IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S141 of 2018

BETWEEN:

PAUL OLAF GRAJEWSKI
Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS (NSW)
Respondent

APPELLANT'S REPLY

Part I: Certification

1. This submission is in a form suitable for publication on the Internet.

Part II: Submissions in reply

"Physical engagement with property"

2. In addition to reliance on the notion of physical interference with property, the respondent introduces (at [6] of his submissions (**RS**)), a further concept being "physical engagement with property" which, although not altered or deranged in any way, is temporarily inoperable or temporarily impaired in function. The advent of this further idea exposes the *de minimis* nature of the physical act which, on the respondent's construction of s 195 of the *Crimes Act* 1900 (NSW), suffices to establish criminal liability for damage to property. "Engagement" would appear to have an even lower threshold than "interference".
3. "Physical engagement with property" would accommodate the kind of mere low-level physical attachment to property in the example of the bulldozer (given by Leeming JA at [62]) which is, on analysis, no different in substance to mere presence without physical contact, such as the protester who lies down in front of the bulldozer instead of tying herself to it.
4. The introduction of the term "physical engagement" puts yet a further gloss on the words "destroy or damage" impermissibly broadening (again) the scope of the offence under s 195.

The respondent equates damage with the risk of damage

5. The bulldozer example also highlights the error in conflating the *risk* of damage with actual damage, as the respondent does (at RS[38] and [45]) by reference to *R v Fisher* (1865) LR 1

THIS DOCUMENT IS FILED ON BEHALF OF THE APPELLANT
THIS DOCUMENT IS DATED: 24 AUGUST 2018
THE APPELLANT'S SOLICITOR IS: Mr Peter O'Brien, O'Brien Criminal & Civil Solicitors Pty Ltd
Suite 504, 233 Castlereagh Street, SYDNEY NSW 2000
Tel: 02 9261 4281 Fax: 02 9261 4282
Ref: Mr Peter O'Brien Email: peter.obrien@obriensolicitors.com

CCR 7 and *Fraser & O'Donnell* [2008] NSWSC 244.

6. In *Fisher*, the defendant's liability derived from the physical displacement of the steam engine's parts which rendered it useless. That, together with the fact that Piggott B held that labour was required to reinstate the machine, was sufficient for damage to be made out, irrespective of whether there was a risk of further (no doubt substantial) damage had the engine been used. In *Fraser & O'Donnell*, while noting at [47] the significant risk of damage to the conveyor rollers had the system been re-started, Simpson J (as her Honour then was) held, correctly, it is submitted, that a risk of injury or damage is not sufficient to make out the offence under s 195.

7. In the present case, where there is no suggestion of physical alteration or derangement of the ship loader, there is not even a suggestion of a *risk* of damage were it to be activated while the appellant was attached to it. Indeed, the only risk of harm was to the appellant himself (fact 7). That risk gave rise to safety concerns leading to the machine being shut down and inoperable until the appellant was removed (facts 4 and 8). As Leeming JA observed at [64], "the stated case establishes that [the appellant's] physical presence attached to Ship Loader 2 caused the machine to continue to be inoperable for some two hours."

8. Accordingly, in both the case of *Fraser & O'Donnell* and the present case, "damage" can only be established if the presence of the protesters without alteration or derangement of the coal/ship loader – their "physical engagement" with the property perhaps – is sufficient for a s 195 offence.

The legislative context favours the appellant's construction

9. The respondent draws on the former provisions of Chapter II of the *Crimes Act* repealed by the *Crimes (Criminal Destruction and Damage) Amendment Act 1987* (NSW). In particular, the respondent relies on the terms of s 224 ("Injuries to mines") and s 232 ("Injuries to railway carriages") and relevant secondary materials emphasising the simplification process undertaken with the passage of the *Criminal Damage Act 1971 (UK)* which was the precursor to the 1987 amendments.

10. The respondent's point appears to be that the simplified offence in s 195 should be construed so as to ensure that it covers the field previously occupied by the myriad of offences which were directed to the destruction of, and damage to, various specified kinds of property and which also extended to matters such as "obstruction" of property.

11. That approach to the proper construction of s 195 should be rejected for several reasons.

12. First, the respondent's submission depends upon discarding the specific provisions of the *Crimes Act* upon the enactment of the 1987 amendments, whilst in substance retaining the

extended definitions contained in the repealed provisions. Such an approach involves a failure actually to construe the words of the statute, contrary to accepted principles of statutory construction: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; 239 CLR 27.

13. Further, nothing in cases such as *Alcan*, *Aubrey v The Queen* [2017] HCA 18; 260 CLR 305, or *Minogue v Victoria* [2018] HCA 27; 92 ALJR 668, contrary to RS[26], diminishes the principle that doubt as to the meaning or scope of a penal provision is to be resolved in favour of the defendant, as this Court has consistently held: *R v Adams* [1935] HC 62; 53 CLR 563 at 567 – 8; *Beckwith v The Queen* [1976] HCA 55; 135 CLR 569 at [9]; *Smith v Corrective Services Commissioner (NSW)* [1980] HCA 49; 147 CLR 134 at [8]; *Minogue v Victoria* at [46] – [47]). Moreover, the respondent's approach overlooks the words of the Law Commission of England and Wales set out in RS[14] describing the purpose of the simplified classification enacted by the UK legislation. It is apparent from the Commission's references to its position that "the essence of the offences of criminal damage should be the destruction of or damage to the property" and "the basic nature of the offence", that the aim of the simplified classification was to eliminate the complexity and variety of provisions and to bring the offence of criminal damage back to its "basic nature".

14. Secondly, the 1987 amendments included s 201, a specific provision concerning mines that largely embodied the former s 224. Section 201(1)(b) creates an offence to "destroy, damage or obstruct any shaft, passage, pit, airway, waterway or drain of, or associated with, a mine". The word "obstruct" would be superfluous if it were wholly encapsulated in the word "damage" within either s 195 or s 201. As a general rule a court will adopt that construction of a statute which will give some effect to all of the words which it contains: *Beckwith v The Queen* at [6] per Gibbs J. The express use of the word "obstruct" accordingly suggests that Parliament did not intend that "damage" would encompass that act.

15. Thirdly, (the repealed) s 232 was, as is plain on its face, directed to the obstruction of engines or carriages on railways and had nothing to do with other areas of activity. It is an untenable contention that s 195 should be construed so as to import that notion of obstruction, previously confined to the railways, and apply it to all forms of property. On that approach, a protestor who lies down in front of the bulldozer and obstructs its path, will have committed an offence under s 195 despite having committed no offence under s 224 (or, for that matter, under s 201).

Contested Facts – s 5B of the Criminal Appeal Act 1912 (NSW)

16. The respondent, at RS[5], draws attention to the limitations of the stated case procedure and

the CCA's rejection of any submission which invited the Court to draw a conclusion as to the causal connection between the appellant's conduct and the inoperability of the Ship Loader which went beyond the facts in the stated case.

17. However, at RS[43], the respondent seeks to equate the appellant's conduct with the stick thrust into the pipe in *Fisher*, the soil and rubble left on the land in *Henderson & Battley* (Court of Appeal, unreported, 29 November 1984), the water released into the breath analysis machine in *Griffiths v Morgan* (Supreme Court of Tasmania, unreported, 13 October 1972) and the water covering the cell floor in *R v Fiak* [2005] EWCA Crim 2381. In doing so, the respondent seeks to support the conclusion that, as in those cases, the appellant's conduct was "a physical interference with property that impaired or stopped the functioning of the property", as distinct from, for example, a decision to shut down the ship loader due to safety concerns posed by the appellant's presence.

18. Accordingly, the respondent is asking the Court to draw an inference as to the causal connection between the appellant's conduct and the inoperability of the ship loader, contrary to the limitations of the stated case procedure as explained in *R v Rigby* [1956] HCA 38; 100 CLR 146 at 150–151. In *Rigby* (at 151), their Honours said that a court's "authority" on a stated case is "limited to ascertaining from the contents of the case stated what are the ultimate facts, and not the evidentiary facts, from which the legal consequences ensue that govern the determination of the rights of parties." The Court went on to emphasise that implication of fact was permissible but not inference: "An implication is included in what is expressed: an implication of fact in a case stated is something which the Court stating the case must, on a proper interpretation of the facts stated, be understood to have meant by what is actually said, though not so stated in express terms. But an inference is something additional to the statements."

19. It was therefore appropriate for the CCA to proceed upon the basis that the shutting down of the machine referred to in fact 4 was as a result of a decision in the control room (Leeming JA at [6]). Similarly, it may be implied that that decision was made because of safety concerns for the appellant (facts 4 and 7) and that once he was removed, the machine was able to recommence its operation (facts 8 – 10).

20. Any uncertainty in the facts stated, however, is readily capable of decisive resolution by reference to the judgment of Bright DCJ in the District Court at [4]: "The evidence establishes that, with the appellant in that position, the machine, Ship Loader 2, was rendered inoperable because his position posed a potential risk of serious harm to himself." Contrary to the respondent's submissions, and the judgment below (see Leeming JA at [5] – [6]), the

prohibition against making a finding of fact or drawing inferences from facts found by the court below does not prevent the Court from *identifying* the facts which were found by the court below.

21. In *Lavorato v Regina* [2012] NSWCCA 61, Basten JA at [11] – [12] referred to the difficulty which can arise where there are discrepancies or inconsistencies between the findings of fact identified by the trial judge in the stated case and those appearing from the judgment, and had regard to the terms of the judgment (for example at [42], [47]-[48]. In *Talay v The Queen* [2010] NSWCCA 308, the facts were said to have been stated by appending the judgment from the court below. While critical of that approach, Simpson J (Schmidt J and Howie AJ agreeing) did not consider that the judgment was not properly before the court, and proceeded to identify (not find) the facts from the judgment.

22. These decisions accord with policy and the just determination of a stated case. It should be uncontroversial that a court, in considering a stated case in order to exercise its power to acquit or confirm a criminal conviction, may have regard to the judgment in order to satisfy itself that it is acting on the facts as found, particularly in cases where there is any ambiguity or doubt. How else, it may be asked, could the Court exercise the powers given to it under s 5B(3) in the exercise of the s 5B jurisdiction, particularly in circumstances where that jurisdiction is only engaged after the appeal in the District Court has been finally disposed of (s 5B(2)).

23. In the present case, when read in conjunction with the judgment, fact 8 demonstrates that the appellant's use of a rope and harness was not physically causative of the machine becoming inoperable. The appellant's "attachment" to Ship Loader 2 is only relevant to the extent that it made his removal more difficult, thereby prolonging the duration of his presence.

24. The respondent's equation of the appellant's conduct and the facts of *Fisher*, *Henderson & Battley*, *Griffiths* and *Fiak* cannot stand. Further, there is no basis to suggest that the appellant would have been liable pursuant to any provision in Chapter II before the 1987 amendments, even if this Court accepted the respondent's submission at [19] that "injury to property" included "obstruction".

Dated: 24 August 2018

T. Game
Forbes Chambers
T: (02) 9390 7777
tgame@forbeschambers.com.au

A.T.S. Dawson
Banco Chambers
T: (02) 8239 0237
sandy.dawson@banco.net.au

N. Funnell
Sir Owen Dixon Chambers
T: (02) 8076 6603
nfunnell@sirowendixon.com.au