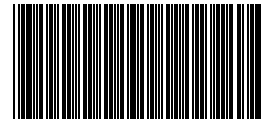




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Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00202613

TITLE OF PROCEEDINGS

First Appellant	85 PRINCESS PTY LTD ACN 165384510
First Respondent	Ian Alexander Fleming

FILING DETAILS

Filed for	85 PRINCESS PTY LTD, Appellant 1
Legal representative	DEEPAK SHANKAR
Legal representative reference	
Telephone	
Your reference	250527

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (251030 Reply Submissions 85 Princess Pty Ltd ACN 165 384 510 v Ian Fleming NSWCA.pdf)

[attach.]

IN THE NEW SOUTH WALES COURT OF APPEAL CASE NO. 2025/00202613

APPELLANT'S REPLY SUBMISSIONS

1. These submissions reply to the respondent's submissions filed 20 October 2025 (**RS**).

Reply to RS[12]

2. Grounds 1(a), (e) and (g) have not been abandoned. Those grounds were addressed in the appellant's primary submissions filed 1 October 2025 (APS) as follows:
 - a. Ground 1(a) related to the findings at J[114], [116] and [120] which concerned the appellant's intention to replace the concrete slab. This is addressed at APS Part D [37] to [42];
 - b. Ground 1(e) related to the finding at J[131] concerning the discharge of the onus. This is addressed at APS [14], [15], and Part E [43] to [51]; and
 - c. Ground 1 (g) related to the finding at J[137] concerning cost of the implementing a monitoring and repair program. This is addressed at Part E [43] to [51].

Mr England's evidence: RS [13] – [26]

3. It is common ground that Mr England's evidence was not accepted by the primary judge.

Cracking not structural: RS [27] – [32] Notice of Contention - Grounds 1 and 2

4. Although not clear, it appears that the submissions at RS[27] – [32] are advanced in support of Grounds 1 and 2 of the Notice of Contention.
5. Ground 1 of the Notice of Contention (Red[82]) seeks to impugn the finding at J[72] which concluded that there was a breach of cl 70.2(d). Clause 70.2(d) provided that "the Building is structurally sound and can withstand the loadings likely to arise from its expected use". The key factual finding underpinning the structural soundness warranty at cl 70.2(d) was that "there was a structural problem in that the saw cuts were ineffective and that meant that cracks were highly likely to emerge which, if left untreated, would lead to the deterioration of the slab such that it would come to fail to bear loadings likely to arise from its expected use" at (J[72]).
6. This finding was based on the evidence of the respondent's expert, Mr Hazelton - as appears to be accepted by the respondent (see reference to J[55] at RS[32]). Indeed, J[55] commences with the following "Mr Hazelton agreed that if the wider cracks that he observed in March 2024 were left untreated, a deterioration in the slab would be accelerated because vehicular traffic on the edge of the crack will chip it away". The RS do not identify any conflicting evidence which would justify this Court revisiting such a finding. It was open

to the primary judge to make a finding that the slab could not withstand the loadings likely to arise from its expected use (at J[72]).

7. Ground 2 of the Notice of Contention seeks to impugn the findings at J[73], however, no mention is made of J[73] in the RS. For completeness, the conclusion in J[73] that there was a breach of 70.2(e) because of non-compliance with cl 9.1 of AS3600, was based in the evidence of Mr Hazelton (including the above evidence) and should not be disturbed on appeal.

Notice of contention: RS[34] – [48] Notice of Contention - Ground 3

8. Central to Ground 3 of the Notice of Contention is the statement at [115] of **Roberts v Goodwin Street Developments Pty Ltd** (2023) 110 NSWLR 557; [2023] NSWCA 5 at 583 [115], per Kirk JA and Griffiths AJA. The statement at *Roberts* [115] was made in the context of an appeal concerning the measure of damages in an action on the case in trespass. It does not establish that a breaching party can escape the *prima facie* rule simply because the non-breaching is out of possession.
9. The respondent asserts that the *prima facie* position of reinstatement does not apply because “in reality” the appellant purchased a “a reversionary interest in a sublease of ten years, expiring in 2031” (RS[43]). The respondent’s conception of “reality” is not the same as that provided by the contract of sale which assigned the Reece lease to the appellant (cl 60.d BlueV1:P:216G)), for a number of reasons.
10. *First*, the reality was the appellant was obliged to provide quiet enjoyment (cl 16.1 Blue V:1 P:292), promptly undertake structural repairs at its own cost (cl 10.1(d) Blue V1:P:287K and cl 16.3 Blue V:1 P:292) and to maintain the premises in a structurally sound way at its own cost (cl 16.3 Blue V:1 P:292).
11. *Secondly*, the reality was that Reece could exercise up to 3 options each for five years which potentially extended the lease horizon from 2031 to 2046 (see cl 21.1 Blue V:1P:297H and item 12 V:1P:303I).
12. *Thirdly*, the reality was that by agreeing to cl 70.2(a) to (f) of the contract for sale (BlueV1:P:223F) the respondent became responsible for the work of the vendor, **Fleming Investments** (ACT) Pty Ltd. Fleming Investments assigned the Reece lease to the appellant (see contract of sale special condition cl 60.d BlueV1:P:216G). The respondent (who was the director, secretary and sole shareholder of Fleming Investments) caused the land to be developed, procured construction of the and the slab (J[1]).
13. In those circumstances, the *prima facie* position applies.

14. For completeness, the appellant rejects the submission at RS[35] that it bears no responsibility to Reece (see RS[35]). As above, the appellant has a number of obligations to Reece such as providing quiet enjoyment, repair and maintenance (Reece, in turn, owes the same obligations to GoTropo - see BlueV:1 P400D-F which effects the sublease by changing the name of the landlord).

Intention to replace RS[49] to [58]: Notice of Contention - Ground 4.

15. Ground 4 of the Notice of Contention states the primary judge should have drawn “adverse inferences” by reason of the unexplained failure to call a director (Red 83). The Notice of Contention does not set out the adverse inference which was not drawn but should have been. However, at RS[58] the respondent asserts that “inferences adverse to the appellant regarding its genuine intentions to replace the slab, and even if genuinely held, whether those intentions were rational or reasonable, ought to have been drawn by the primary judge by the absence of Mr Shankar.”
16. This inference was not sought before the primary judge. Rather, the inferences sought before the primary judge related to the whether the lessees had made a claim against the appellant (see Black 170.35-42; Black 211 at [44]; Black 215 [77] to [78.b] and [78.c]). The primary judge dealt with this by drawing a non-*Jones v Dunkel* inference to the effect that there was no relevant claim at the lessee level (at J[101]) – which is accepted.
17. Notwithstanding the absence of a submission advancing that a *Jones v Dunkel* be drawn against the appellant on the issue of intention, the primary judge at J[115] considered the issue and concluded that “all I would infer is that Mr Shankar’s evidence would not have been better for 85 Princess than the evidence of Dr Kapila”. That is a routine application of the rule and there is no reason to revisit it on appeal. The appellant gave evidence through one of its directors, Dr Kapila. It was not a case where the conduct of a particular director was impugned and there was no requirement to call each director (see: *Manly Council v Byrne* [2004] NSWCA 123 Campbell J (Beazley JA and Pearlman AJA agreeing) at [60] to [67]; *Ling v Pang* [2023] NSWCA 112, Kirk JA (Leeming and Mitchelmore JJA agreeing) at [20]–[28]; *Brady v NULIS Nominees (Australia) Limited in its capacity as trustee of the MLC Super Fund (No 4)* [2024] FCA 1374 at [607] per Markovic J). Further, the respondent carried the onus on the issue of intention which was not pleaded, and the respondent tendered no evidence on the issue of intention - in those circumstances an inference should not have been drawn (see *Cross on Evidence* 11th edition at [1215], p 41).

18. The evidence of the appellant on the issue of intention is extracted in J[99] and J[114]. This evidence was consistent with the obligations the appellant had to Reece for quiet enjoyment, maintenance and repair.



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Dated: 30 October 2025