DISTRICT COURT OF QUEENSLAND

CITATION:	*Haggar v Qld Metal Recyclers Pty Ltd* [2019] QDC 263
PARTIES:	**GRAHAM CHARLES HAGGAR** (plaintiff) **v** **QLD METAL RECYCLERS PTY LTD** (first defendant) **and** **NICHOLAS VINCENT CHAMBERS** (second defendant) **and** **TKR HOLDINGS PTY LTD** (third party) **and** **J HUTCHINSON PTY LTD** (fourth party)
FILE NO/S:	BD2248/2018
DIVISION:	
PROCEEDING:	Civil Trial
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	8, 9, 10, 31 October and 1 November 2019
JUDGE:	McGill SC DCJ
ORDER:	**Judgment that the defendants pay the plaintiff $111,955.27, including $9,455.27 by way of interest. Judgment that the third party pay the defendants $111,955.27. Fourth party proceedings dismissed.**
CATCHWORDS:	TRESPASS – To chattels – assessment of damages – goods not able to be repaired – replacement value – allowances – vindication damages. MISREPRESENTATION – whether made – whether contract – whether negligent – whether misleading or deceptive – no reliance. *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 – considered.

Darbishire v Warran [1963] 1 WLR 1067 – followed.
Jansen v Dewhurst [1969] VR 421 – cited.
Re Jigrose Pty Ltd [1994] 1 Qd R 382 – cited.
Malec v JC Hutton Pty Ltd (1990) 169 CLR 638 – distinguished.
Pietruszkiewicz v Whitfort [2003] QDC 577 – followed.
Plenty v Dillon (1991) 171 CLR 635 – applied.
R v Secretary of State for the Home Department [2012] 1 AC 245 – not followed.
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332 – distinguished.
Webster v Yasso [2002] QDC 206 – cited.

COUNSEL: S W Sheaffe for the plaintiff
M Doyle for the defendants and the third party
M Martin QC for the fourth party

SOLICITORS: PHV Law for the plaintiff
Conomos Lawyers for the defendants and the third party
Mills Oakley for the fourth party

[1] This is an action for trespass to or conversion of goods. The plaintiff was the owner of a quantity of steel which the first defendant, of which the second defendant was the director, caused to be cut up into shorter lengths with a view to its being recycled. As between the plaintiff and the defendants the only issue is quantum. The defendants and the third party have resolved matters between them, and had the same counsel at the trial. The third party claims an indemnity from the fourth party on the basis that the third party's director was told by an employee of the fourth party in effect that he could have the steel which belonged to the fourth party, which was not true.

Background

[2] The plaintiff and his wife own a parcel of land on Burnside Road at Stapylton on which are constructed some industrial buildings, which are tenanted.[1] At some point part of the land was taken to construct a road, Christensen Road, which at the moment is a dead-end road, and which as a made road does not extend beyond the entrance to one of the industrial buildings, even though footpaths and kerbing and channelling do extend most of the way to a creek.[2] The effect of this was to cut off a triangular parcel of land which had previously been the northeast corner of the plaintiff's land, which is now bounded by the new road, the creek, and an area of land owned by the fourth party. The fourth party's land is and has been for a long time a builder's yard with a number of buildings and hard standing surrounded by a security fence; at the relevant time it was used for constructing demountable buildings, and for storage of parts of cranes and other things.[3]

[3] In 2007 the plaintiff purchased a steel framed industrial shed which had been erected at Murarrie: p 12. The shed was about 60 metres by 40 metres, and

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1 Exhibit 1 para 1, 2. This is an affidavit of the plaintiff, and has its own exhibits.
2 Ibid Exhibit GCH3; plaintiff p 12, p 24.
3 Ballard p 4-6. Aerial photographs suggest that it has also been used to store shipping containers.

unusually high, with steel columns on the sides 16 metres high and in the approximate centre 18 metres high,[4] supporting steel roof beams. The frame was braced and supported purlins and girts to which steel sheeting was attached. In addition, the columns supported fairly heavy steel beams, on which overhead cranes could move up and down the building, one on each side of the central columns: p 58. For this purpose something like railway track was laid along on the top of the beams.[5] The former owners took a number of photographs of the building before it was dismantled, and they were provided to the plaintiff and in turn to one of his experts: p 26.[6]

[4] The plaintiff purchased all of the steel framing and the sheeting for $80,000, and spent a further $25,000 transporting it to the land, in 2007: p 13. He was provided with rough plans showing how the building could be reassembled.[7] On the land the major structural members were stacked in an orderly fashion, with a number of crane beams on the bottom, columns laid at right angles above them, and roof beams in turn at right angles above them.[8] Some of the smaller steel members were then placed above the roof beams, and the steel sheeting was stacked separately. Some of the crane beams were also placed nearby,[9] as was another piece of the building, possibly the frame from which the front doors were suspended.[10]

[5] When the site was inspected by the defendants' expert engineer recently, he identified crane beams which were separate from the main stack, as were a quantity of steel sheeting and galvanised purlins and girts, and some other metal work. It is unclear whether all of this had been at some point in a separate pile, or whether this was to some extent the result of the actions of other people after the steel was put on the site. He also said that some of the internal columns were separated from the main pile, and were lying a little to the north of it.[11] These are not visible on early aerial photographs of the site, and I expect that the explanation is that they were separated from the main pile at some stage by other persons who were taking steel from the site.

[6] On the other hand, the plaintiff conceded that some of the crane beams had been stored separately from the main pile originally: p 3-14. Putting the crane beams on the ground at the base of the main pile, and having some of them stored separately and more casually on the ground, suggests to me that there was no great concern shown at the time the steel was placed on the site to preserve the crane beams, at least in the long term; no doubt the shed could easily have been used without refitting the overhead cranes, which the plaintiff did not obtain: p 59. Subject to that, I expect that physically at the time the steel was placed on the site it could have been reassembled into a building essentially identical with the one that had been dismantled to produce this pile of steel. The land was adjacent to an area of industrial land owned by the plaintiff, where additional buildings could have been constructed, and it is not difficult to accept the plaintiff's evidence that he acquired

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4 The central columns were offset slightly to one side, so the roof beams were longer on one side than on the other: Van de Hoef p 3-119.

5 An illustration of this sort of crane is attachment A, taken at the Powerhouse Museum in Sydney.

6 They may be seen in Exhibit 1 and in Exhibit 6.

7 Exhibit 1 Exhibit GCH2.

8 Plaintiff p 13; p 23. See also the aerial photo Exhibit 1 Exhibit GCH4.

9 Plaintiff p 3-14.

10 Plaintiff p 3-17.

11 Van de Hoef p 3-106; the plaintiff said, and I accept, that originally all the columns were in the main stack: p 3-13.

it intending to construct on the adjacent land a building or buildings using the framework.[12]

[7] In the event that never occurred. The plaintiff said that just after he acquired it the demand for industrial sheds declined as a result of the global financial crisis, and the opportunity for him to let such a shed did not arise: p 57. There was he said one occasion when a prospective tenant showed some interest in having the shed re-erected, as a result of which he had an engineer look at the steel to see whether it was able to be used, but in the end that tenant was not prepared to wait until a building had been reconstructed, and went elsewhere.[13]

[8] The steel as it was positioned was not protected in any way, except by a good deal of obscurity. There was no reason for anyone to go far enough along Christensen Road to see the steel, and the land there became somewhat overgrown with time, tending to conceal the presence of the steel.

[9] The defendants pleaded that the steel had been abandoned, but that was not even put to the plaintiff in cross-examination,[14] and there is no reason to think that that was the case. Abandoning a chattel, so that it ceases to be owned by the person who previously owned it, requires an act consistent with abandonment done with an intention to abandon, that is to surrender, all right to possession of the property.[15] Plainly that never occurred here, and the steel remained at all material times, and remains, the property of the plaintiff.

[10] Unfortunately general ignorance of the presence of this steel did not last. Someone who knew Mr Graham, the director of the third party, which had a steel fabrication business about half a kilometre away from the plaintiff's land (p 2-43), told him in January 2018 that there was steel down Christensen Road: p 2-44. In March 2018 someone asked Mr Graham about some beams for a job he was doing, and on 26 March Mr Graham had a look at this steel: p 2-44, 52. He said another person was there with a truck, removing steel from the site, who told Mr Graham he had spoken to someone from the fourth party and had permission to remove the steel: p 2-50.

[11] Mr Graham said that he then went to the fourth party's yard, and into their office. At the counter there was a mobile phone number and a name, and he rang that number three or four times but did not receive an answer: p 2-52. The following day, 27 March, he went back again, again rang the number and spoke to Mr Ballard who came to reception and met him. Mr Graham said that he asked if the fourth party had any 610 UBs for sale and was told that they did not, but Mr Ballard added that there was a stack of steel down the back outside the fence that had been sitting there for 10 or 12 years and "if it was any good to me I could take it." He mentioned that the Council were doing an upgrade on the road and that "they would probably have to get the steel removed off that site."[16]

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12 Plaintiff p 33; he intended to put it just across Christensen Road: p 57.

13 Exhibit 1 para 15; plaintiff p 56. He never thought of selling it as a building frame (p 62) but such a thing was always possible.

14 Counsel for the defendants did however refer to it in other questioning as "the abandoned steel", for example at p 4-15 line 4. I regarded this as improper.

15 *Re Jigrose Pty Ltd* [1994] 1 Qd R 382.

16 Later in his evidence in chief he claimed he was also told the fourth party owned the steel, and the land: p 2-55.

[12] Mr Graham then rang the person for whom he was trying to source some beams who met him at the site, but that person rejected the beams for his particular job, though he said that he could use some of them for racks at his yard: p 2-53. Mr Graham asked his son-in-law for an estimate to get some of the beams out from where they were,[17] but his son-in-law regarded it as a difficult job and would have charged quite a bit for it, and the scheme was not worthwhile on that basis: p 2-53. Mr Graham then contacted the second defendant and asked if he would be interested in looking at the steel, and the second defendant and his manager came to the site on 5 April. He said the arrangement made was that the first defendant would drop off six to eight of the beams at the third party's yard and in return would take the rest of the steel, with no money changing hands.[18]

[13] The second defendant said that in order to get the vehicles in it would be necessary to ensure that there were no cars parked so as to block Christensen Road, and for that reason Mr Graham went back to the fourth party's reception where he saw there was a different name and a different number written down. He made a note of the number, and after he returned to his yard he rang the person who almost immediately rang back: p 2-54. He said that he told that person that he had been talking to Mr Ballard about the steel in the back paddock and that the person said that he had been told about that. Mr Graham said he had organised for the third party to come and remove the steel and they needed the worker's cars to be parked somewhere else so they could get access. That person said that he would arrange that on Monday morning: p 2-55.

[14] Mr Ballard and Mr Redmond gave evidence, and gave quite different versions of these conversations. Mr Ballard said that he had some recollection that in about April 2018 someone came to the fourth defendant's yard wanting to buy steel: p 4-7. He said at the time he was employed as a yardman at the site (p 4-11), responsible for the day to day running of the yard, keeping the yard tidy, organising forklift drivers and the loading and unloading of trucks, and the general cleanliness of the yard: p 4-6. He said that Mr Graham asked him about some steel in the yard which he said he had seen through the fence,[19] and they walked to it, but when Mr Ballard saw the steel that Mr Graham was asking about he said it was wanted by the fourth party: p 4-7.

[15] He said that the question of the steel outside the fence came up and Mr Graham asked if the fourth party owned that steel: p 4-8. Mr Ballard said that he had been told that they did, but he was not certain, and that he would have to check, and Mr Graham then left the site. He thought that Mr Graham telephoned about a week later asking whether he had found out any more about the steel, and while he was on the phone Mr Ballard asked someone else who worked in the yard, who told him that possibly the fourth party owned it but he was not sure, and Mr Ballard passed that information on to Mr Graham. He said that on a second occasion there was a similar phone call when Mr Graham said there was someone out the back taking the steel, and asked whether he had authorised this, and Mr Ballard responded that he did not know if it did belong to the fourth party, that he knew that the road was

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17 The son-in-law runs a tracking and crane hire business from the same premises: p 2-85.

18 Graham p 2-54; White p 3-61. The beams for the third party were marked with white dots – Gill p 2-96 – and were the roof beams left in the stack: photos Exhibit 13.

19 Mr Graham agreed he asked if they had any second hand steel beams for sale: p 2-63. Otherwise he denied this conversation: p 2-64.

being extended and it might have been organised by the Council, but he did not know.

[16] Mr Ballard said that when he was away on holidays Mr Redmond took over his functions: p 4-8. Mr Ballard denied that he ever said anything to Mr Graham about taking the steel. He said that sales by the fourth party had to be documented, but he was not involved in the process by which the fourth party would sell things: p 4-10. He said the fourth party had an arrangement with particular recyclers so that if there was steel that they did not want it would be made available to those recyclers. Under cross-examination, Mr Ballard denied that he told Mr Graham that if the steel was any good to him he could take it, or that he had told him that it was the fourth party's steel: p 4-15. Mr Ballard had, after 9 April 2018, made a statement to the police about what passed between him and Mr Graham but no part of that statement was put in evidence as a prior inconsistent statement.[20]

[17] Mr Redmond said that while he was looking after the fourth defendant's yard (he was usually working there as a forklift driver at the time – p 4-18) someone did ring about getting access to Christensen Road, and for that purpose to have the employees of the fourth party park their cars somewhere else, and he arranged that: p 4-21. He said that Mr Ballard had told him about the Council coming to do some sewer work and he expected that that was why the person was ringing, assuming it was someone from the Council who was ringing him: p 4-18. He denied that there had been any discussion with Mr Ballard about steel on the land outside the fence (p 4-21), or that there was any discussion in the phone call about taking steel: p 4-18. He was aware of the presence of the steel outside the fourth defendant's boundary: p 4-20.

[18] It is possible that details of this nature had simply escaped Mr Redmond's memory; at one stage he had some difficulty in remembering his own mobile phone number at that time: p 4-19. On the other hand, his answer to me, that he had been told by Mr Ballard about someone from the Council wanting to get access to Christensen Road for works they were doing (p 4-21), struck me as quite natural and genuine and Mr Redmond did not seem to me to be a dishonest witness. Mr Hopper, who was with Mr Graham when he made this call, gave a version which was much closer to Mr Redmond's version than to Mr Graham's version: p 2-87.

[19] Mr Ballard gave his evidence in a natural and straightforward fashion, conceding reasonably enough that he did not have a good recollection of the events in question: p 4-10. It was submitted for the defendants that Mr Ballard's evidence should be rejected, and Mr Graham's accepted, for three reasons. The first was that both Mr Graham and the plaintiff had each said that, when they came upon someone else on the land, that other person had claimed to have the fourth party's permission to take the steel. I have mentioned Mr Graham's account of this. The plaintiff's version appeared from a statement that he made to the police on 29 March 2018, about an incident that occurred on that day when he had gone to the land and saw two trucks parked in a position to load steel, and three men were there doing so, one of whom was cutting up the steel.[21] One of the men when challenged initially claimed he was working for the fourth party, but when the plaintiff pressed for details, said that he was working for someone who was working on behalf of the

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20 Mr Graham's account of Mr Ballard's response when asked by police on 9 April was consistent with Mr Ballard's evidence: p 2-58.

21 Exhibit 2. See also plaintiff p 29.

fourth party, and then conceded he did not know who that person was working for, but he thought that it was the fourth party. He said that he was taking the steel to scrap merchants.

[20] Since the steel was located immediately behind a yard identified as operated by the fourth party, it would be an obvious excuse for someone found taking steel from the plaintiff's land there to claim some authority derived from the fourth party. I do not consider that that suggests that in fact Mr Ballard had been saying to other people things of the nature that Mr Graham claimed he said to him. The account given to the plaintiff, as recorded in that contemporaneous police statement, is quite inconsistent with the notion that the person he spoke to had in fact been told by Mr Ballard that he could take the steel, assuming the story was not a complete invention. I do not consider that this argument provides any support for Mr Graham's account.

[21] The second matter relied on was the proposition that Mr Graham's telephone records are not consistent with Mr Ballard's evidence that Mr Graham rang back on two subsequent occasions. Mr Graham's telephone records do show that Mr Ballard's number was rung a number of times on 26 March, and once on 27 March, and indeed they also show a phone call to Mr Redmond's number on 6 April, when no doubt he arranged for the cars of the fourth party's employees to be moved out of the way.[22] On the other hand, it is possible that Mr Graham used some other phone to make those calls, and it is also possible that it was someone else who was ringing about the steel, and Mr Ballard assumed it was the same person. It strikes me as an odd thing for Mr Ballard to invent if there was not some substance to that part of his evidence, but I accept that this does provide some reason for preferring the evidence of Mr Graham.

[22] The third reason advanced was that Mr Graham had consistently claimed that he had the permission of the fourth party to take the steel, having claimed that to the first defendant's manager. That is true, but the position could simply be that he was saying this essentially for the same reason that the person the plaintiff spoke to claimed some association with the fourth party as a justification for what he was doing, that is, it was a plausible excuse. I accept that he had a conversation with Mr Ballard (if not more than one), and may well have formed the view as a result of that conversation that Mr Ballard had no particular interest in the steel and would not stop him from taking it, or having it taken by someone. Claiming that he had the permission of a plausible supposed owner would be the obvious excuse for someone interested in turning this steel to his own advantage, and having told that story, he had to stick to it. On the whole I do not think this provides a particularly compelling reason for preferring his evidence.

[23] On the other hand, there are reasons why Mr Ballard's evidence is plausible. People working at the yard may well have assumed from the fact that the steel was close to the yard that it belonged to the fourth party, but in circumstances where in fact it did not, one would expect there to be a lack of confidence or certainty about that proposition. No-one working for the fourth party was in a position to assert correctly that the steel belonged to the fourth party, and in those circumstances one would expect such people to display some measure of circumspection in any

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22 Exhibits 11, 21. Mr Graham was recalled on the fourth day to prove Exhibit 21, which includes another version of Exhibit 11.

comments they made to outsiders. Furthermore, if the employees thought the steel belonged to the fourth party, there is no reason why they would have been happily giving it away to strangers; on the contrary, it would only be if some employee thought that the steel did not belong to the fourth party that he might have been willing to be indifferent to what some stranger did with the steel.

[24] It was submitted for the third party that the fourth party might have had to have the steel removed because the Council wanted access to the land for some works that they were undertaking. Precisely why the Council would have wanted access to that land in order to undertake works is by no means obvious to me, but if the land had belonged to the fourth party, and if the Council had made contact with the fourth party and asked (or demanded) that it clear the steel from the land,[23] the fourth party would not have sat back and waited for someone like Mr Graham to walk through the gate and express some willingness to take the steel away; it would have made arrangements with its regular steel recycler, or at least a steel recycler, to have the steel removed.

[25] There is also some inconsistency between the third party's statement of claim against the fourth party and the evidence of Mr Graham. Mr Graham in his initial evidence did not say that Mr Ballard had said to him that the steel was owned by the fourth party, simply that there had been steel outside the back fence for a long time and that he could take it: p 2-52. The subsequent comment about the Gold Coast City Council doing an upgrade on the road is ambiguous. There was also no evidence about the matter pleaded in paragraph 4(b), which was inconsistent with Mr Graham's evidence that he had looked at the steel before he spoke to Mr Ballard.[24] He gave no evidence of expressing any agreement to take the steel if it was suitable. In addition, paragraphs 9 and 10 pleaded terms of the conversation, supposedly had on 5 April with Mr Redmond, which are much fuller than the actual evidence of Mr Graham. There was therefore some inconsistency between the pleading and Mr Graham's evidence. This is not in itself a matter of great significance, but it tells against the acceptance of Mr Graham's evidence.

[26] There are also a number of other things about Mr Graham's evidence which made me wary about its reliability. He was very critical about the state of the steel that he looked at, claiming that it was suffering from very extensive rust pitting as well as surface rust, and that the main stockpile was mostly scrap: p 2-46. That was not consistent with the evidence of either of the expert witnesses,[25] or with his then offering it to his friend: p 2-53. He said that there was nothing on top of the rafters (p 2-46) when it is apparent from the photographs that there were things on top of the rafters;[26] indeed even after the defendant had done its worst, photographs show there were still some things on top of the rafters. There were a number of things other than rafters and columns which ended up in the pile of cut up steel, all of which the person who cut the steel up said he obtained from the main stack.[27]

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23 This of course would not have happened, the Council would have contacted the true owner, the plaintiff. So this whole thing is absurd.

24 Graham p 2-52, p 2-63.

25 See for example re pitting: Graham p 2-46 "very extensive"; cf Van de Hoef p 3-125: "The stuff that was easily visible doesn't appear to have significant pitting."

26 Plaintiff p 3-18, about Exhibit 1 Exhibit GCH4. See also Exhibit 20, p 25.

27 Gill p 2-94. He also thought there were just large beams in the main stack (p 2-90) but this was wrong, as the photos show, and the evidence of Mr Van de Hoef: Exhibit 20, p 23.

Obviously therefore there were things other than columns and rafters in the stack, and they must have been on top of the rafters, as appears in the aerial photographs.

[27] Mr Graham claimed that after he had shown his friend the steel, and shown the site to his son in law, he "forgot about the steel altogether" (p 2-53), yet in a week he rang the second defendant offering him the steel.[28] He said the steel appeared to have been dumped: p 2-62. The main stack certainly did not look like that to me in the aerial photos.

[28] Apart from this, Mr Graham said that all of the rafters had double-plating, that is extra plates stitch-welded onto the top and bottom of each rafter: p 2-47. This was not a matter particularly mentioned by either expert,[29] but it was possible during the trial to locate some examples in photographs, though the majority of the rafters appearing in photographs, whether in the untouched pile or the cut up pile, showed no signs of such plates stitch-welded on. This evidence was therefore not true, and it strikes me as another attempt to denigrate gratuitously the plaintiff's steel. I am wary about placing too much reliance on matters of demeanour, but for what it is worth Mr Redmond struck me as quite an honest witness, though one with a poor memory; Mr Ballard struck me as essentially a straightforward person who gave his evidence frankly and openly. I was on the whole less impressed by Mr Graham, though he was direct enough in his evidence; it was more a matter of a lack of anything positive in his demeanour, rather than the presence of anything negative.

[29] I am not prepared to accept the evidence of Mr Graham as to the substance of these conversations, and in particular, that he was told that the steel belonged to the fourth party, and that he could have it. This is in the light of all the matters referred to, particularly the inherent implausibility of his version, and bearing in mind that there are other aspects to his evidence which I regard as unsatisfactory, and as I did not accept that Mr Redmond was not telling the truth to the best of his ability. In these circumstances, the third party has failed to prove its case against the fourth party. It is unnecessary for me to consider the various causes of action pleaded, since the claim fails on the facts. I need not decide whether it was reasonable for Mr Graham to have relied on the proposition that someone in Mr Ballard's position had ostensible authority to give away the fourth party's property, or whether he in fact relied on what Mr Ballard said, though I regard the former proposition as obviously wrong.

Quantum

[30] The plaintiff's claim is based on the proposition that the only effective way to replace what the plaintiff has lost would be to acquire new steel which would be suitable for constructing an equivalent building on the plaintiff's land. It was argued that the building as it stood was capable of reconstruction as a steel frame for a building, though the plaintiff indicated that he was not particularly concerned about reusing the steel sheeting for the roof and sides, and also not concerned about some of the lighter steel work.[30] So the only effective way of putting the plaintiff into the position he was in before this damage was done is to provide him with the cost of purchasing a new steel frame.

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28 Spoke to son in law "a couple of days" after 26 March, and rang second defendant 5 April: p 2-53, 54.

29 See Rebibou, p 3-32; Van de Hoef p 3-129.

30 Plaintiff pp 24, 34, 59, 63.

[31] There are however a number of difficulties with this argument. The basic function of compensation for tort is to put the plaintiff in the same position as if the wrong had not been committed, which in the case of damaged goods is prima facie of the cost of repair.[31] In the present case where the long pieces of steel had been cut up roughly by shears, no one suggested that it would be feasible to repair them so as to put them back into the state they were in before the defendant's actions. In such a situation, the appropriate measure is ordinarily the cost of replacement. That will be the situation if the cost of repair exceeds the value of the goods prior to the damage.[32]

[32] This of course assumes that it is practicable to obtain a replacement in the market; if the goods damaged are for one reason or another irreplaceable, the process of assessing damages can become more complicated. The cost of repair in those circumstances might be recoverable, or it may simply be an exercise in compensating the plaintiff as best one can, essentially on a jury basis, for the loss of something which is effectively irreplaceable. Complications can also arise in the case of chattels which have some special value to the owner, such as old family photographs, but no great market value. That however was not the situation here. What was damaged was a set of steel frames for a building, which was not new.

[33] The defendants and the third party claimed that, because no steel had actually been removed from the site by them, all that had happened was that the steel had been dealt with in a way which facilitated its sale for scrap, and, as its only practical use before the defendant's actions was as steel saleable for scrap, its value had not been diminished; if anything it had been slightly enhanced, though no attempt was made to quantify that. The plaintiff's argument on the other hand was that essentially the steel could still have been used before the defendant's actions to build a steel frame for a building on the adjacent land where other similar buildings had been constructed, and that was no longer possible, so the measure of damages should be by reference to the cost of obtaining alternative steel usable in that way. Accordingly, the evidence at the trial focused on the state of the steel immediately prior to the defendant's actions, and to what extent at that time the steel could have been reused for a building.

[34] I have already mentioned the plaintiff's acquisition of the building, why it was not re-erected reasonably promptly after he acquired it, and one occasion when the prospect arose of his re-erecting it, but the proposed tenancy did not proceed, and nothing was done at that stage except for having an engineer look at the frame, and express in concise terms that the frame was usable.[33] None of the experts saw the steel as it was immediately before the defendant's actions, of course, and they were relying on an exercise in reconstruction, to work out what the situation was at that time.

[35] At the time the building was dismantled, the steel at least for the main frame was stacked in an orderly way on the site, and the other pieces required for the building were also delivered to and stacked on the site. At that point, I accept that the steel

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31 McGregor on damages (15th edition 1988) para 1247.

32 *Darbishire v Warran* [1963] 1 WLR 1067; *Jansen v Dewhurst* [1969] VR 421.

33 There was a letter in evidence (Exhibit 7 to Exhibit 1) which recorded the fact that this advice was given, but it was not prepared as a statement of expert evidence, so it did not satisfy the test for admissibility as expert opinion, nor the requirements of the rules for expert evidence. It is admissible only to prove the fact that this advice was provided to the plaintiff at that time.

frame could have been re-erected to reconstruct the building which had been dismantled in order to produce the steel in the first place, subject only to the consideration that it would have been necessary to obtain regulatory permission to reconstruct the building.[34] The fact that the building had recently been functioning as a constructed building might not have been sufficient to enable such approval to be obtained, at least without further engineering certification, which may have involved undertaking some testing of the steel work. The reason for this is that no one has been able to find any identifying markings on the steel so as to prove its age and origin,[35] and the regulators have, at least now, a different approach to the approval of steel framed buildings if the steel is identifiable, so that its structural strength can be relied upon, or if it is unidentified. It is unnecessary to consider what the situation would have been at the time the building was first placed on the land, because what matters is what the situation was at the time of the defendant's actions, or, for practical purposes, now.

[36] Two engineers gave evidence as to the useability of the steel as it was immediately before the tort, Mr Rebibou from Booth Engineers and Associates Pty Ltd, and Mr Van de Hoef of NJA Consulting Pty Ltd on behalf of the defendants. It seemed to me that ultimately both of them had a similar position in relation to the steel, that at the relevant time it could have been reused in the construction of a building, though not without some additional work and testing, and, probably, in a building not as high or as large as the original building had been.[36] The main difference between them was that Mr Van de Hoef tended, in his evidence, to stress the difficulties that would have to be overcome in order to achieve that result, whereas Mr Rebibou had a more optimistic approach to the ability of engineers such as himself to overcome any particular problems which would be faced in that process.[37]

[37] Mr Van de Hoef paid a lot of attention to the extent of the corrosion on crane beams, and on the subsidiary steel, but he conceded that the main columns and rafters were generally in reasonable condition (p 3-110), and could be reused in a building (p 3-111), although it would be necessary to check the structural strength taking into account the extent of any pitting corrosion. It is therefore not difficult to conclude that, prior to the defendant's actions, the steel work could have been used as structural steel for the construction of an industrial or commercial building on the land available to the plaintiff had he wished to do so, though it would have required some additional expense compared with what would have been required if the steel had been new.

[38] There was a good deal of evidence about this, and again the engineers seemed to me to be saying much the same thing, though with different approaches and with different emphasis. Various difficulties were identified, and there was evidence about these matters. The steel had surface rust, which is of no consequence in terms of its structural strength,[38] though it was something that would require treatment before it was reused in a building. That would involve sand blasting, and there was evidence about the cost of carting the steel away,

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34 Rebibou p 3-45; Van de Hoef Exhibit 20 p 7.

35 Except that a number of sections are stamped 'BHP': Exhibit 20, page 31.

36 Rebibou p 3-43, 44.

37 He embodied the notion that it is the job of an engineer to overcome engineering problems with engineering solutions.

38 Rebibou p 3-49; Van de Hoef p 3-109.

giving it a heavy sand blast and one coat of rust inhibitor, and carting it back,[39] though it occurs to me that it is likely that something like this could be done on site without the transport cost.

[39] Of greater significance was evidence that there were some areas where rust was more than just surface rust, and there was some signs of pitting of the steel, which potentially could effect, at least to some extent, the structural strength of the steel. Mr Rebibou agreed that this was present to some extent, but evidently did not regard it as a major problem;[40] Mr Van de Hoef spoke of the pitting as being more extensive, but had not attempted an item by item examination of the steel, something that was difficult in any event because of the lack of stability in the pile of cut up steel. There was evidence that the pitting could have been treated, either superficially or by adding to the structure in some way, though I expect that for practical purposes the way it would have been dealt with would have been by constructing the new building in such a way as to reduce the structural loads on the steel frame to what it could carry in its current state,[41] or by cropping the steel short of the serious damage. Mr Rebibou said the easiest way to do this would be to reduce the height of the building, and I accept that evidence,[42] though it does not follow that damages should be assessed on the basis that the columns can be replaced with shorter lengths.

[40] Another way in which any diminished strength in the columns and beams could have been dealt with is simply by placing them closer together,[43] or by adding supporting columns.[44] This could have reduced the footprint of the building, but evidently Mr Rebibou regarded it as still capable of being large enough to be a building which was useful in a practical sense as an industrial or commercial building. He said that if the height were reduced a building with much the same footprint should have been achievable: p 3-36. Mr Van de Hoef had done this when using existing steel to build a new building: p 3-113.

[41] Another issue was that the steel would have to be tested in order to ascertain its true tensile strength, but the extent of the testing would depend on the circumstances, and be a matter of engineering judgment.[45] Given the apparent age of the building which had been obtained by the plaintiff in the first place, Mr Rebibou considered that testing would reveal that the steel probably had a reasonably good structural strength, since it was quite likely to have been Australian steel all from the one source used in the construction of the original building.[46] My impression from the evidence is that the concern of the regulators is directed more to unidentified steel produced more recently in certain overseas countries where the tensile strength is more suspect, and such steel is unlikely to have been used in a building such as

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39 Lunniss p 2-26: $500 per tonne, plus transport $300 per tonne.

40 Rebibou p 3-49.

41 As suggested by Mr Van de Hoef p 3-111.

42 It occurred to me that another way would be simply not to reinstall the overhead cranes, which would have been appropriate because of the more extensive damage to the crane rails. Mr Rebibou said that would have been effective in reducing the engineering loads, but not as effective as reducing the height: p 3-35. The crane beams were in poor condition, and only fit for scrap: Exhibit 20 page 31.

43 Van de Hoef p 3-113.

44 Rebibou p 3-33. This would deal with weakened rafters.

45 Rebibou p 3-40.

46 Rebibou p 3-42. There were some marks "BHP": Exhibit 20 p 31. See also Van de Hoef p 3-114.

this.[47] As usual, Mr Van de Hoef was more pessimistic about the extent of the testing that would be required.

[42] Neither of the engineers was particularly shaken in cross-examination, and both appeared to be competent and experienced. There is however one matter which I think supports the evidence of Mr Rebibou: he was the engineer that the plaintiff had previously asked to look at the building with a view to actually reconstructing it, or something like it, and the initial assessment which he made at that time, that the building could be reconstructed, was one which would have been made in the expectation that he would be the engineer responsible for getting the new building up if he recommended, as he did, that it could be done.[48]

[43] The fact that Mr Rebibou opined that the steel could be used to construct a building at a time when he was facing the prospect of being responsible for achieving that result suggests that his evidence to similar effect, is deserving of some additional weight. At the time of his current report, of course, there was no prospect of his being required to reconstruct the building, but the fact that he had previously expressed the same opinion, in circumstances where he might have been expected to back up that opinion by actually demonstrating that it was correct, I think adds some weight to the opinion he currently expresses. Besides, when put to the point Mr Van de Hoef conceded that a building could have been produced previously using the steel, though he remained keen to stress the difficulties. As I say, I do not think there is much practical difference between the two experts, but insofar as they differ, I prefer the evidence of Mr Rebibou.

[44] Mr Van de Hoef expressed the opinion that the internal columns were not stored in the main stock pile,[49] though he did not identify on the site the number of internal columns that there would have been in the building prior to its being dismantled. There were obviously internal columns or the remains of internal columns in the pile of cut up steel or elsewhere. Mr Van de Hoef, in response to questioning from me, conceded that photographs in Exhibit 6 showed steel from at least one internal column. He acknowledged that most internal columns were in the main pile, which I took as a reference to the cut up pile: p 3-126. The evidence from the man who was driving the machine with the shear and doing the cutting up was that all of the steel he cut up came from the main stack (p 2-94), and the aerial photographs do not show any significant stack of what could have been internal columns stored anywhere else on the land. Logically the internal columns would have been stored with the other columns in the main stack when the steel was placed on the land, and in the light of all the evidence I do not accept Mr Van de Hoef's proposition that (prior to the actions of the defendant) the internal columns were stored somewhere else on the site.[50] To the extent that there are a small number of what he identified as internal columns now elsewhere on the site, that must be due to the actions of other people who had moved such columns with a view to taking them

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47 Rebibou p 3-41; Lunniss p 2-29.

48 Apart from the fact that he was retained on this occasion, he has done other work for the plaintiff (p 3-47), so could expect that if the project went ahead he would be doing the engineering work.

49 Van de Hoef p 3-103.

50 This proposition was rejected by the plaintiff, who said that the main frames were all in the main stack, even after the earlier incident – pages 23, 53, 62, 3-13, 3-16 – and even by Mr Graham, when he first saw the steel: p 2-47, 48. It is I suppose possible that some columns were moved between 9 April 2018 and when Mr Van de Hoef inspected the site.

themselves.[51] The fact that Mr Van de Hoef drew this conclusion is a factor which reflects a little on his evidence as a whole.

[45] It must also be said that neither expert had of course undertaken the degree of engineering investigation and analysis which would have been required if he was actually engaged in using the steel to construct a new building. Neither was able to say there were X column and Y roof beams which could be used essentially as is, XX and YY would require some extra work or some additional allowance in the design for reduced strength, and XXX and YYY would have been effectively unusable, so that the design would have to be modified not to require them. So much is understandable given the nature and parameters of the dispute, particularly in circumstances where a detailed examination of the steel in the pile of cut up steel was not practicable. The evidence must be understood subject to those limitations. Nevertheless, I accept that, prior to the defendant's actions, the stack of steel could have been reused to construct an industrial building of reasonable size, though possibly not having quite as large a footprint, or not being as tall, as the original building had been.[52] There was also the possibility that the steel could have been used in two or more smaller buildings, depending on what tenant or tenants the plaintiff was able to secure.

[46] I accept the building could probably not at the relevant date have been reconstructed exactly as it was, but it may have been always unlikely that the plaintiff would actually do that, otherwise it would probably have been done at once. The plaintiff's approach appears to have been one of using the steel to construct a building only as required by a particular tenant, and accordingly any particular building which was built would be influenced by the requirements of the particular tenant. In those circumstances, it is difficult to be dogmatic about just what use the plaintiff might reasonably have made of the steel work had the defendant not damaged it in this way. In particular, it cannot be assumed that the height would be reduced to 12 metres or less. To compensate the plaintiff only on that basis would be to close off the possibility, which was open to him, of using the steel in a taller building and compensating for any structural weakness in other ways. He should not have to accept that.

Deterioration with time

[47] One disadvantage of leaving a pile of steel framework stacked in otherwise vacant land, apart from the risk that people will make off with bits of it or cut it up for scrap, is that it will tend to deteriorate over time. No doubt a point would be reached when the framework could not be used in any practical way in the construction of a building, though I reject the submission for the defendants that that point had already been reached. The plaintiff's approach in the past has been that he would use the steel in this way only if he had a specific tenant available to use the building which would be constructed with the steel, so the possibility must exist that, even if the defendants had not acted as they did, the plaintiff would not have had an occasion to reuse the steel in a building, to the extent that it could be so reused, prior to the time when it deteriorated to the point where it became unusable.

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51 Another possibility is that they are columns associated with the internal structure from the original building as shown in the photos in Exhibit 6; the columns shown in the photos shown to Mr Gill at pp 2-98 – 2-102, which he said he did not cut, look too short to be part of the main structure.

52 A building 16 metres tall is very unusually tall: Rebibou p 3-35. A typical height is 7 or 8 metres.

[48] The plaintiff's explanation for not having reused the steel soon after he acquired it is reasonable enough, but although the effects of the global financial crisis in the immediate sense have passed, the economy has not reverted to boom conditions, and it has not since these events shown much disposition to do so. Things may change of course but there is the distinct possibility that no further prospective tenant would present itself, and the plaintiff might not embark on the use of the steel to construct a building "on spec" before the point was reached where the steel had deteriorated to the stage where it was not reusable in a practical sense.[53] There was no evidence as to how long that situation would take, except in the sense that the defendant's case was that that point had already been reached, a proposition which I reject.

[49] One aspect of this no doubt is the fact that the steel was preserved, for most of the time until recently, essentially by its practical obscurity, but word appears to have got out, and there was certainly the risk that, even if the defendants had not embarked on the large scale scrapping that they did, others would, probably on a much smaller scale, be nibbling away at this pile of steel. It might have been necessary for the plaintiff, had he wanted to continue to preserve the steel, to take some steps at least to identify it as steel that was owned and was wanted, if not actually going as far as fencing off the area so as to attempt to exclude thieves.

[50] That is also a factor which tends against the proposition that sooner or later if the defendants had not intervened the steel would have been reused in a building by the plaintiff. There was no particular evidence by the plaintiff of a specific intention to reuse the steel in the immediate future had it not been for the defendants' actions, and, if it matters, by the time of the trial the plaintiff was working in the United States of America on some other project. But it seems to me that it is distinctly possible that the plaintiff might in any event have never reused the steel in a building, so that, even if the steel was of more value than as scrap at the time of the defendants' actions, that was its fate.

[51] At the time of addresses in the trial it seemed to me that a consequence of this was that the damages ought to be assessed taking into account the principle of *Malec v Hutton.*[54] After giving the matter some further consideration, however, I have concluded that this is not a factor which is properly taken into account. The idea arose I suspect because I was thinking about the assessment of damages by reference to the amount the plaintiff would have saved in building an industrial building on his land in the future by being able to reuse the steel he already had rather than buying new steel. If the matter is approached on that basis, essentially on the basis of quantifying the economic advantage to the plaintiff of having the steel available if it is used in that way, it may well be appropriate to assess damages by reference to the principles in *Malec v Hutton*, because the loss the plaintiff actually suffered in that way would have been contingent on the plaintiff's actually using the steel in that way, which was a future hypothetical fact.

[52] The authorities on damage to chattels however do not proceed on the basis that damages are to be assessed in that way; in a case where it is not appropriate to repair the chattels, or where the chattels are effectively unrepairable, the authorities

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53 The plaintiff said he had not contemplated selling the steel – p 59, p 62 – but that would be something else he could do.

54 *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638; see also *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

indicate that the ordinary measure of damages is the replacement cost of that which has been damaged. In effect, the defendant is required to pay the cost of buying replacement steel so as to put the plaintiff in as a good a position as he would have been if the harm had not been done. If one approaches the assessment of damages in that way, there is no room for taking into account future hypothetical facts. The assessment turns on the availability of replacement steel, and what it would cost to procure it and transport it to the site.

[53] There was some evidence about this, although most of it was obtained from witnesses called by the defendants and the third party, and I am somewhat sceptical about it for that reason. The effect of the evidence was that steel similar to the steel columns, and of a similar length, is available from time to time, though it is normally not resold as second-hand steel, essentially because of an absence of buyers for such a product.[55] The second defendant's evidence was that its value was ordinarily only as scrap. Nevertheless, the evidence was that such steel could be obtained by the defendant, as such steel was offered from time to time in the course of its business, although the second defendant could not be dogmatic about just how long it would take.[56]

[54] Because of a lack of buyers, the defendant would not normally keep a stock of such steel, but could put aside supplies of such steel offered to it from time to time, if a buyer wanted it. For practical purposes therefore there is available in the market, at least to a buyer willing to exercise some patience, replacement steel broadly comparable with that which was damaged, at least so far as the columns are concerned. The roof beams seemed to me from the photographs to be a little more specialised in their construction. They had a tapered addition at each end supporting a base plate, what was referred to as a haunch: p 3-39. For that reason they would have been more difficult to replace. I expect it would have been a matter of doing some additional work on steel that was purchased to make it sufficiently consistent with the remaining roof beams to function as effective replacements for those damaged. That would of course be an additional cost, of which there was no specific evidence, but Mr Lunniss in his calculations allowed an extra 10% for fitting up new steel.[57]

[55] Replacement steel would also have to be delivered to the plaintiff's premises, which would cost money. One of the complicating features with this steel was that, because of its length, it was difficult and expensive to transport, but that is a factor which would necessarily be involved in any replacement of the damaged steel. The defendant said that sometimes it would deliver second-hand steel for nothing (in effect treat the sale price as inclusive of delivery)[58] but that depended on the steel being delivered somewhere handy (which as it happens the plaintiff's land is) and no doubt on the steel being of a length which was relatively easy to transport, which in this case the steel was not.[59] In the circumstances I consider that it would be appropriate to make some allowance for the cost of delivery of the replacement steel to the plaintiff, as well as the sale price of the replacement steel.

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55 Chambers p 3-86.
56 Chambers p 3-81. He did not often see 610mm beams 16 metres long: p 3-85, p 3-88.
57 Exhibit 6 p 7; Lunniss p 2-39.
58 Chambers p 3-95.
59 Chambers p 3-84 line 5.

[56] It was then submitted for the defendants that it was necessary to deduct from this the scrap value of the steel, which remains available to and realisable by the plaintiff. There was some evidence of the scrap value of steel to the defendants, but the value of scrap steel to a dealer in scrap steel is inevitably going to be more than the value of scrap steel to someone else.[60] The second defendant gave evidence to the effect that, when acquiring scrap steel, sometimes they pay the vendor and sometimes the steel is acquired on the basis that they are paid, in effect, to cart it away.[61] The second defendant did not give evidence that he would have been prepared to pay the plaintiff any particular amount if the plaintiff had offered to sell him this steel as scrap steel at the relevant time, or for that matter now. Some indication of the true situation is given by the arrangement in fact made between the defendants and the third party, that the defendant would deliver a small number of beams intact to the third party's yard which was nearby, and otherwise would take the steel as scrap, and no money would change hands.[62] In effect the defendant "paid" the cost of moving a small number of long beams a short distance to obtain the balance of the steel. That suggests that the value of the steel as scrap to the plaintiff, what is relevant in these circumstances, is very little, nothing like what the first defendant can resell it for.

[57] The defendants submitted that replacement second-hand steel could be used without having to undertake the remedial work referred to by the experts, or the engineering assessment described by them. There was no evidence from the second defendant that the second-hand steel which he would expect to be available in this way would not require sandblasting for surface corrosion,[63] and I do not consider that there is any other evidence to that effect, or any good evidence that engineering assessment would not be required for the use of any second-hand steel in a new building. I expect that some engineering assessment would be required to establish that the material was suitable and to engineer the new building in an appropriate way taking into account the nature and condition of any second hand material that was available. I do not accept the submission that no engineering assessment would have been necessary, so the cost of it should not be deducted from the price of the replacement second-hand steel. As to sandblasting and rust treatment, Mr Van de Hoef said that the treatment required for surface rust was similar to what would be done anyway for new steel,[64] so presumably some such treatment would also be required for any second hand steel. At most therefore some allowance should be made for some additional cost for sandblasting the more heavily rusted bits.

[58] The plans which are part of Exhibit 1 show that each side of the shed had nine columns, and in addition there were nine columns in a line close to the middle of the shed.[65] The end with the large doors had four other columns, and the other end had 5 other columns, so there were a total of 27 external columns and nine internal columns. The internal columns appear to have been 18 metres in length; 18 of the

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60 Chambers: buying up to $200 per tonne; selling for export $400 per tonne: p 3-82, 83.

61 Chambers p 3-90. See also White p 3-71 (or sometimes no payment is made).

62 Graham p 2-54; White p 3-61.

63 Counsel for the defendants relied on his evidence at p 3-82 lines 6-8 and p 3-95 lines 4-18, but this was just about the market price, not about the need for sandblasting and rust treatment, and the first passage assumed more extensive remedial work was required. In any case, Chambers was not an independent witness, and I am wary of his evidence. I expect if the plaintiff wanted to buy such steel second hand, he would have to pay $1,000 a tonne for it, as it was, unless perhaps it required major rectification.

64 Van de Hoef p 3-126, line 7.

65 One side was slightly wider than the other, so that rafters came in two sizes.

external columns, along each side, would have been somewhat shorter (16 metres), while the columns on the front and back walls would have had heights lying in between.[66] There were also a total of 18 roof beams, which were slightly longer on one side than on the other. On one side there were additional fittings which provided for a vertical window to one side of the peak of the roof.

[59] The photographs suggest to me that the drawings were reasonably accurate. The photographs and the drawings indicate that apart from this there were a significant number of less substantial pieces of steel which were used as bracing, a number of pieces of steel as a frame for the internal storage unit, and a large number of purlins and girts attached to the frame, to which the sheeting for the roof and walls was in turn attached. The building originally had two large doors at the front, and two much smaller doors, which are not full height, at the back, and what looks like a layer of windows high up on the back and side walls. The plaintiff said he was not interested in the internal structures.[67]

Vindication damages

[60] There is another aspect to the assessment of damages in a case involving an intentional tort, such as trespass to goods. That is the aspect of damages by way of vindication of the plaintiff's proprietary rights. Such damages can also be awarded in the case of trespass to land, and trespass to the person, and indeed in the latter case may well assume additional significance, because of the seriousness of a non-consensual intrusion on individual integrity.[68] I touched on this matter in *Pietruszkiewicz v Whitfort* [2003] QDC 577 at [81]-[84], where I referred among other things to the fact that such damages were recognised by the High Court in *Plenty v Dillon* (1991) 171 CLR 635 at 645. As explained in my earlier judgments, the authorities indicate that damage of this nature are compensatory in nature, rather than an aspect of aggravated or exemplary damages, and therefore depend on the effect of the defendants' actions on the plaintiff's rights, rather than the existence of any conscious wrongdoing on the part of the defendant.[69]

[61] Counsel for the defendants referred to recent English authority of *R v Secretary of State for the Home Department* [2012] 1 AC 245, but in circumstances where damages to vindicate a right of property have been expressly endorsed by the High Court I do not consider that this is of relevance to me. The English decision was referred to by some of the members of the High Court in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, but it seems to me that Hayne and Bell JJ in a joint judgment at [155] stated the position in terms consistent with *Plenty v Dillon*. Neither Kiefel J (as her Honour then was) nor Keane J expressly considered the significance of *Plenty v Dillon* (*supra*), let alone overruled it. I do not consider that the English decision can be said to have changed the applicable law in Australia. This aspect of the matter may be particularly significant in cases where other compensatory damages are not substantial.

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66 This does not quite agree with the figures in Exhibit 6 on p 7. Mr Lunniss has only 35 columns, but my count from the drawings is 36.

67 Plaintiff p 34, p 59.

68 I adopt without repeating them the reasons I expressed in *Webster v Yasso* [2002] QDC 206.

69 I certainly regard the defendants' behaviour, in acting on only the slightest evidence that Mr Graham was entitled to deal with the steel, as woefully inadequate and reckless, but I accept they were not deliberately damaging what was known to be the plaintiff's property. In *Plenty v Dillon* the police believed they were entitled to do what they did.

[62] The plaintiff was cross-examined in some length about a statement which he made to the police about the incident on 29 March 2018 when he had come upon three men at the site with a truck who appeared to be loading some of his steel, and in one case cutting up pieces: Exhibit 2. In that statement the plaintiff said among other things:

> "I could see a major section of the building was missing. I saw heavy beams being cut by oxy… Much of the building was missing… I believe the remaining materials were useless and the building is no longer viable to reconstruct."

[63] The plaintiff said that that represented his view at the time he made the statement to the police, but at that stage he had not had a thorough look at the situation on the site. He subsequently had a good look at it and realised that the main parts of the steel frame, particularly the columns and the steel rafters, were still intact on the site: p 55. These thieves had been concentrating on the smaller pieces of the steel, the framework for a mezzanine floor, pieces of angle line used as bracing in the main structure, and purlins and girts. I accept the plaintiff's evidence about this, which is consistent with the proposition that a large quantity of steel was cut up by the defendants' operator and placed in a separate pile, and that this steel was taken from the main stack of the larger pieces of steel on 9 April 2018.

[64] I suspect it was probably true to say that as a result of what was done by the other thieves it would not have been possible to reconstruct the building exactly as it had been, but, particularly in the light of the evidence suggesting that a more viable use of the building was likely to be to construct a building or buildings having a reduced height, or a smaller footprint, or both, the value of the plaintiff's steel for reuse lay in the main framework, and I accept that that had not been interfered with by the thieves on 29 March 2018. Apart from anything else, that is consistent with the analysis of Mr Van de Hoef: Exhibit 20 p 29.[70]

[65] There was some evidence about the cost of transporting replacement steel from Mr Lunniss, a quantity surveyor, who gave a figure of $150 per tonne for transport each way in connection with the cost of having the steel sand blasted and given a coating of rust inhibitor at a fabrication facility: p 2-27. It emerged however that this was an average cost, taking into account all of the steel on site, including the shorter pieces which would be much cheaper and easier to transport.[71] He did not give a figure specifically for the cost of transporting the longer beams, but the second defendant suggested $200 per tonne, though it was apparent that he regarded columns and beams of this length as relatively expensive items to transport. I am somewhat sceptical of this estimate, and doing the best I can, I propose to allow a figure of $250 per tonne for transport of the replacement steel to the site.

[66] It appears that, of the columns and rafters that were in the main stockpile, there were four columns which survived the defendants' actions,[72] and nine rafters,[73] four of them longer sections and five shorter sections.[74] There would originally have been

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70 Because of this analysis of the defendants' expert witness, this whole cross-examination was a complete waste of time.

71 Lunniss p 2-32. Transporting oversize steel, over 12 metres long, requires special precautions and extra expense: Chambers p 3-84.

72 Van de Hoef p 3-103.

73 Exhibit 7, photo on p 7.

74 These numbers I obtained from photographs, particularly the aerial photographs in Exhibit 10.

in the pile a total of 36 columns, and 18 rafters. It follows that 32 columns and 9 rafters, five of the longer ones and four of the shorter ones, have been turned into scrap by the defendants. There were also some crane rails left at the site, but I do not think any particular allowance needs to be made for them, because I doubt if they were ever going to be reused by the plaintiff anyway. The defendant also damaged some of the other smaller sections of steel, other secondary structural steel[75] and some allowance should be made for this steel as well, although no precise measurement can be obtained for it.

[67] I do not accept that the other smaller columns on the site were part of the main structure of the shed, and in particular I do not accept that the internal columns were stored separately, even if three of them are still there.[76] There are some shorter columns at the site, but the explanation is that these would have been associated with the internal storage structure, which was not of great interest to the plaintiff, and were stored separately. Mr Lunniss in his report gave a length for the roof beams of 18 metres, and a weight per metre of 0.067 tonnes, but Mr Van de Hoef said that on one side the rafters were approximately 24.8 metres long.[77] On this basis there was a total of 385.2 metres of roof beams initially on the site, weighing 25.8084 tonnes.

[68] With regard to columns, I assume that the remaining four columns are 16 metres long, so there have been 14 16 metre columns, 6 18 metre columns, and a further 9 columns of intermediate lengths, say 17 metres scrapped. The columns along the walls had a weight per metre of 0.101 tonnes, while the other columns had a weight per metre of 0.097 tonnes. On this basis the total weight of the columns and beams destroyed by the defendants comes to 48.553 tonnes.

[69] Apart from that there was some ancillary steel which was also destroyed by the defendants. There is no very clear evidence as to the quantity of this, but clearly there was some and some allowance should be made for it. Given the difficulty of working out exactly what was in the pile of cut up steel, it is understandable that there is no precise evidence about this, and doing the best I can, and bearing in mind that Mr Lunniss allowed just under 1.2 tonnes in total for the steel bracing, I think it is appropriate to allow 0.4 of a tonne for this steel. In arriving at this figure I am taking into account the aerial photographs which show that there was a reasonable amount of other lighter steel on top of the main stack in the photographs taken prior to the defendants' action, but very little later, and accepting that some of it may have been taken by others, and some was purlins and girts.

[70] Overall therefore it appears that the volume of the steel damage was destroyed by the defendant comes to 48.953 tonnes. No doubt the practicalities would mean that the replacement pieces would not be precisely the correct length, so for practical purposes I allow 50 tonnes of replacement steel, at $1,000 per tonne. There is the complicating feature however that some of the steel, particularly the roof beams, had been specially fabricated with built up haunches, and it was not suggested in evidence that roof beams similarly built up in this way would be readily available. There would be some costs involved both in purchasing the steel and in fabricating the haunches, but there was no evidence as to the cost of this provided to me. The photographs show that there is haunching at each end of these roof beams, both at

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75 Van de Hoef p 3-145.
76 Van de Hoef p 3-106.
77 Exhibit 30 p 2. On the other side they are 18 metres: p 3-119.

the end where they were bolted to the side columns and at the end where they were bolted to the central columns.[78] I expect to some extent this haunching was needed for the stability of the building. In any event, some allowance needs to be made for the cost of replacing this. The only evidence was the allowance Mr Lunniss made in Exhibit 6 at page 7, of 10% or 11.551 tonnes, but this was based on a total of 115.512 tonnes of steel. If I allow 10%, that is 5 tonnes and this would have to be new steel, to obtain exactly the materials needed to fabricate the haunches. On his price of $4,400 per tonne, this comes to $22,000.

[71] The evidence from Mr Lunniss was that the cost of heavy sandblasting and one coat of rust inhibitor was $500 per tonne, a figure which corresponded to that given by the second defendant: p 3-83. Mr Rebibou referred to light sandblasting (and rust inhibitor) for the steel work, and on that basis I expect a figure of $500 per tonne is an exaggeration. Some of the steel may well have required more substantial sandblasting, to clear away rust for proper engineering assessment, but I think most of the steel which would have been reused would have required only the light sandblasting referred to by Mr Rebibou. He would have probably have modified the design in a way which would have made unnecessary more substantial work, given his general approach. As I indicated above, I am not prepared to allow all of this, in view of the evidence of Mr Van de Hoef, so I will allow only $100 per tonne as a saved cost, which comes to $5,000.

[72] Modifying the design would no doubt have required some additional work to be undertaken, for example fitting new base plates if the columns were shortened to allow for some reduction in the height of the building. On the other hand, if replacement second hand columns were obtained from other buildings being demolished, it is very likely that these would also not happen to be fitted with pre-existing base plates with exactly the height required for whatever building was to be erected, so this is a cost likely to be incurred anyway with replacement steel. On the whole therefore I do not think it would be appropriate to make any deduction for any cost associated with work done to modify the existing steel to accommodate any change of design made necessary by engineering considerations; indeed, if anything it is more likely that the replacement steel would require more such work. There would certainly be labour costs associated with attaching the haunches to the replacement rafters, and I have no evidence of this. In all the circumstances I am not prepared to make any further adjustment either way on this basis.

[73] There was no evidence about the cost of any engineering assessment required, but in my view, engineering assessment would be required for a new building built with second hand steel anyway, and I suspect that the practical situation is likely to be much the same, particularly in circumstances where it is necessary for the roof beams to have extra fabrication work done on them in the case of the replacement steel. Where there is no quantification of the cost of engineering assessment, I think the position is that the plaintiff would have been up for this cost anyway whether he reused the original steel or whether he used replacement steel obtained in the second hand market and modified it, and accordingly this is not a cost which should be deducted. The significance of the cost of engineering assessment really arises when comparing the cost of reusing the steel with the cost of using new steel,

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78 See the various photos of the rafters. Rebibou p 3-39: the end plates on the haunches appeared to be in usable condition.

but in view of the figures given that is clearly the more economic approach, and that was the effect of the evidence of Mr Rebibou.[79]

[74] Therefore, in my opinion the appropriate quantification is the cost of purchasing replacement second hand steel plus the cost of transporting it to the site, less an allowance for extra sand blasting of the original steel had it been reused, plus some allowance for extra steel required for modification of the replacement steel, particularly the replacement roof beams. In the circumstances this is necessarily an imprecise process, but it is the best I can do on the evidence available. It is clear that the plaintiff has suffered a real loss.

[75] I am not persuaded that I should make any significant deduction for the scrap value of the steel left on the site. In the light of the evidence, it appears to me unlikely that the plaintiff could now realise any significant return if he attempted to sell the steel to a scrap metal merchant. In the circumstances I would allow a nominal figure for this of $2,000. So the replacement cost damages come to:

(a)	Replacement of second hand steel 50 t	$50,000.00
(b)	New steel for modifications etc. 5 t	$22,000.00
(c)	Transport costs	$12,500.00
	Sub-total	$84,500.00
(d)	Less extra sandblasting	$5,000.00
(e)	Less scrap value	$2,000.00
	Total	$77,500.00

[76] In addition a figure needs to be added, in my view, for vindication damages. This is essentially a figure derived on a "jury" basis, simply as an amount to vindicate the plaintiff's right of property in the steel. There are no comparable decisions, or even vaguely similar awards, of which I am aware. Doing the best I can in the circumstances I will allow a figure of $25,000. Overall therefore the plaintiff is entitled to an award of damages of $102,500. This is assessed on the basis of damages for trespass; damages for conversion would be greater, because the defendants would become the owners of the destroyed steel, so the figure of $2,000 would not be deducted. In my opinion however this is properly a case of trespass, not conversion.

[77] There was some argument addressed as to whether the judgment should go against the second defendant as well as the first defendant, but there is some authority that a company director is personally liable if he personally instigated the tort,[80] and in any case, in view of the arrangement with the third party, the point is academic. In the circumstances I give judgment for the plaintiff against both defendants for that amount, together with interest by statute,[81] in the sum of $9,455.27, a total of $111,955.27. The defendants are entitled, pursuant to their arrangement with the third party, to judgment for indemnity in this amount. The third party's claim against the fourth party is dismissed. I will invite submissions about costs when these reasons are delivered.

Attachment A:

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79 Rebibou p 3-44.

80 Clerk & Lindsell on Torts (15th Ed, 1982) para 2.49.

81 As per the court calculator.