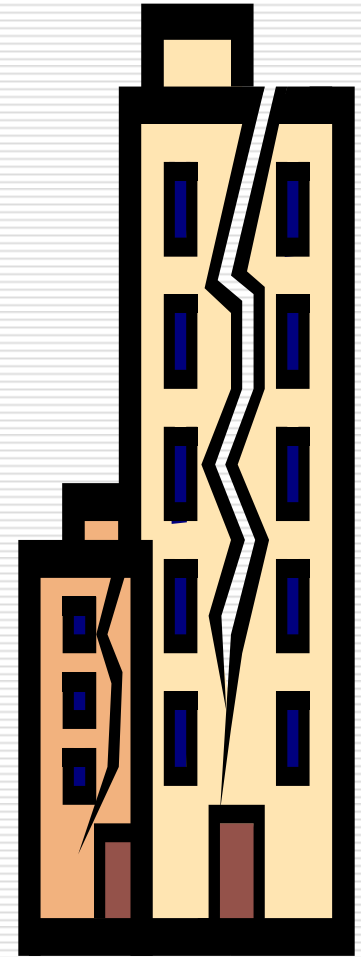
Australia's first, Australia's global



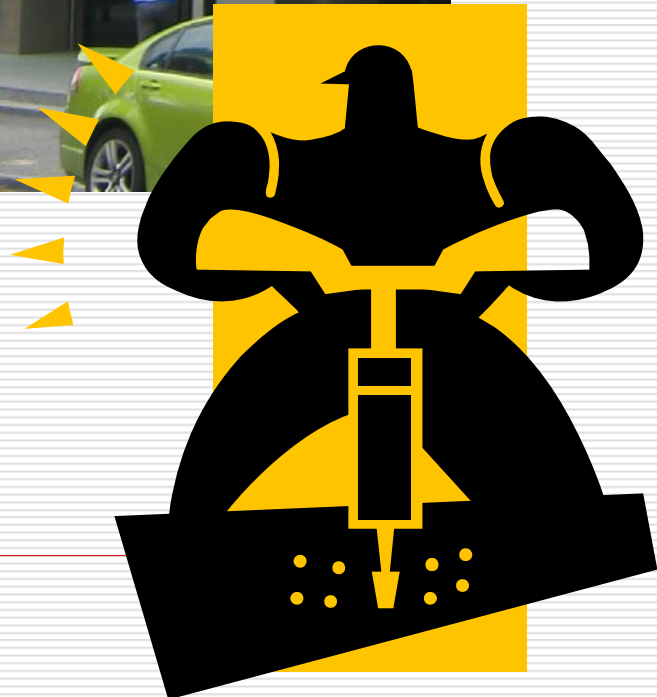
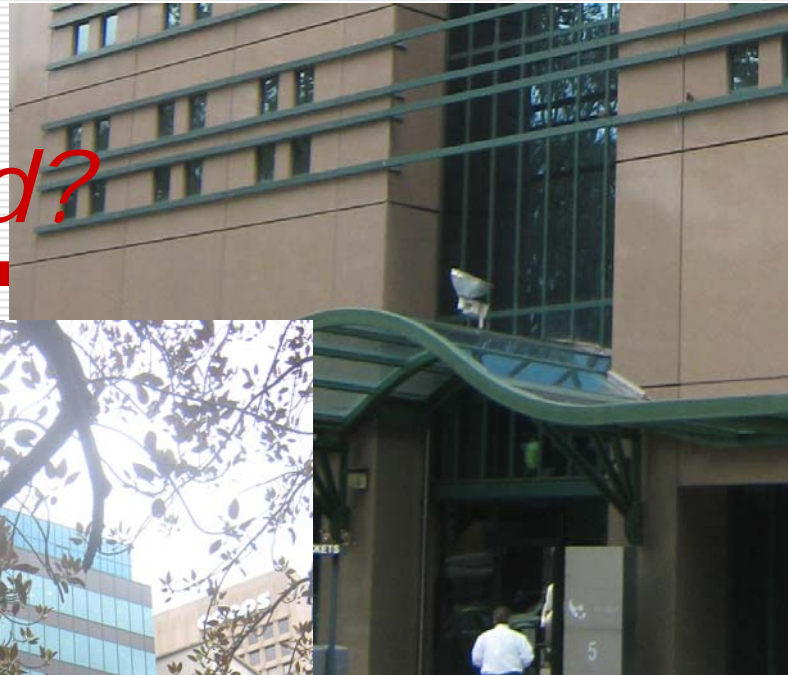
Tabcorp Investments Ltd v Bowen Investments Pty Ltd

(2009) 83 ALJR 390, [2009] HCA 8

- Joint judgment
 - French CJ, Gummow, Heydon, Crennan and Kiefel JJ
- 27 paragraphs long (9 pages in ALJR)
- Heard 2-3 December 2008; judgment delivered 12 February 2009
- Upheld Federal Court Full Court award of \$1.38M:
 - \$580K to restore foyer to original condition + \$800K for lost rent during restoration
(at trial, nominal damages only for reduction in leasing value of foyer)



Background *what happened?*



Background

the law

- Damages for defective building work
 - *Bellgrove v Eldridge* (1954) 90 CLR 613
 - **Starting point** that damages = cost of rectification
 - **BUT** the rectification work must be:
 - **necessary** to produce conformity AND
 - a **reasonable** course to adopt
 - Damages for breach of repair covenant
 - *Joyner v Weeks* [1891] 2 QB 31
 - applies where (as in Victoria) not modified by statute
 - (as interpreted by Federal Court at trial in *Tabcorp*)
rectification damages apply where landlord can prove a 'special interest in reinstatement arising from a radical change to the usage to which the property can be put following renovations by the tenant.'
-



Key features of *Tabcorp* in the HC

- Whether *Joyner* supplanted by *Bellgrove* (in jurisdictions where *Joyner* not modified by statute)
 - Application of *Bellgrove* outside traditional, defective building sphere?
 - Relevance of the premises being commercial
 - Can aesthetic considerations be protected?
 - Guidance on the two limbs of *Bellgrove's* qualification
 - Reasonableness and necessity
 - Divergence from *Ruxley* as to proportionality?
-

A taste of
things to
come?



Further reading

The *Tabcorp* case

- Matthew Bell, 'Four buildings and a swimming pool: the relevance of intention to rectify in the assessment of damages for defective building work in Australia' (forthcoming article – submitted to *International Construction Law Review*)
 - Minter Ellison [Alert](#) (10 March 2009): 'High Court confirms damages award on unauthorised alterations to leased premises'
 - Clayton Utz [Projects Insights](#) (12 March 2009): 'When can rectification costs be recovered as damages for breach of contract? High Court clarifies'
 - *Campbell v CJ Cordony & Sons Pty Ltd* (Supreme Court of NSW, Hammerschlag J, 2 March 2009) [2009] NSWSC 63
 - First case considering *Tabcorp* – cites it at [155]
-

Further reading (select bibliography)

Defective work damages generally

- Bryan Thomas, 'The Assessment of Damages for Breach of Contract for Defective Building Work' (2004) 20 *Building and Construction Law* 230
 - Chris Fenwick, 'Necessity, Reasonableness and Intention to Rebuild: A Reconciliation of the Australian and English Approaches to Quantification of Damages in Building Cases' *Building Dispute Practitioners' Society Newsletter* March 2004, 4
 - Douglas Bates, 'The Assessment of Contractual Damages for Defective Building Work in Australia: Is Loss of Amenity an Available Measure?' (1999) 15 *Building and Construction Law* 2
 - Jocelyn Winterton, 'The Use of Damages for Rectification Works: Should the Courts Intervene?' (1998) 14 *Building and Construction Law* 2
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Further reading (select bibliography)

Defective work damages generally cont

- ❑ John Dorter and John Sharkey, *Building and Construction Contracts in Australia* (Thomson legalonline) [1.830]
 - ❑ Doug Jones, *Building and Construction Claims and Disputes* (1996) 49-57
 - ❑ Philip Davenport, *Construction Claims* (2nd ed 2006) 184-192
 - ❑ Damien J Cremean, B A (Toby) Shnookal and Michael H Whitten, *Brooking on Building Contracts* (4th ed 2004) 185-195
 - ❑ Ian Bailey, *Construction Law in Australia* (2nd ed 1998) 92
-

Further reading (select bibliography)

Defective work damages generally cont

- ❑ JW Carter, Elisabeth Peden and GJ Tolhurst, *Contract Law in Australia* (5th ed 2007) 849-50
 - ❑ Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (3rd ed 2009) 382-4
 - ❑ NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract* (9th Australian ed, 2008) 1105-1107
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