CIMIC Group Limited v AIG Group Limited - [2022] NSWSC 999

Supreme Court

New South Wales

Medium Neutral Citation:	**CIMIC Group Limited v AIG Group Limited [2022] NSWSC 999**
Hearing dates:	16 May 2022 – 3 June 2022
Decision date:	27 July 2022
Jurisdiction:	Equity
Before:	Peden J
Decision:	1. The parties are to confer and provide agreed short minutes of order to give effect to these reasons and appropriate costs orders within 7 days of the publication of this judgment. 2. Should the parties not be able to agree, the parties are to provide their competing short minutes together with submissions of no more than 10 pages, and any necessary evidence, within 10 days of the publication of this judgment. 3. Liberty to apply on 24 hours' notice.
Catchwords:	INSURANCE — Liability insurance — Directors and Officers — Claim for indemnity and declaratory relief against two consecutive insurance towers — Claim for declaratory relief sought in the alternative against later insurance tower — Costs incurred by insured for

securities litigation, investigations and a settlement arising from a file note — Whether costs caught under policy— Whether settlement reasonable — Retention — Statutory interest

INSURANCE — *Insurance Contracts Act 1984* (Cth) — Duty of disclosure — Non-disclosure and misrepresentation — Construction of insurance policy — Whether parties contracted out of statutory remedies — Whether continuity clause allowed a claim against the later insurance tower — Relationship between liability limits in policies — Whether but for relevant failure insurer would have entered into contract — Whether cover should be reduced to nil

INSURANCE — Cross-claim in relation to one insurance policy — Contract — Formation — Rectification — Intention — Common intention — Signed placing slips

INSURANCE — Cross-claim by one insurer against two other insurers — Equitable contribution — Double insurance — Coordinate liabilities — Proper measure of contribution

INSURANCE — Whether insured barred from its alternative case — Election, waiver and estoppel — Futility — Whether declaratory relief hypothetical — Construction of notification clause — Whether late notification possible under the policy

LIMITATION OF ACTIONS — Equity — Application of limitation periods by analogy — Indemnities and insurance — Analogies in Contract and contribution between joint tortfeasors — Whether some claims for costs out of time

Legislation Cited: ASX Listing Rules r 3.1

Australian Securities and Investments Commission Act 2001 (Cth) ss 13, 19, 30, 33

Corporations Act 2001 (Cth) ss 674, 1307(1)

Criminal Code Act 1995 (Cth) div 70

Evidence Act 1995 (NSW) ss 69, 97, 128, 135, 140(2)

Federal Court of Australia Act 1976 (Cth) ss 33V, 33ZF

Insurance Contracts Act 1984 (Cth) ss 7, 21, 22, 28, 40(3) 54 , 57

Insurance Contracts Amendment Act 2013 (Cth)

Insurance Contracts Regulations 2017 (Cth) r 10

Law Reform (Miscellaneous Provisions) Act 1946 (NSW)

Limitation Act 1969 (NSW) ss 14(1)(a), 23, 26

Migration Act 1958 (Cth)

Practice Note SC Eq 3

Supreme Court Act 1970 (NSW) ss 63, 75

Uniform Civil Procedure Rules 2005 (NSW) r 28.2

Cases Cited:

ACN 161 046 304 Pty Ltd (Formerly known as Melbourne City Investments) v CIMIC Group Limited [2019] VSC 48

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 239 CLR 570

AIG Australia Ltd v Kaboko Mining Ltd [2019] FCAFC 96

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564

Albion Insurance v Government Insurance Office (1969) 121 CLR 342

All Class Insurance Brokers (in liq) v Chubb Insurance (No 2) [2021] FCA 782

Allianz Australia Insurance Limited v General Cologne Re Australia Limited [2004] NSWCA 433

AMP Financial Planning Pty Ltd v CGU Insurance Ltd [2005] FCAFC 185

AMP Workers Compensation Services (NSW) Ltd v QBE Insurance Ltd (2001) 53 NSWLR 35

Antico v Heath Fielding Australia Pty Ltd (1997) 188 CLR 652

ASIC v Hellicar (2012) 247 CLR 345

Australian Casualty Co Ltd v Federico (1986) 160 CLR 513

Australian Securities and Investments Commission v Sigalla (No 2) [2010] NSWSC 792

Bankstown Football Club v CIC Insurance Ltd (unreported, Sup Ct, NSW, 17 December 1993)

Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334

Baycorp Advantage Ltd v Royal and Sun Alliance Insurance Australia Limited [2003] NSWSC 941

BNP Paribas v Pacific Carriers Limited [2005] NSWCA 72

BP Petroleum Development Ltd v Esso Petroleum Co Ltd [1987] SLT 345

Brighton Ceiling Pty Ltd v Pocrnja [2005] NSWCA 175

Briginshaw v Briginshaw (1938) 60 CLR 336

Brotherton v Aseguradora Colseguros [2003] EWCA Civ 705

Burke v LFOT Pty Ltd (2002) 209 CLR 282

Caledonian Railway Co v Colt (1860) 3 Macq 833

Carr v Finance Corporation of Australia Ltd (No 1) (1981) 147 CLR 246

CGU Insurance Limited v AMP Financial Planning Pty Ltd (2007) 235 CLR 1

CGU Insurance v Blakeley (2016) 259 CLR 339

CGU Insurance v Porthouse (2008) 235 CLR 103

Chief Commissioner of State Revenue v Paspaley [2008] NSWCA 184

Ciavarella v Balmer (1983) 153 CLR 438

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384

Claremont Petroleum NL v Cummings (1992) 110 ALR 239

Cohen v Cohen (1929) 42 CLR 91

Commonwealth v Verwayen (1990) 170 CLR 394

Craine v Colonial Mutual Fire Insurance Co Ltd (1920) 28 CLR 305

Delor Vue Apartments v Allianz Australia Insurance Ltd (No 2) [2020] FCA 588

Delta Pty Limited v Mechanical and Construction Insurance Pty Limited [2019] QCA 62

DIF III – Global Co-Investment Fund LP v DIF Capital Partners Ltd [2020] NSWCA 124

DIF III – Global Co-Investment Fund v Babcock & Brown International Pty Limited [2019] NSWSC 527

DIF III – Global Co-Investment Fund v Babcock & Brown International Pty Limited [2020] NSWCA 124

Edwards v Santos (2011) 242 CLR 421

Elilade Pty Ltd v Nonpareil Pty Ltd (2002) 124 FCR 1

Euro Pools Plc v Royal & Sun Alliance Insurance Plc [2019] EWCA Civ 808

FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd (2001) 204 CLR 641

Ferrcom v Commercial Union Assurance (1993) 176 CLR 332

Fitzgerald v CBL Insurance Ltd [2014] VSC 493

Forster v Jododex (1972) 127 CLR 421

Fruehauf Finance Corp Ltd v Zurich Australian Insurance Ltd (1993) 32 NSWLR 735

Galaxy Communications Pty Ltd v Paramount Films of Australia Inc (Unreported, NSW Court of Appeal, 24 February 1998)

General Reinsurance Corporation v Forsakringsaktiebolaget Fennia Patria [1982] QB 1022

General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria [1983] 1 QB 856

GIO General Limited v Wallace [2001] NSWCA 299

Globe Church Incorporated v Allianz Australia Insurance Ltd (2019) 99 NSWLR 470

Gordon v Ross [2006] NSWCA 157

Gosford City Council v GIO General Ltd (2003) 56 NSWLR 542

Gregg v R [2020] NSWCCA 245

HDI Global Specialty SE v Wonkana No 3 Pty Ltd (2020) 104 NSWLR 634

HIH Casualty & General Insurance Ltd (in liq) v Insurance Australia Limited (No 2) [2006] VSC 128

HIH Casualty and General Insurance Ltd v Riunione Adriatica Di Sicurta SpA [1999] VSC 336

HLB Kidsons (a firm) v Lloyd's Underwriters [2008] EWCA Civ 1206

Hobart International Airport Pty Ltd v Clarence City Council [2022] HCA 5

Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW) (1993) 182 CLR 26

Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Limited [2020] FCA 510

Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Ltd [2019] FCA 1480

Jamison v The Queen (1993) 177 CLR 574

Jones v Dunkel (1959) 101 CLR 298

Kajima UK Engineering Ltd v The Underwriter Insurance Co Ltd [2008] Lloyd's Reports 391

Kammins Ballroom Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850

Khoury v Government Insurance Office (NSW) (1984) 165 CLR 622

La Trobe Capital & Mortgage Corp v Hay Property Consultants (2011) 190 FCR 299

Lawrence Edward Stewart v Australia and New Zealand Banking Group Limited [2020] NSWSC 1787

LCA Marrickville Pty Ltd v Swiss Re International Se [2022] FCAFC 17

Lohar Corp Pty Ltd v Dibu Pty Ltd (1975) 1 BPR 9177

Lynch v Hamilton (1810) 128 ER 15

McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579

Melbourne City Investments Pty Ltd v Leighton Holdings Limited [2015] VSCA 235

Melin v Mutual Community General Insurance Pty Ltd (1991) 6 ANZ Ins Cas 61-057

Minister for Immigration v Ozmanian (1996) 71 FCR 1

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104

National Australia Bank Limited v Nautilus Insurance Pte Ltd (No 2) [2019] FCA 1543

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] 67 ALJR 170

Newbon v City Mutual Life Assurance Society Ltd (1935) 52 CLR 723

Nicholls v Michael Wilson and Partners [2010] NSWCA 222

Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd (1994) 8 ANZ Ins Cas 61-235

NRMA Insurance Ltd v Tatt (1989) 92 ALR 299

O'Connor v SP Bray Ltd (1936) 36 SR (NSW) 248

O'Neill v FSS Trustee Corporation as Trustee of the First State Superannuation Scheme [2015] NSWSC 1248

Onley v Catlin Syndicate [2018] FCAFC 119

P&S Kauter Investments Pty Ltd v Arch Underwriting at Lloyd's Ltd (2021) 105 NSWLR 110

Paymer v Ayres (2017) 259 CLR 478

Payne v Parker (1976) 1 NSWLR 191

Permanent Trustee v FAI General (2001) 50 NSWLR 679

Permanent Trustee v FAI General (2003) 214 CLR 514

Prepaid Services Pty Ltd v Atradius Credit Insurance NV [2013] NSWCA 252

Protec Pacific v Steuler Services [2014] VSCA 338

Pullen v Gutteridge Haskins & Davey Pty Ltd (1993) 1 VR 27

QBE Insurance (Australia) Ltd v Lumley General Insurance Ltd (2009) 24 VR 326

Quintis Ltd (Subject to a Deed of Company Arrangement) v Certain Underwriters at Lloyd's London Subscribing to Policy Number B0507N16FA15350 [2021] FCA 19

Quintis Ltd (Subject to Deed of Company Arrangement) v Certain Underwriters at Lloyd's London Subscribing to Policy Number B0507N16FA15350 (No 2) [2021] FCA 327

RHG Mortgage Ltd v Ianni [2015] NSWCA 56

Ruby Steam Ship Co Ltd v Commercial Union Assurance Co Ltd (1933) 150 LT 38

Ryledar Pty Ltd v Euphoric Pty Ltd (2007) 69 NSWLR 603

Sanderson Computers Pty Ltd v Urica Library Systems BV (1998) 44 NSWLR 73

Sandersons Eastern Suburbs v Mercedez-Benz Australia /Pacific [2018] NSWSC 52

Sargent v ASL Developments (1974) 131 CLR 634

Sayseng v Kellogg Superannuation Pty Ltd [2007] NSWSC 857

Schlaepfer v Australian Securities and Investments Commission [2017] FCA 1122

Simic v New South Wales Land and Housing Corporation (2016) 260 CLR 85

Stealth Enterprises v Calliden Insurance [2017] NSWCA 71

Sydney Turf Club v Crowley (1971) 1 NSWLR 729

Sydney Turf Club v Crowley (1972) 126 CLR 420

Taylor v The Queen [2020] NSWCCA 355

Tokio Marine & Nichido Fire Insurance Co Ltd v Holgersson [2019] WASCA 114

Trans Realties Pty Ltd v Grbac (1975) 1 NSWLR 170

Tropical Traders Ltd v Goonan (1964) 111 CLR 41

Tszyu v Fightvision Pty Ltd; Fightvision Pty Ltd v Onisforou (1999) 47 NSWLR 473

UBS AG v Tyne (2018) 265 CLR 77

Ucak v Avante Developments [2007] NSWSC 367

United Australia Ltd v Barclays Bank Ltd [1941] AC 1

Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd (1998) 192 CLR 603

Vero Insurance v Baycorp Advantage [2004] NSWCA 390

Vero Insurance Ltd v Power Technologies Pty Ltd [2007] NSWCA 226

Walton v Gardiner (1993) 177 CLR 378

Watkins Syndicate v Pantaenius (2016) 244 FCR 5

Weir Services Australia Pty Limited v AXA Corporate Solutions Assurance [2018] NSWCA 100

White Industries Qld Pty Ltd v Hennessey Glass and Aluminium Systems Pty Ltd [1999] 1 Qd R 210

Wilkie v Gordian Runoff (2005) 221 CLR 522

Zhang v ROC Services (NSW) (2016) 93 NSWLR 561

Texts Cited:

D K Derrington and R S Ashton, *The Law of Liability Insurance* (3rd ed, 2013, LexisNexis Butterworths)

Handley, *Estoppel by Conduct and Election* (1st ed, 2006, Lawbook Co)

I C F Spry, *The Principles of Equitable Remedies* (9th ed, Lawbook Co, 2014)

JJ Spigelman, 'Knowledge of a Corporate Insured' (1994) 6 *Insurance Law Journal* 1

Kirsty Sutherland, 'An Uneasy Compromise: An Analysis of the Effect of a Settlement Reached by an Insurer with a Third Party Claimant vis-à-vis his or her Insurer' (1998) 9 *Insurance Law Journal* 257

Nigel Rein, 'Liability Policies: The Relationship of the Claim against the Insured and the Insured's Claim on the Insurer' (1994) 6 *Insurance Law Journal* 193

Peter Handford, *Limitation of Actions* (2nd ed, Lawbook Co, 2007)

Peter Mann, *Mann's Annotated Insurance Contracts Act* (7th ed, 2016, Lawbook Co)

P W Young, *Declaratory Orders* (2nd ed, Butterworths, 1984)

Spencer Bower and Turner, *The Law Relating to Estoppel by Representation* (3rd ed, 1977, Butterworths)

WIB Enright and RM Merkin, *Sutton on Insurance Law* (4th ed, Lawbook Co, 2015)

Category:

Principal judgment

Parties:	CIMIC Group Ltd (Plaintiff) AIG Australia Ltd (First Defendant) Chubb Insurance Australia Ltd (Second Defendant) Catlin Syndicate Ltd (Third Defendant) Catlin Australia Ltd (Fourth Defendant) Liberty Mutual Insurance Company (Fifth Defendant) Berkley Insurance Company (Sixth Defendant) Swiss Re International SE (Seventh Defendant) Zurich Australian Insurance Ltd (Eighth Defendant) Arch Underwriting at Lloyd's Limited on behalf of Syndicate 2012 (Ninth Defendant) Dual Australia Pty Ltd (Tenth Defendant)
Representation:	Counsel: M A Jones SC and B Ryde (Plaintiff) G Rich SC and J Taylor (First Defendant) S R Donaldson SC and N D Oreb (Second Defendant) I R Pike SC and M Newton (Third and Fourth Defendants) M R Elliott SC and L Hulmes (Fifth Defendant) M A Friedgut and A Lim (Sixth Defendant) E Muston SC and H Mann (Seventh Defendant) R Dick SC and S Fitzpatrick (Eighth Defendant) A Horvath SC and M Caristo (Ninth and Tenth Defendants) Solicitors: Allens (Plaintiff) Wotton + Kearney (First Defendant) Lander & Rogers (Second Defendant) DLA Piper (Third and Fourth Defendants) Colin, Biggers & Paisley (Fifth Defendant) Mills Oakley (Sixth Defendant) Kennedys (Seventh Defendant) YPOL Lawyers (Eighth Defendant) Moray & Agnew (Ninth and Tenth Defendants)
File Number(s):	2020/00172061
Publication restriction:	Nil

Judgment

Background

1. The plaintiff CIMIC (previously Leighton Holdings Limited) has sued its towers of Director and Officers' Insurers for the years 2010/2011 and 2011/2012.

2. In this judgment, I refer to the plaintiff company:

    1. by its previous name, Leighton Holdings Limited (LHL or Leighton), when considering the factual matters when it bore that name, as the documents do so; and

    2. as CIMIC, when referring to submissions and the running of the litigation.

3. On 23 November 2010, Leighton's incoming Chief Executive Officer (CEO) made a handwritten file note, which recorded representations made to him by a co-Chief Operating Officer (COO), that might suggest Leighton officers engaged in bribery of, or made improper payments to, foreign officials to secure construction contracts for Leighton in Iraq (Iraq File Note). About a year after it was created, Leighton disclosed the Iraq File Note to the Australian Federal Police, which resulted in various investigations and criminal and civil proceedings against Leighton and some of its officers, some of which remain ongoing. At the commencement of the litigation, CIMIC had spent $45,769,509.08 in relation to those criminal and civil proceedings.

4. At a general level against the first to fifth defendants (AIG, Chubb, Catlin Syndicate, Catlin Australia, and Liberty respectively, and collectively 2011 Insurers), CIMIC has sought:

    1. a declaration that those 2011 Insurers are severally liable (according to their respective layers) to indemnify it for the costs expended; and

2. damages for the 2011 Insurers' failure to indemnify and interest under *Insurance Contracts Act 1984* (Cth) (*IC Act*) s 57.

5. CIMIC's claim against the 2011 Insurers is based on a primary policy and several excess policies of the five defendants for the period from 30 June 2011 to 30 June 2012 (2011 Policy). CIMIC has an alternative claim against Chubb for some costs pursuant to a policy in place between 30 June 2013 and 30 June 2014 (2013 Primary Policy).

6. This claim requires a determination of the proper construction of various clauses of the 2011 Policy, and, in particular, whether the 2011 Insurers remain entitled to exercise an insurer's rights under s 28 *IC Act* to avoid or reduce their liability for pre-inception non-disclosure of the allegations recorded in the Iraq File Note. Various other defences have been raised.

7. At a general level, CIMIC's alternative claim against the sixth to tenth defendants (Berkley, Swiss Re, Zurich, Arch and Dual respectively, and collectively 2010 Insurers) is based on a primary policy and several excess policies in place between 30 June 2010 and 30 June 2011 (2010 Policy). This claim arises only if CIMIC's claim against the 2011 Insurers fails.

8. This claim seeks a declaration as to Leighton's relevant state of mind during the 2010/11 Policy Period concerning the allegations in the Iraq File Note, so that CIMIC can seek an indemnity from the 2010 Insurers in future proceedings. To date, CIMIC has not made any claim under the 2010 Policy. The 2010 Insurers resist any declaration on various bases, including that CIMIC elected to sue the 2011 Insurers instead, and that the declaration sought is hypothetical, futile, or out of time.

9. At a pre-trial motion heard on 4 May 2022, CIMIC explained the structure of its case, including that no formal notification under the 2010 Policy had been made to the 2010 Insurers for fear of triggering "an express exclusion for claims that have a relationship to a circumstance that has been notified under an earlier policy" in cl 3.2(i) of the 2011 Policy. Counsel for CIMIC noted:

> to genuinely bring forward a notification against the 2010 insurers late, we would have to at least have awareness of that circumstance that we are going to notify during the period of the 2010 cover. And there's a fundamental problem with us bringing that forward now in circumstances where our principal case is that we didn't have that awareness.

10. At the hearing, CIMIC emphasised that declaratory relief was sought against the 2010 Insurers:

> [T]o avoid an outcome where in the present proceedings, the 2011/12 insurers succeed in establishing that CIMIC had relevant awareness of relevant notifiable circumstances in 2010/11, but in any subsequent proceeding, the 2010/11 insurers are

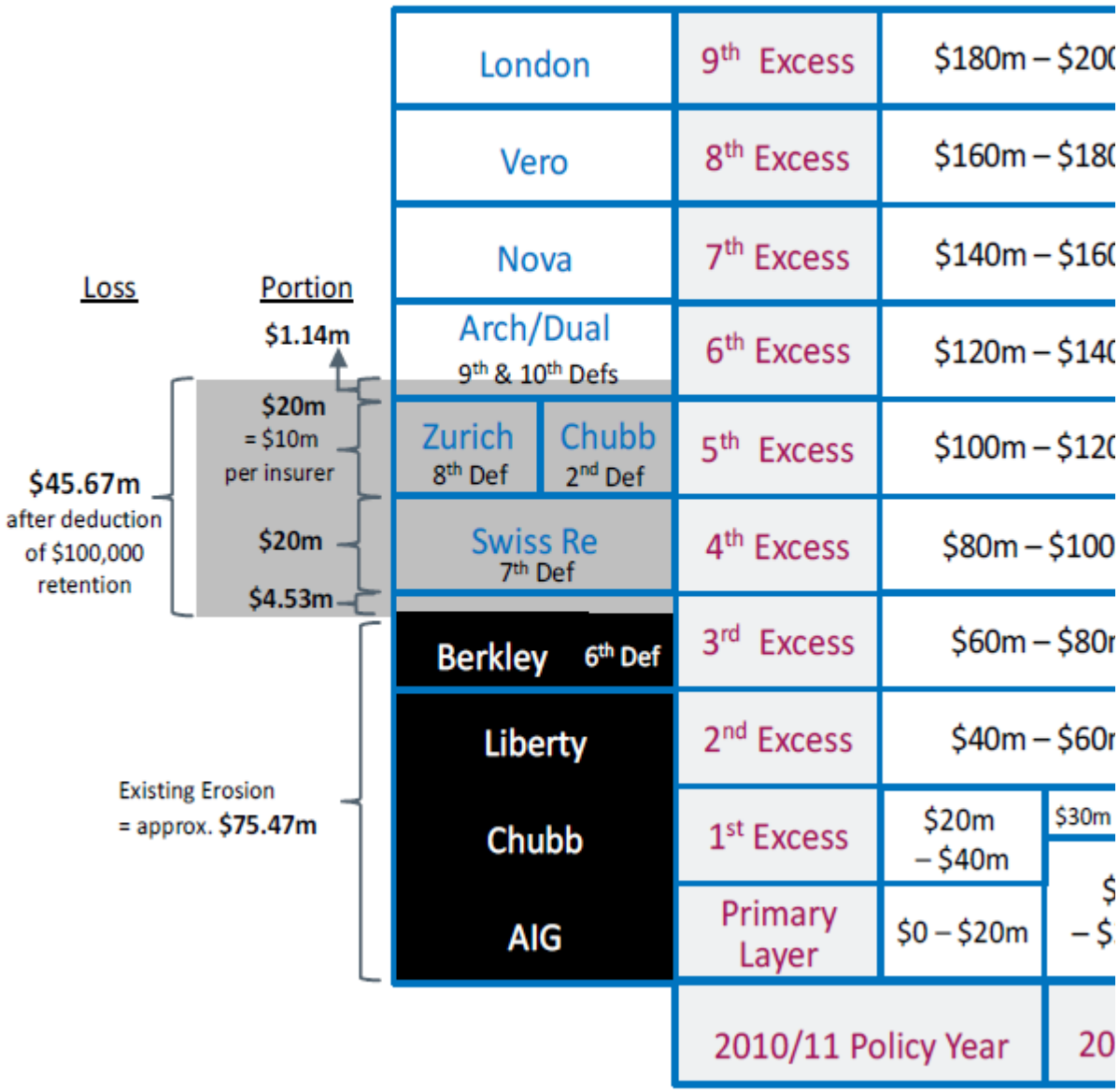
able to satisfy a differently constituted Court, perhaps, that it was not aware of relevant notifiable circumstances in 10/11.

11. These proceedings also involve two cross claims:

    1. A cross claim by the 2011 primary co-insurer (AIG) against two of the 2010 Insurers (Berkley and Swiss Re) for equitable contribution totalling 50% of any amount, for which AIG is found liable to pay CIMIC (AIG Cross Claim).

    2. A cross claim by Catlin against CIMIC seeking a declaration that the terms of its contract for excess insurance contained a continuity date of 30 June 2011, not 30 June 2005. In the alternative, Catlin sought an order for rectification to reflect that 2011 continuity date (Catlin Cross Claim). If successful, and the continuity date ought to be 30 June 2011, Catlin has a complete defence to CIMIC's claim.

12. A diagram taken from CIMIC's submissions illustrating the two towers of CIMIC' s D&O insurers in 2010/11 and 2011/12, and existing erosion and exposure is set out below.



13. As identified in the diagram:

    1. the 2010 Insurers have paid about $75.5 million for other claims not relevant to these proceedings. These payments exhausted the layers of AIG, Chubb and Liberty under the 2010 Primary Policy and eroded all but about $4.53 million in Berkley's excess layer.

    2. the 2011 Insurers have paid about $921,000 in relation to early Iraq File Note investigation costs incurred by CIMIC (the 2013/14 Payments), however, in June 2014 the 2011 Insurers stopped paying as they had formed the view that they were not in fact liable.

    3. The various insurers in either tower that would be liable to pay CIMIC's costs if it is successful in relation to all costs are shaded in grey.

Procedural history

14. On 8 June 2020, CIMIC commenced these proceedings. It amended its claim in October 2020, and then again on 4 February 2022 to insert additional claims in respect of payments made in what has been called the "Gregg Prosecution Costs".

15. On 28 June 2021, the matter was set down for a three-week hearing.

16. On 4 May 2022, I ordered separate determination of the liability relief and damages relief questions (Separate Hearing), pursuant to Uniform Civil Procedure Rules 2005 (NSW) (UCPR) r 28.2 and the Commercial List and Technology and Construction List Practice Note SC Eq 3 (Commercial List Practice Note), subject to the parties providing the following undertakings:

> (a) the relevant party will not appeal the judgment of Peden J on Liability Relief, once published, until the issue of Damages Relief and Interest Relief is determined.
>
> (b) the relevant party will not after the judgment on Liability Relief has been published until the judgment on Damages Relief and Interest Relief is published, raise an argument that Peden J:
>
> > (i) is part heard in the matter, or, is for any reason, the only judicial officer who can hear any issue concerning the Damages Relief and Interest Relief; or
> >
> > (ii) is in any way precluded from determining the proceedings in the context of the reference contemplated.

All the parties proffered these undertakings by 5 May 2022. Some of those parties gave the undertaking on a stated assumption that time would not start to run for the purposes of any appeal until after the Separate Hearing was completed.

17. The liability relief questions determined in this judgment concern the following prayers for relief in the Further Amended Summons against the 2011 Insurers:

> 3. A declaration that AIG and Chubb are each severally liable (according to their respective proportions) to indemnify the plaintiff (CIMIC) in accordance with the terms and conditions of a "Directors and Officers Liability and Company Securities Insurance Policy" being Policy No. 113690 for the "Policy Period" between 4 PM on 30 June 2011 and 4 PM on 30 June 2012 (the 2011 Primary Policy), subject to its "Limit of Liability" and "Retention" for:
>
> > (a) "Investigation Costs" (the AFP Investigation Costs) incurred in connection with an investigation by the Australian Federal Police (AFP) into matters which were the subject of a referral by CIMIC to the AFP on or about 7 November 2011 (the AFP Investigation);

(b) "Investigation Costs" (the ASIC Investigation Costs) incurred in connection with an investigation by the Australian Securities and Investments Commission (ASIC) into suspected contraventions of ss. 181, 184, and/or 1307 of various sections of the Corporations Act 2001 (Cth) (the Corporations Act) by the directors, officers and/or employees of CIMIC and/or its subsidiaries in about 2009 – 2011 including:

> (i) ss. 181, 184, and/or 1307 in relation to payments made to third parties during 2009 – 2011 to secure certain contracts concerning the development of offshore loading facilities for Iraq's crude oil exports;
>
> (ii) ss. 180, 182, 184 and/or 1307 in connection with payments made to a Dubai based company, Asian Global and Trading FZE, in or around August 2011; and
>
> (iii) ss. 1308, 1309 and/or 1041H by virtue of the extent of disclosure made to the ASX relating to the sale by Leighton International of a 35% portion of its Indian operations to Welspun Infra Projects Pty Ltd in or around April 2011.

(c) "Defence Costs" (the MCI Class Action Defence Costs) incurred in connection with the investigation and defence of representative proceedings commenced by Melbourne City Investments Pty Ltd (MCI) on its own behalf and on behalf of "Group Members" who acquired ordinary shares in CIMIC between 23 November 2010 and 3 October 2013, in the Supreme Court of Victoria, being:

> (i) Proceedings No. S CI 2013 05159 (the First MCI Class Action); and
>
> (ii) Proceedings No. S CI 2015 0163 (the Second MCI Class Action);

(d) "Defence Costs" (the Inabu Class Action Defence Costs) incurred in connection with the investigation and defence of representative proceedings commenced by Inabu Pty Ltd "as trustee for the Alidas Superannuation Fund" (Inabu) on its own behalf and on behalf of "Group Members" who acquired ordinary shares in CIMIC between 23 November 2010 and 3 October 2013 in the Australian Capital Territory District Registry of the Federal Court of Australia, being Proceedings No. ACD93 of 2016 (the Inabu Class Action); and

(e) "Loss" being CIMIC's liability to pay the "Settlement Amount" under a Settlement Deed dated 20 December 2019 entered into by CIMIC to settle the Inabu Class Action (the Inabu Settlement Amount); and

(f) "Defence Costs" and "Loss" (the Gregg Prosecution Costs) incurred in connection with the investigation and defence of the prosecution of Mr Peter Alan Gregg for offences under s. 1307 of the Corporations Act in relation to the falsification of books affecting or relating to affairs of CIMIC, being Proceeding No. 2017/22547 in (at trial) the District Court of New South Wales and (on appeal) the New South Wales Court of Criminal Appeal (the Gregg Prosecution).

4. A declaration that Catlin is liable to indemnify CIMIC in accordance with the terms and conditions of an "Excess Layer Insurance" policy, being Policy No. 891014 for the "Policy Period" between 4 PM on 30 June 2011 and 4 PM on 30 June 2012 (the First 2011 Excess Policy), subject to its "Limit of Liability" and "excess" for:

(a) the AFP Investigation Costs;

(b) the ASIC Investigation Costs;

(c) the MCI Class Action Defence Costs;

(d) the Inabu Class Action Defence Costs; and

(e) the Inabu Settlement Amount; and

(f) the Gregg Prosecution Costs.

5. A declaration that Liberty is liable to indemnify CIMIC in accordance with the terms and conditions of an "Excess Layer Insurance" policy, being Policy No. DO-SY-SPC-11- 500075 for the "Policy Period" between 4 PM on 30 June 2011 and 4 PM on 30 June 2012 (the Second 2011 Excess Policy), subject to its "Limit of Liability" and "excess" for:

(a) the AFP Investigation Costs;

(b) the ASIC Investigation Costs;

(c) the MCI Class Action Defence Costs;

(d) the Inabu Class Action Defence Costs; and

(e) the Inabu Settlement Amount; and

(f) the Gregg Prosecution Costs.

...

6A. Further or alternatively to paragraphs 1-6 above, if the Court finds that part (or parts) of the ASIC Investigation and/or the Gregg Prosecution were not (and are not) deemed to have been made during the period of the 2011 Primary Policy (the Non-Iraq Investigation), then, as against Chubb:

(a) a declaration that Chubb is liable to indemnify CIMIC in accordance with the terms and conditions of a "Directors and Officers

Liability Insurance" policy, being Policy No. 01CH5633023 for the "Policy Period" between 4 PM on 30 June 2013 and 4 PM on 30 June 2014, subject to its "Limit of Liability" and "Retention" for:

(i) "Legal Representation Expenses" incurred in connection with the Non-Iraq Investigation; and

(ii) the Gregg Prosecution Costs."

18. The damages relief and interest relief to be determined at the Separate Hearing concerns the quantification and reasonableness of the same categories of costs and interest payable on those costs..

19. In determining the application for the Separate Hearing, I was also persuaded that the following quantum issue should be determined in these proceedings:

> The quantification of the amount of the "Inabu Settlement Amount" (as defined in paragraph 156(a) of the FACLS) for which the First to Fifth Defendants are liable, including whether the Inabu Settlement Amount, or some other lower amount, is "Loss" (as defined in clause 4.21 of the 2011 Policies).

20. There were more than 14,000 pages of documents tendered in evidence, however, I informed the parties that I would not have regard to any material that was not referred to in oral or written submissions. Written submissions totalled almost 1000 pages and oral submissions went for 7 days. The Court was ably assisted by counsel in ensuring the conclusion of the hearing within the allocated time.

Factual background

Leighton's Operational Structure

21. At the time of the events in issue in these proceedings, Leighton conducted a construction contracting, services and project development business with more than 40,000 employees in over 20 countries. Its revenue in the 12 months to June 2011 was approximately $15.6 billion.

22. In 2009, Leighton was the sole shareholder of six subsidiaries, which together formed the "Leighton Group". The subsidiaries were referred to within the Group as "operating companies" and each had its own board, managing director (who attended the board meetings of Leighton Group), chief operating officer, corporate identity, and code of ethics.

23. The governance structure between Leighton and its operating companies involved a combination of lines of delegation and autonomy for the operating companies. That

framework was described in various terms by Leighton's senior executives as "flexible and decentralised" and promoting "adequate freedom … to operate". The framework included the following features:

1. Each operating company was managed by a Chief Operating Officer (COO), who was the principal executive with responsibility for the operations and performance of his respective operating companies. The COOs, in turn, reported directly to the Group CEO.

2. The operating companies operated under business plans approved by Leighton and were subject to 33 governance guidelines, which comprised Leighton's Governance and Risk Management Roadmap for Leighton Group Operating Companies, or as it was called internally at Leighton, the "Rules of Racing".

3. The Leighton Board maintained oversight of and supervision over the operations of the operating companies in relation to them meeting the targets set in its annual objectives and strategic agenda.

4. Each operating company provided a quarterly "Compliance Report" to Leighton' s Ethics and Compliance Committee. As part of the report, the managing director and COO certified that the operating company had policies and procedures in place, which were consistent with the Leighton Code of Ethics and compliant with the operating company's own code of ethics.

5. It was the role of the Leighton Audit Committee to ensure that Leighton's corporate governance policies and systems were consistent across the Leighton Group. The Audit Committee also received reports from the operating companies on matters such as project reviews and audits.

24. One operating company was Leighton International Limited (LIL). It appears from documents that LIL housed various divisions, including some that are relevant to this dispute:

    1. Leighton Offshore (Oil and Gas) Pte Ltd, which had different departments, such as Leighton Offshore Middle East;

    2. Leighton Contractors Singapore Private Limited; and

    3. Leighton Contractors India Pvt Ltd.

25. Some of these divisions were affected by a restructure to LIL in 2011 for reasons which will be detailed later.

Key Leighton Policies

26. There was no specific policy at Leighton addressing the risk of bribery and corruption until its introduction, at the request of the Ethics and Compliance Committee, in June 2011. Several of Leighton's guidelines were said to be relevant to the prevention and detection of bribery and corruption:

1. The Project Risk Management Guidelines required operating companies to undertake project audits and carry out annual reviews of tendering processes as well as of project execution.

2. The Tendering Processes and Practices Review Guideline required Leighton's Risk Management Group to review each operating company's processes for preparing and approving tenders.

3. The Corporate Ethics Guidelines contained the Leighton Code of Ethics, which was approved by the Board. The Code required, amongst other things, that directors and employees comply with the law and act honestly and with integrity.

27. The Group Work Procurement Guidelines were also relevant and had the following features:

    1. They allowed operating companies to conduct their own assessment of the terms of their bids/tenders for work, but within parameters established by the Leighton Board.

    2. Under cl 7.4, the Group CEO, or as delegated, the relevant Group COO, was required to approve the submission of tenders of "greater than A$500m or where the project involves high risks or complexities" and less than A$1 billion. In his evidence, Mr King, Leighton's CEO at all relevant times until 31 December 2010, described the delegation as a "standing delegation", which "didn't work on the hour by the minute", and COOs, like Mr David Savage (who features large in this litigation), did not necessarily discuss jobs with him before submitting tenders, even though a strict reading of the policy might have required that.

    3. A proposed tender by an operating company was also required to be compliant with all applicable laws and the code of ethics of the relevant operating company and the Leighton Group.

Key Individuals

28. Around the date of the creation of the Iraq File Note in November 2010, the following individuals were involved in the management of Leighton:

    1. Mr Wallace (or Wal) King was the CEO of Leighton from January 1987 until his resignation, taking effect on 31 December 2010. Mr King remained employed by Leighton until 31 January 2011 but ceased involvement with Leighton's committees and Board after 3 November 2010. As CEO, Mr King did not sit on the committees of the operating companies. He did, however, chair the Leighton Executive Committee until November 2010. That Executive Committee comprised the senior executives of Leighton, including Mr Savage. Mr King accepted that he gave the COOs considerable autonomy and discretion to run the operating companies within the Rules of Racing. Mr King gave evidence for CIMIC.

2. In July 2009, Mr David Stewart was appointed as one of the COOs of Leighton. The other COO at that time was William Wild. In his role as COO, Mr Stewart had oversight of LIL, including Leighton Offshore. As COO, he also attended some board meetings of the operating companies and approved authorities to prepare offers and submit tenders and quarterly project reviews. He also monitored management performance, policy compliance and major issues as appropriate. On 24 August 2010, a board meeting confirmed he was CEO-elect, and that was announced to the market via a media release on 13 September 2010. Mr Stewart was the CEO from 1 January 2011 until his resignation took effect on 19 November 2011, although his last day in the office was 25 August 2011. Mr King's evidence was that, after the public announcement of Mr Stewart as the incoming CEO in September 2010, Mr King was serving as a "caretaker CEO" and took a step back from executive decision-making, and encouraged Mr Stewart to assume control. On 2 June 2022, I issued Mr Stewart a section 128 certificate under the *Evidence Act 1995* (NSW) (*Evidence Act*) in relation to his evidence concerning the Iraq File Note matters.

3. From about December 2009 to 31 March 2011 (when he left Leighton), Mr David Savage was a Leighton COO, Managing Director of LIL, and Associate Director of Al Habtoor Leighton Group (AHLG). He reported directly to Mr King. Mr Stewart recorded conversations with Mr Savage in the Iraq File Note suggesting bribery. Mr Savage did not give evidence.

4. Mr William (or Bill) Wild was the only COO of Leighton between January 2006 and July 2009, when Mr Stewart was appointed as another COO. While he was the only COO, he had oversight of LIL, including Leighton Offshore. From early 2011, he was the Deputy CEO and COO of Leighton, and in that capacity supervised Mr Savage and was responsible for approving any tenders proposed by Mr Savage. Mr Wild investigated improper conduct of LIL (and therefore Mr Savage) in relation to a Malaysia dams project also. In early April 2011, Mr Wild announced his intention to resign from Leighton and, on 30 June 2011, he left Leighton. Mr Wild gave evidence for CIMIC.

5. Mr Peter Gregg was the Chief Financial Officer (CFO) of Leighton. Mr Gregg was not called to give evidence. He was prosecuted for offences under s 1307(1) of the *Corporations Act 2001* (Cth) (*Corporations Act*) for engaging in conduct that resulted in the falsification of company books and records, but was acquitted on appeal in 2020. The legal costs involved in his defence are known in this matter as the "Gregg Prosecution Costs" and are one category of costs sought by CIMIC.

6. Mr Stephen Johns was a non-executive director of Leighton and the Chairman of the Remuneration and Nominations Committee. He was appointed Chairman of Leighton on 24 August 2011, replacing Mr Stewart. He gave evidence for CIMIC.

7. On 20 June 2011, Mr Craig van der Laan was appointed as the General Counsel, Chief Risk Officer, and Chair of the Audit Committee at Leighton. He was not aware of the Iraq File Note until 3 November 2011. He did not give evidence.

8. Mr Stephen Sasse was the General Manager of Organisational Strategy, who, at Mr Stewart's request, gave a presentation to a meeting of Leighton's Ethics and Compliance Committee in 2011 in relation to an investigation into allegations of improper conduct by LIL (and therefore Mr Savage) between 2008 and 2011 concerning the construction of a pipe laying barge called "Leighton Eclipse". Mr Savage was working for LIL during that period. He did not give evidence.

9. Mr Hamish Tyrwhitt was Managing Director of Leighton Asia and, in Mr King's evidence, one of the possible choices for the CEO position to replace him. In fact, he replaced Mr Stewart as CEO in late 2011. He did not give evidence.

10. Mr Fergus Eley was an employee at Leighton Offshore involved in the Iraq Tender documentation and internal working documentation. He reported to Mr Russell Waugh and Mr Savage. He did not give evidence.

11. Mr Russell Waugh was the CEO of Leighton Offshore. He reported to Mr Savage. He was also the Managing Director of Leighton Contractors India Pvt Ltd. He was the primary negotiator of the Iraq contracts. He did not give evidence.

12. Mr Peter Cox commenced with Leighton Offshore in about late 2010 and reported to Mr Waugh, and, by May 2011, was the CEO of Leighton Offshore. He did not give evidence.

Leighton's Operations in Iraq

29. As noted above, Mr Savage was the COO of LIL and responsible for its tenders in 2010 and until early 2011.

30. Prior to July 2009, Leighton did not have operations in Iraq. Entry into a new market was subject to Leighton's requirement in the Group Work Procurement Guidelines that a "New Country Approval" be submitted to, and approved by, the Leighton Board. For that purpose, in July 2009, LIL (under Mr Savage) prepared a document entitled "Proposal to Enter New Geographic Market". The Proposal contained a "New country risk checklist", which noted (amongst other things):

    1. Local agents were not required for LIL to operate in Iraq.

    2. Iraq's score on the "Corruption Perception Index" was 1.3 out of 10, which placed Iraq as the second most corrupt country out of the 180 countries included in the survey.

    3. The security situation in Iraq was highly dangerous and LIL did not plan to "have [its own employees] onshore in Iraq".

31. At all times material to this case, the Leighton Board and senior executives took a consistent view of not being prepared to risk the safety of its own employees working onshore in Iraq.

Iraq Phase 1 Project

32. The South Oil Company of Iraq (SOC) was owned by the Iraqi government.

33. In 2009, SOC retained Foster Wheeler Energy Limited, an international engineering company, as the "Front End Engineering Design Contractor" (FEED contractor) to devise, conduct and make recommendations as to a competitive tender process for what was known as Iraq Phase 1 Project.

34. The project was one part of the broader Iraq Crude Oil Export Expansion Project (ICOEEP), which involved offshore pipeline and marine construction projects in Iraq, and which were to be funded by the US Government as part of the post-war reconstruction of Iraq.

35. Mr King's evidence was that the Iraq Project "was an unusual and complex job." However, I was not taken to evidence of the detail of the project, including the necessary equipment and components to be supplied and built by Leighton.

36. Leighton Offshore was one of four invitees chosen on 18 December 2009 by Foster Wheeler and SOC to bid for the Phase 1 Project. The other three international invitees were the National Petroleum Construction Company (NPCC), Saipem, and J Ray McDermott.

37. The bidding process worked in two stages. First, there was to be a simultaneous priced commercial bid and technical unpriced bid. Second, there was to be a priced bid evaluation. Each stage was subject to detailed evaluation by Foster Wheeler. Foster Wheeler required fixed, lump sum prices in US dollars be used in tenders, so that they included all contingency, uncertainties and risk costs; there was no allowance for variations in cost.

38. On 25 March 2010, Mr Savage provided Mr King with a copy of the Iraq tender "Green Sheet" (internal document summarising the elements and their cost for the proposed tender) and had a phone call with Mr King to discuss it. Mr King's unchallenged evidence was that he expressed some concern for the safety of employees in Iraq, but was content for the bid to proceed, subject to the ordinary Leighton tender processes being followed.

39. On 26 March 2010, Leighton Offshore's tender was approved by Leighton's then COO, Mr Stewart. Although there were concerns about the Iraq market due to its scores on international corruption assessments, Mr Stewart's evidence was that his concerns were assuaged because there was a competitive tender process arranged by Foster Wheeler, which involved well-known American, English and European construction companies.

40. By 30 March 2010, two of the invited tenderers, J Ray McDermott and NPCC, had declined to bid for the Phase 1 Works. The only tenderers remaining were Leighton Offshore and Saipem.

41. On 30 March 2010, Leighton Offshore, along with a joint venture partner known as Habtoor Leighton Holdings (HLG), a company in which Leighton held a substantial interest, submitted an initial commercial priced bid at US$633,470 and unpriced technical bid. Mr Savage signed the Approval to Submit Tender.

42. As between Leighton Offshore and Saipem, a 22 May 2010 summary of Foster Wheeler's evaluation of the technical bid indicated that Leighton received a slightly higher total bid evaluation score.

43. Foster Wheeler asked Leighton and Saipem to submit revised bid prices to take into account some changes in the scope of works by 28 May 2010.

44. In the meantime, in April 2010, Leighton Offshore first encountered Unaoil Limited (Unaoil), an onshore contractor. Unaoil's involvement in Leighton Offshore's tender is a matter critical to this litigation, because it is said to involve corrupt payments in relation to all the Iraq Project contracts won by Leighton.

45. Unaoil had originally been the proposed agent and contractor of J Ray McDermott, however, as J Ray McDermott's bid did not proceed, Unaoil sought to join a new bidder as a provider of onshore work. As detailed further below, from May 2010, various LIL entities entered into MOUs and Agreements with Unaoil to provide subcontract works as part of the Leighton Offshore tenders.

46. On 28 May 2010, Leighton Offshore submitted its revised bid at a fixed sum of US$688.725 million. The 2011 Insurers submitted this price increase was the result of a meeting between LIL's Mr Waugh and Unaoil's Mr Willimont in Perth, where Mr Waugh agreed to pay bribes.

47. On 15 June 2010, SOC issued an invitation to Leighton Offshore and Saipem to provide further updated tenders that included another change in scope of works; "Addendum 4" required additional works for supply of linepipe, amongst other things.

48. On 22 June 2010, Leighton Offshore submitted a revised fixed sum bid price of US$763.2 million, taking account of Addendum 4. This tender price was much lower than that of its competitor, Saipem, whose tender price was US$977.8 million.

49. On 13 October 2010, after further negotiations with SOC, Leighton Offshore gave its "best and final offer" of US$733 million for the Phase 1 works.

50. On 23 October 2010, Leighton Offshore entered into a US$733 million contract (Phase 1 Contract) with SOC. On that same day, Leighton announced the contract to the ASX in a media release, quoting Mr Savage:

> This project is a fantastic opportunity for Leighton, and coming closely behind the recent SPM [single point mooring] project win in Tanzania, provides strong recognition of Leighton's strength and experience in SPM installations... In recent years, Leighton has built an enviable track record on SPM's and large diameter pipelines, having worked on some 13 SPM's around the Asia region. Being awarded the Middle East's largest and most prominent SPM contract is a great honour for us and great reflection of the strength of our capabilities.

Iraq Phase 3 Project

51. Leighton Offshore did not win the Phase 2 Project and nothing turns on that in this litigation.

52. On 1 November 2010, SOC's FEED contractors, Iraq Sealine and Japan Oil, issued an invitation to bid for the Iraq Phase 3 Project (or "JICA" Phase), with bids due on 4 February 2011. I was not taken to any of the technical detail of what was involved in this project.

53. Mr Stewart was aware of the opportunity to bid at the time, but was not involved in the tender.

54. Around this time, Mr Waugh, on behalf of Leighton Offshore, was seeking to have the invitation to bid withdrawn and for Leighton Offshore to instead obtain the Iraq Phase 3 Project as an extension or variation of the Iraq Phase 1 Contract. These attempts proved unsuccessful.

55. On 18 April 2011 (after Mr Savage had left Leighton), Leighton Offshore submitted its bid for Phase 3 and, on 13 October 2011 (after Mr Stewart had been replaced), it was awarded a US$518.157 million contract (Phase 3 Contract).

Creation of the Iraq File Note on 23 November 2010

56. The Iraq File Note was handwritten by Mr Stewart on 23 November 2010, during, and shortly after, an in-person conversation with Mr Savage, and also shortly after a telephone call with Mr Savage on the same day. At the time, it was Mr Stewart's practice to keep a notebook, in which he made notes during and after meetings. There are no other contemporaneous file notes of these conversations.

57. Mr Stewart's recollection was that the in-person meeting with Mr Savage ran for around 20 minutes in total, of which, 10 minutes was spent discussing the Iraq Project. At that time, Mr Stewart was aware that Leighton Offshore had won the Phase 1 Contract and a possible extension to the Iraq Phase 1 Project was being negotiated, because it had been discussed at various Leighton Board meetings.

58. Given the centrality of the Iraq File Note in these proceedings, it is set out in full below. Mr Stewart accepted the below words were handwritten by him, and he agreed that the definitions in square brackets were an accurate explanation of the shorthand he had used:

> Iraq Project Discussion
>
> File Note 23/11/10
>
> Meet D.G. Savage
>
> Advised me that he has an opportunity to negotiate a US$500 extension /variation to the current contract in Iraq but it will require a payment to a 3rd Party N.S.C. [nominated sub contractor] who will do all onshore works.
>
> The payment for the N.S.C [nominated sub contractor] for onshore work is $50-$60 Mill. D. Stewart asked what is the real value of the work & he said < 50% of the payment.
>
> I asked him how we won the current $720 contract & he says it was won by a $87 Mill payment to a N.S.C [nominated sub contractor] on the same terms.
>
> I asked did WMK [Mr King] approve this & he said yes. I said I will talk to WMK & he said that WMK will now deny it or have 'forgotten it'.
>
> I said I understand the concept & it is exactly what got the AWB [Australian Wheat Board] into trouble with their trucking contract at 2 – 3 x Market Rate. I asked what Foster Wheeler think about it?
>
> I asked who negotiated it? He said Russell Waugh.
>
> I said I will talk to Wal [Mr King] and he said No.
>
> I said I will think about it & that I am not comfortable but understand the plan.
>
> I asked how we pay & he said proportional to our payments.
>
> _____
>
> Thought about it, talked to WJW [Mr Wild] & we agreed to tell David [Savage] we do not agree & if we can't win without this, we don't want the job.
>
> Tried to call @ 6.05. Left a message to call me about Iraq.
>
> Call again @ 6.25pm.
>
> Spoke to DGS [Mr Savage] and made it clear that I was not comfortable with the arrangements & that if he can't win without this, then we don't want the work. WMK [Mr King] is still the CEO & if he is O.K. with it, then go for it, but be aware I will not support it.

> I told him I fully understand the concept & the fact we have been introduced to this 'N.S.C' [nominated sub contractor] by the client but it is too much money & a clear lack of value of money & we should not do it.
>
> _____
>
> D.G.S. [Savage] said that R.W. [Russell Waugh] was in Bagdad now and meeting with the Minister PTO to try to negotiate this job. DGS [Savage] says he will ring Russell [Waugh] & talk to him.
>
> D Stewart says that WMK [King] is still CEO & if he is O.K. with it go for it but he has to approve it & I will not ask Wal [King] about the current job.

59. While not recorded in the File Note, in the days afterwards, Mr Stewart also described his conversations with Mr Savage to Mr Gregg and Mr Sasse, neither of whom gave evidence. Mr Savage also did not give evidence.

Leighton after 23 November 2010

Restructure of Leighton International

60. As the new CEO from 1 January 2011, Mr Stewart had decided to restructure LIL. The effect of the restructure was to reallocate most parts of LIL's existing business to other entities including Leighton Asia. The plan was put into effect following a review of LIL conducted in January 2011 by Mr Wild, Mr Sasse, and Mr Savage.

61. From January 2011, Leighton also introduced a new process whereby Leighton executives would be nominated as directors of each operating company board. Mr Wild was appointed the nominated executive of LIL. In this role, Mr Wild was to attend board meetings of LIL and conduct financial reviews as he saw fit. An internal memorandum recorded that he was to be responsible for:

> ... ensuring that the OpCos [operating companies] and LIL meet LHL's performance expectations, with a particular emphasis on project performance, operational risk management, tender and pre-contract disciplines, approval of all new geographies, project execution and project review processes. All tenders over $500 million in value require sign off by LHL and should be directed to [Mr Wild].

62. Because Mr Wild was responsible for approving LIL tenders and the submission of completed LIL tenders, Mr Savage lost his authority to have the final say in relation to the Phase 3 tender. That tender was submitted after Mr Savage had left Leighton.

Profit downgrade

63. On 11 April 2011, Leighton, through Mr Stewart, announced to the ASX that it expected to report a loss of $427 million for the 2010/11 financial year, short of its previous expectation of a profit of $480 million after tax. According to the ASX release, the approximate $900 million downgrade was:

> ...primarily due to write-backs of expected profit on the Airport Link project in Queensland and the Victorian Desalination Project, and an impairment of Leighton's investment in the Habtoor Leighton Group (HLG).

"Discovery" of the Iraq File Note

64. As noted above at [28(7)], in June 2011, Mr van der Laan was appointed to the newly created positions of Chief Risk Officer and Group General Counsel for the Leighton Group.

65. In August 2011, there were a number of other personnel changes at Leighton which were announced to the market:

    1. Mr Johns replaced the previous Chairman, Mr David Mortimer; and

    2. Mr Stewart was replaced as CEO by Mr Tyrwhitt, with immediate effect.

66. The Iraq File Note first came to the attention of Leighton's external solicitors in November 2011 during a document review, which was conducted in order to respond to a notice issued under *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*) s 33 as part an ASIC investigation concerning the April 2011 profit downgrade. In response to that request, Mr Stewart supplied documents, including his notebooks, which contained the Iraq File Note. Prior to that time, Mr Stewart had not disclosed the existence of the Iraq File Note to any person and had not discussed any matters recorded in it with anyone other than Mr Wild, Mr Sasse, and Mr Gregg.

67. In November 2011, Leighton's solicitors informed Mr van der Laan of the Iraq File Note, who, in turn, informed Mr Johns. A meeting then took place between Mr van der Laan and Mr Johns, followed by a second meeting with Mr Tyrwhitt and Mr Wayne Osborn, then Chairman of the Ethics and Compliance Committee. Leighton then engaged external solicitors, Allens, for legal advice.

68. Mr Johns' evidence was that, at the time, he was shocked and did not consider the allegations in the Iraq File Note to be true based on his experience on the board and his knowledge of Leighton as a company.

69. Shortly thereafter, a unanimous decision was made by the Leighton Board to conduct an internal investigation to determine the veracity of the allegations contained in the Iraq File Note, and also to refer the Iraq File Note to the Australian Federal Police (AFP). Mr Johns

gave evidence that the decision to refer the Iraq File Note was reached very quickly. The outcome of the internal investigation was not in evidence.

70. On 7 November 2011, Leighton's solicitors wrote to the AFP and enclosed the following materials (together, the AFP Referral):

    1. A copy of the Iraq File Note.

    2. A document setting out Leighton's understanding as to individuals identified by initials or abbreviations in the Iraq File Note, the roles of those individuals as at 23 November 2010, and whether the individuals were still employed by the Company. Consistent with the transcription of the File Note above, those individuals were Messrs Savage, Stewart, King, Wild and Waugh. As at 7 November 2011, of those persons, only Mr Waugh remained employed at any Leighton company.

    3. An ASX media release issued on 25 October 2010 entitled "Leighton Offshore awarded US$733m Iraq Crude Oil Export Facility Project", which referred to the signing of the Phase 1 Contract.

    4. An ASX media release issued on 25 October 2011 entitled "Leighton awarded US$518m Iraq Crude Oil Project" which referred to the award of the Phase 3 Contract.

    5. A draft ASX media release "to be issued by the Company in the event that aspects of any investigation by the AFP become public".

71. The covering letter noted:

> At this stage, it is unclear whether the contract announced on 14 October 2011 is the "US$500m extension/variation to the current contract" referred to in the Notebook Entry, an alternative version thereof or a completely separate contract.
>
> We confirm that the Company will cooperate with any investigation undertaken by the AFP into issues referred to in the Notebook Entry.

72. On 9 November 2011, the AFP responded to the Referral and indicated that "[t]he information contained in the referral indicates foreign bribery offences may have been committed by Leighton Offshore employees" and commenced an investigation.

73. Initially, the AFP allowed Leighton to collect information and report to the AFP for the AFP's evaluation. Subsequently, the AFP obtained a search warrant dated 12 December 2012, authorising the AFP to enter and search the premises of Leighton's external solicitors. The suspected offence was identified in the search warrant as follows:

> That between 2009 and 2011, in Iraq and Australia, David Stewart, David Savage, Russell Waugh, Peter Cox, Wallace King, William Wild and divers other employees

> of Leighton Offshore Private Limited, Leighton International Limited and Leighton Holdings Limited, caused a benefit to be paid to a foreign public official contrary to *Section 70.2(1)(ii)* of the *Criminal Code Act 1995 (Cth)* .

74. In early 2012, the AFP charged Mr Waugh with alleged foreign bribery and Mr Savage with allegedly misleading the Leighton's Board in an October 2010 presentation about the Iraq tender. As at the hearing, those trials had not commenced.

75. On 13 February 2012, Leighton issued a media release to the ASX, which stated that Leighton Holdings:

> … had reported to the [AFP] a possible breach of its Code of Ethics that, if substantiated, may contravene Australian laws.
>
> The possible breach related to payments that may have been made by Leighton's subsidiary company, Leighton Offshore Pte Limited, in connection with work to expand offshore loading facilities for Iraq's crude oil exports.
>
> …
>
> At this stage it is not known whether there has been any wrongful or illegal conduct, or whether there will be any adverse financial consequences for Leighton. The AFP investigation is at an early stage …

2012 Notification

76. On 23 February 2012, Leighton, through its broker Marsh, notified the 2011 Insurers by email referring to "attached information notifying circumstances that may give rise to a claim" and relying upon the Notification Clause in the 2011 Primary Policy and incorporated in the 2011 First and Second Excess Policies (2012 Notification). The 2012 Notification was subsequently copied to Catlin and Liberty.

77. The 2012 Notification indicated that Leighton had reported a possible breach of its Code of Ethics to the AFP which, if substantiated, might contravene Australian laws.

78. The 2012 Notification contained the following material:

    1. A cover letter to Marsh;
    2. An ASX announcement issued on 13 February 2012;
    3. The AFP Referral made on 7 November 2011.

The 2012 Notification did not make any reference to any ASIC investigation nor attach a copy of the Iraq File Note.

79. By the time of the 2012 Notification, the AFP Investigation had already involved five voluntary interviews and a review of a substantial number of documents.

80. In February 2012, Leighton also indicated to the broker Marsh that "the Company's internal investigation has focussed on the collection of electronic data. At the request of the AFP, only one interview has been undertaken by the Company at this stage."

81. In March 2012, ASIC commenced an investigation in relation to the 13 February 2012 media release and issued a s 33 notice under the *ASIC Act* seeking documents.

Categories of Payments/Costs Claimed

82. All the defendants accept that CIMIC has incurred costs, in relation to which it seeks remedies. The costs have been identified as:

    1. AFP Investigation Costs;
    2. ASIC Investigation Costs;
    3. MCI Class Actions Defence Costs;
    4. Inabu Class Action Defence Costs;
    5. Inabu Class Action Settlement Sum; and
    6. Gregg Prosecution Costs (Defence and Witness Costs)

Each type of loss is briefly described below.

83. CIMIC relies upon the 2011 Deeming Clause (as incorporated into the 2011 Excess Policies) to deem notification of *all* the investigations, class actions and prosecutions as having been made with the 2012 Notification, because they arose out of, were based upon and/or were attributable to the same or similar originating cause — that is, the facts or contraventions of Australian law alleged or described in the AFP Referral and circumstances the subject of the 2012 Notification. Accordingly, CIMIC submitted the 2011 Insurers are liable for a single "Claim" including all categories of loss.

84. Since 2012, CIMIC has sought confirmation from the 2011 Insurers that they would indemnify it for these costs. The 2011 Insurers made the 2013/14 Payments, but then changed their view of their legal liability, and thereafter have refused to indemnify CIMIC for all categories of costs.

AFP Investigation costs

85. Since the AFP Referral in November 2011, certain Leighton officers (Messrs Cox, Savage, Stewart and Wild) have been subject to an AFP investigation, which was still on foot at the time of the hearing. Various fees, costs and expenses have been paid by Leighton.

86. There is no dispute that the 2011 Insurers are liable for these costs (before the limitation defence). Quantum will be determined at the Separate Hearing.

ASIC Investigation(s) costs

87. From March 2014 ASIC commenced an investigation into matters concerning the Iraq File Note and the 2012 ASX announcement (ASIC Iraq Investigation). There is no dispute that the 2011 Insurers are liable for the Iraq Investigation costs (before the limitation defence), and quantum will be determined at the Separate Hearing.

88. However, in May 2014, the ASIC investigation expanded into other suspected contraventions of the *Corporations Act* not related to the Iraq File Note, and the issue is whether the investigation remained one, for which the 2011 Insurers are liable, or whether the Non-Iraq Investigation costs ought to be borne by the later 2013/14 Primary Insurer, Chubb, as a new Claim notified in that policy year.

MCI Class Actions costs

89. On 4 October 2013 and then on 14 April 2015, Melbourne City Investments (MCI) commenced representative proceedings in the Supreme Court of Victoria against Leighton. Both actions alleged various contraventions of the *Corporations Act* , including misleading and deceptive conduct and breaches of continuous disclosure obligations under the ASX Listing Rules (e.g. r 3.1), concerning the failure to disclose the Iraq File Note. The October 2013 MCI Class Action was permanently stayed, and the April 2015 MCI Class Action was discontinued.

90. The issue is whether the 2011 Insurers are entitled to rely upon s 28(3) *IC Act* rights in relation to "Company Securities Claims" and reduce their liability for these costs to nil. The contest is the same as for the Inabu Class Action costs.

Inabu Class Action (Defence Costs and Settlement Amount)

91. On 23 November 2016, Inabu Pty Ltd (Inabu) commenced representative proceedings, by a closed class, against CIMIC in the Federal Court of Australia. Inabu alleged contraventions of the *Corporations Act* and ASX Listing Rules in similar terms to that of the MCI Class Actions.

92. On 20 December 2019, the Inabu Class Action was settled by confidential deed. On 28 April 2020, Jagot J approved the lump sum of $32.4 million (Inabu Settlement Amount) pursuant to sections 33V and 33ZF of the *Federal Court of Australia Act 1976* (Cth) : *Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Limited* [2020] FCA 510.

93. In these proceedings, CIMIC seeks to recover costs incurred in defending the class action, as well as the Inabu Settlement Amount paid. This is the largest category of costs. The 2011 Insurers seek to rely on s 28(3) *IC Act* to reduce their liability to nil.

94. Unlike the quantum of the other cost categories and interest payable, which are to be resolved in the Separate Hearing, the quantum and reasonableness of the Inabu Settlement was retained as part of these proceedings.

Gregg Prosecution

95. The ASIC investigation into matters concerning Mr Gregg's conduct commenced in March 2014 with the service of s 33 *ASIC Act* notices in relation to suspected contraventions of insider trading provisions in s 1034A of the *Corporations Act* . The scope of that investigation was subsequently expanded with the service of further s 30 *ASIC Act* notices in May 2014.

96. The only issue here is whether the Gregg Prosecution arose out of the same originating cause as that described in the AFP Referral and the 2012 Notification, meaning the 2011 Insurers are liable, or whether Chubb is liable under the 2013/14 Policy. Again, quantum will be determined at the Separate Hearing.

Overview of the Policies

97. This case turns on the proper construction of provisions in the relevant insurance policies. There are three primary policies and eight excess policies relevant to this case.

98. The key terms of the 2011 Primary Policy are reproduced in the Appendix to this Judgment. Terms are capitalised in this Judgment where they reflect defined terms in the policies.

2010 Policies

99. The 2010 Primary Policy was between CIMIC and, initially, AHA and subsequently, AIG as lead insurer.

100. The 2010 Primary Policy provided cover to CIMIC for "Loss" arising out of "Claims", including for "Defence Costs" incurred in connection with a "Securities Claim" and "Investigation Costs" paid on behalf of "Insured Persons".

101. The 2010 Primary Policy relevantly contained clauses in the same terms as the 2011 Primary Policy, such as the Notification Clause and Deeming Clause, which are reproduced in the Appendix, save for the following:

    1. The "Policy Period" for the 2010 Primary Policy was between 30 June 2010 and 30 June 2011 (Schedule, Item 2).

    2. The "Limit of Liability" was $20 million (cl 4.20 and Schedule, Item 5) rather than $30 million in 2011.

    3. AIG was the sole primary insurer in 2010, unlike in 2011 where it had an underlying co-insurance arrangement with Chubb in the proportions of 50% or $15 million each.

    4. The "Retention" was specified as $250,000 from a Securities Claim and $100,000 for any other Claim (cl 4.30 and Schedule, Item 8), unlike the increased retention of $1 million in 2011. A single Retention applies to all Loss arising from any Claim (cl 6.2).

    5. The "Premium" was $132,000 (Schedule, Item 9), which was increased to $345,000 in 2011.

102. There were six excess policies in total between CIMIC and, in numerically ascending order, Chubb, Liberty, Berkley (formerly WRB), Swiss Re (formerly AXIS, Zurich (subject to a coinsurance arrangement with Chubb covering 50% each) and Arch and Dual (formerly Lloyd's Syndicate).

103. Each 2010 Excess Policy follows the same approximate structure: first, the relevant excess insurer agreed to provide insurance to the Insureds (as defined under the 2010 Primary Policy); then the excess insurer provides insurance in excess of applicable "Underlying Limits" for the "Underlying Policies".

104. Underlying Limit is defined to mean "an amount equal to the aggregate of all [underlying] limits of liability … plus the uninsured retention, if any, applicable to the Primary Policy" (see, eg, First 2010 Excess Policy cl 6.6).

105. The Excess Policies substantially incorporate the terms relating to cover for "Loss" arising out of "Claims" in the 2010 Primary Policy as well as the 2010 Notification Clause and 2010 Deeming Clause.

106. There are also slight variations between the Excess Policies in the definition of "Insured". For instance, the Second 2010 Excess Policy defined "Insured" to include "each person or entity insured under the Primary Policy" (cl 10). The Fourth 2010 Excess Policy defined "Insured" to include "any person(s) or entity(ies) that may be entitled to coverage under the Primary Policy at its inception" (cl IIC). Nothing is said to turn on these differences.

107. Each of the 2010 Excess Policies provides for a liability limit of $20 million.

108. Under the Fifth 2010 Excess Policy, the insurers, CIC and Zurich, agree to be liable as the Insurer severally and not jointly in the proportions of 50% each.

2011 Policies

109. The 2011 Primary Policy was between CIMIC, AIG (then known as Chartis), and Chubb, (then known as ACE). There is no material difference between the terms of the 2010 and 2011 Primary Policies.

110. However, I note the following features of the 2011 Primary Policy:

    1. The "Policy Period" for the 2011 Primary Policy was between 30 June 2011 and 30 June 2012 (Schedule, Item 2).

    2. The "Limit of Liability" was $30 million (cl 4.20 and Schedule, Item 5).

    3. AIG had an underlying co-insurance arrangement with Chubb in the proportions of 50% or $15 million each.

    4. The "Retention" was specified as $1,000,000 for a Securities Claim and $100,000 for any other Claim (cll 4.30, 6.2 and Schedule, Item 8)

    5. The "Premium" was $345,000 plus charges (Schedule, Item 9)

111. There were two excess policies:

    1. The First 2011 Excess Policy was between CIMIC, Catlin Syndicate 2003 and Catlin Australia (together Catlin Defendants). CIMIC sues Catlin Syndicate as a member of SJ Catlin and others, and Catlin Australia as an agent for members of Syndicate 2003 at Lloyd's.

    2. The Second 2011 Excess Policy was between CIMIC and Liberty.

112. The 2011 Excess Policies were all brokered by Marsh and on the Marsh standard excess wording.

113. Clause 1.1 of the 2011 Excess Policies contained an insuring clause in the following terms:

> We agree to insure on the same terms as the primary policy except as specifically set out in this excess layer policy and any attached endorsements.

114. Clause 5.1 provided:

> The obligations of the Insured in relation to notifications or claims under this Excess Layer Policy are the same as its obligations under the Primary Policy. We are entitled to the same rights and benefits as the Primary Policy Insurer in relation to notifications or claims under the Primary Policy.

115. Accordingly, the 2011 Excess Policies substantially incorporated provisions in the 2011 Primary Policy, including the definitions of "Loss" and "Investigation Costs", as well as the 2011 Notification Clause, 2011 Deeming Clause, Aggregation Clause, Advance Payment Clause, Prior Claims and Circumstances Exclusion, and the Continuity Clause (including the Primary Continuity Date).

116. The only issue which arose in relation to the 2011 Excess Policies was Catlin's cross claim about the continuity date in the First 2011 Excess Policy, as detailed below at paragraphs [498] ff.

117. Under the First 2011 Excess Policy, Catlin agreed to indemnify CIMIC on the same terms as the 2011 Primary Policy. This was expressly made subject to a liability limit of $10 million (cl 1.1), and "the other terms of this Excess Layer Policy, as excess insurance over the Underlying Insurance" (cl 1.2). The Second 2011 Excess Policy was the same except for a liability limit of $20 million (cl 1.2).

2013 Primary Policy

118. The 2013 Primary Policy is only relevant to these proceedings if I do not find the 2011 Policy indemnifies CIMIC for the Non-Iraq ASIC Investigation Costs and Gregg Prosecution Costs. Counsel for Chubb accepted that if the Gregg Prosecution Costs were not caught by the earlier policies, then they must be caught by its 2013 Primary Policy. Chubb did not expressly accept that if the Non-Iraq related ASIC Investigation Costs were not caught by the earlier policies, then they must be caught by the 2013 Primary Policy. However, they must be, given the relevant Non-Iraq aspects of the ASIC Investigation were the subject of a notification by Leighton in May 2014 within the 2013/14 Policy Period.

119. CIMIC submitted that if the relevant Loss falls within the 2013 Primary Policy, then there is no positive case maintained by Chubb as to the operation of continuity provisions or breach of disclosure obligations under that policy, so there is no need for CIMIC to seek coverage for that Loss against the 2010 Insurers.

120. The relevant clauses in the 2013 Primary Policy differ from the 2010 and 2011 Primary Policies, but need not be considered in any detail in light of the conditional concession of liability under that policy by Chubb.

121. None of the 2013 Excess Policies are relevant, because it was not in dispute that these costs are not likely to exceed the liability limit in the 2013 Primary Policy of $20 million (cl 5.1(a); Schedule, Item 3), even with a retention figure of $1,000,000 (cl 5.2; Schedule, Item 4).

Construction of Insurance Contracts

122. Central to this case is the proper construction of various clauses of the policies. The relevant principles of construction are not in doubt, and it is sufficient to note that:

    1. It is trite that the process of construing insurance contracts is governed by ordinary principles of contractual interpretation: *Australian Casualty Co Ltd v Federico* [1986] HCA 32; (1986) 160 CLR 513 at 520 (Gibbs CJ); *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; (2000) 203 CLR 579 at 589 [22] per Gleeson CJ. A clause in an insurance policy must be considered in the context of the policy as a whole, and the policy must be set in its surrounding circumstances or factual matrix, including, if excess policies are involved, the broad scheme of insurance cover intended to provide layers of insurance against the same risk: D K Derrington and R S Ashton, *The Law of Liability Insurance* (3rd ed, 2013, LexisNexis Butterworths) at 422 [3–64]; *Quintis Ltd (Subject to a Deed of Company Arrangement) v Certain Underwriters at Lloyd's London Subscribing to Policy Number B0507N16FA15350* [2021] FCA 19 at [35] (Lee J).

    2. The court seeks to give effect to the intention of the parties based on the meaning of the words used and based on what a reasonable person would have understood the language to convey. Further, where words are unambiguous, they cannot be ignored simply to reach a result that is apparently more commercially convenient. Preference is given to a construction supplying a congruent operation to the various components of the whole and to avoid making commercial nonsense: *HDI Global Specialty SE v Wonkana No 3 Pty Ltd* [2020] NSWCA 296, 104 NSWLR 634 at 639-641 [18]-[31] (Meagher JA and Ball J) 655 [114] (Hammerschlag J).

    3. Regard may be had to the "genesis, aim and purpose" of the contract and a commercially sensible construction is to be preferred: see eg *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104 at 116 [46]-[52] (French CJ, Nettle and Gordon JJ).

    4. An objective approach is taken to the construction process. Subjective intention of the parties is only relevant to rectification: *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47; (2016) 260 CLR 85 at 95 [18] (French CJ); *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65; (2007) 69 NSWLR 603 at 655 [261] (Ca mpbell JA, with whom Tobias JA agreed).

123. There was no contest that the 2012 Notification satisfied the requirements of cl 5.1 of the 2011 Policy in terms of notifying a "Claim". As noted above, the terms of the 2010 and 2011 Polices are identical (while the commercial schedules are different).

124. The 2011 Insurers' primary concern was the Company Securities Claims (MCI Class Action and Inabu Class Action), because they amounted to the largest component of CIMIC's costs. Their primary defence was that Leighton breached s 21 *IC Act* by failing to disclose the fact and contents of the Iraq File Note prior to the inception of the 2011 Policy, such that, pursuant to s 28(3) *IC Act*, the 2011 Insurers are entitled to reduce their liability for Company Securities Claims to nil.

125. CIMIC's position was that the 2011 Insurers have expressly excluded those s 28 *IC Act* rights in the Policy terms – in particular cll 5.3 and 7.1. CIMIC submitted that cl 7.1 means that the 2011 Insurers only retain a s 28(3) *IC Act* right where there was fraudulent failure to disclose a relevant matter in relation to a Company Securities (cl 1.2) claim.. As fraud is not alleged, CIMIC said the 2011 Insurers have no right to reduce their liability to indemnify CIMIC based on the 2012 Notification.

126. Before construing cl 7.1, it is necessary to consider sections 21 and 28 *IC Act* which concern an insured's obligation to disclose and the insurer's possible rights.

127. Section 21 of the *IC Act* relevantly provides:

> **The insured's duty of disclosure**
>
> (1) Subject to this Act, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that:
>
> > (a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or
> >
> > (b) a reasonable person in the circumstances could be expected to know to be a matter so relevant, having regard to factors including, but not limited to:
> >
> > > (i) the nature and extent of the insurance cover to be provided under the relevant contract of insurance; and
> > >
> > > (ii) the class of persons who would ordinarily be expected to apply for insurance cover of that kind.
>
> (2) The duty of disclosure does not require the disclosure of a matter:

(a) that diminishes the risk;

(b) that is of common knowledge;

(c) that the insurer knows or in the ordinary course of the insurer's business as an insurer ought to know; or

(d) as to which compliance with the duty of disclosure is waived by the insurer.

128. Section 28 provides:

General insurance

(1) This section applies if a relevant failure occurs in relation to a contract of general insurance, but does not apply if the insurer would have entered into the contract, for the same premium and on the same terms and conditions, even if the failure had not occurred.

(2) If the relevant failure was fraudulent, the insurer may avoid the contract.

(3) If the insurer is not entitled to avoid the contract or, being entitled to avoid the contract (whether under subsection (2) or otherwise) has not done so, the liability of the insurer in respect of a claim is reduced to the amount that would place the insurer in a position in which the insurer would have been if the relevant failure had not occurred.

129. Section 27AA defines "relevant failure" to mean:

Meaning of relevant failure

(1) In this Act, a *relevant failure* in relation to a contract of insurance is:

(a) if the contract is, or would be, a consumer insurance contract--a misrepresentation made by the insured in breach of the duty to take reasonable care not to make a misrepresentation; or

(b) otherwise:

(i) a failure by the insured to comply with the duty of disclosure; or

(ii) a misrepresentation made by the insured to the insurer before the contract was entered into.

(2) Without limiting subsection (1), if, in relation to a contract of life insurance under which a person other than the insured would become a life insured:

(a) the life insured made a misrepresentation during the negotiations for the contract but before it was entered into; and

(b) the misrepresentation would have been a breach of the duty to take reasonable care not to make a misrepresentation if that duty had applied to the life insured in relation to the contract;

then the misrepresentation is a *relevant failure* in relation to the contract (whether or not the contract is a consumer insurance contract).

130. The *Insurance Contracts Amendment Act 2013* (Cth) inserted the two non-exclusive factors for consideration in ss 21(1)(b)(i)-(ii) , however, those amendments have no effect on policies entered into prior to 28 December 2015 and, accordingly, there is no material effect on the 2011 Primary Policy. No party submitted the absence of these amendments had any importance here.

131. There was no dispute that the 2011 Insurers had properly informed CIMIC of the nature and effect of the s 21 duty of disclosure required by s 22 *IC Act*.

132. The s 21 *IC Act* duty of disclosure applies "before the relevant contract of insurance is entered into" (s 21(1)). Whether the duty has been complied with must be assessed at the time the contract is made, not at some later time. In *Prepaid Services Pty Ltd v Atradius Credit Insurance N V* [2013] NSWCA 252 at [98]-[100] , Meagher JA (with whom Macfarlan and Emmett JJA agreed) stated:

> [98] The duty of disclosure under s 21(1) is a duty to disclose what is known to the insured "before the relevant contract of insurance is entered into". That is the time when the contract is made (s 11(9))... The duty is to disclose every "matter that is known" which the insured also "knows to be a matter relevant" or which a reasonable person could be expected to know to be a matter relevant to the insurer. That relevance must either be to the decision of the insurer as to whether to "accept the risk" or as to the terms on which it will do so. The word "knows" means more than believes or suspects or even strongly suspects: *Permanent Trustee* at [30] per McHugh, Kirby and Callinan JJ. In this context "matter" describes anything which is known to the insured which also is known to be relevant, or that could be expected to be known to be relevant, in each case in the respects described above. This requirement directs attention to the state of mind of a reasonable person in the circumstances of the insured and protects the insurer against inadequate disclosure by an insured who is unreasonable, idiosyncratic or obtuse: *CGU Insurance Ltd v Porthouse* (2008) 235 CLR 103; 248 ALR 240; [2008] HCA 30 at [52] and [53] per Gummow, Kirby, Heydon, Crennan and Kiefel JJ.
>
> [99] The fact that an opinion is held is something that may be known and an insurer may be influenced in its decision to accept a risk, or as to the terms on which it will do so, by the fact that an opinion is held. That is so irrespective of whether the opinion is held by the insured or by a third party, as for example might be the case with a medical opinion concerning the insured. Under the common law such opinions are capable of constituting material facts required to be disclosed: *British Equitable*

Insurance Co v Great Western Railway Co (1869) 38 LJ Ch 314; *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 632–3; 54 ALR 639 at 645–6; [1984] HCA 55 (*Khoury*). In ordinary language a "matter" includes an opinion.

[100] Whether an opinion is relevant to the insurer's decision to accept the risk or as to the terms on which it will do so, will depend, among other things, upon the subject matter of the opinion, the identity of the person holding it, the facts or premises upon which it is based and whether those facts or premises are true or believed by the insurer to be true. An opinion, previously relevant, may cease to be so if the circumstances to which it relates change or if it ceases to be held. This last consideration directs attention to the time at which any failure to comply with the duty of disclosure is to be assessed. That time is when the contract is made... In this respect, the position under the Act is the same as under the common law... If an opinion ceases to be held before the insurance contract is made it may, by reason of that fact, cease to be relevant. Or the fact that it was once held or recently held may be sufficient for it to continue to be relevant. In *Khoury* , the opinion was held at the time the proposal was made and continued to be held at the time the contract was entered into: at CLR 631 and 634; ALR 644–5 and 646. The question of relevance to the decision of the insurer is a question of fact in relation to which the insurer bears the onus.

133. The word "known" in section 21 has been the subject of judicial consideration and means more than "believes" or "suspects" or "strongly suspects": *Permanent Trustee v FAI General* [2003] HCA 25; (2003) 214 CLR 514 at 330 [30] (McHugh, Kirby and Callinan JJ); *Prepaid Services Pty Ltd v Atradius Credit Insurance NV* [2013] NSWCA 252 at [98] (Meagher JA, with whom Macfarlan JA agreed); *GIO General Limited v Wallace* [2001] NSWCA 299 at [15] (Heydon JA, with whom Priestley and Hodgson JJA agreed); *Permanent Trustee v FAI General* [2001] NSWCA 20; (2001) 50 NSWLR 679 at 687-690 [38]-[54] (Handley JA, with whom Meagher and Powell JJA agreed). A matter can be "known" even if it is an allegation that an insured denies is true.

134. Section 21 also requires that the person with the knowledge of the particular matter to know or that they reasonably should know that such a matter is "relevant to the decision of the insurer whether to accept the risk and if so, on what terms". It therefore focuses attention not only on the knowledge of a matter held by the relevant insured, but also to what a "reasonable person in the circumstances could be expected to know": s 21(1)(b) . This focuses on the hypothetical knowledge of a reasonable person in the same extrinsic circumstances of the insured: *CGU Insurance v Porthouse* [2008] HCA 30; (2008) 235 CLR 103 at 118 [52] (Gummow, Kirby, Heydon, Crennan and Kiefel JJ); *Stealth Enterprises v Calliden Insurance* [2017] NSWCA 71 at [38], [39], [41]-[49] (Meagher JA, with whom Ward JA and Sackville AJA agreed) (*Stealth Enterprises*). The Court is required to consider the hypothetical reasonable person "in the same position as the insured *without* taking into account the insured's subjective state of mind (for example, that the insured thought information was irrelevant to an insurer)": *Stealth Enterprises* at [41] per Meagher JA (emphasis in the original).

135. The question posed by s 21(1)(b) is whether a hypothetical reasonable person could be expected to know the "matter" is "relevant", in the sense that it would influence the insurer's

decision whether to accept the risk, and, if so, on what terms: *Delor Vue Apartments v Allianz Australia Insurance Ltd (No 2)* [2020] FCA 588 at [248] (Allsop CJ) (appeal to High Court pending, however, not in relation to the s 21 findings).

136. At paragraphs [182]ff below, I consider the application of the s 21 obligation in the context of the facts of this case. However, first I turn to the proper construction of cl 7.1, and whether it restricts the 2011 Insurers' rights, as submitted by CIMIC.

Construction of cl 7.1

137. Clause 7.1 provides:

> Non-Rescindability
>
> This policy is not avoidable or rescindable in whole or in part and the Insurer shall have no other remedy with respect to any pre-inception misrepresentation or pre-inception non-disclosure by any Insured in connection with this policy, except with respect of Insurance Cover 1.2 ("Company Securities").
>
> If the Insurer has a right to reduce its liability under Section 28(3) of the Insurance Contracts Act 1984 (Commonwealth) for any fraudulent misrepresentation or fraudulent non-disclosure of a matter or fact established by final adjudication of a judicial or arbitral tribunal, or any formal written admission by or on behalf of any Insured, the Insurer will only exercise such right against that Insured.

138. CIMIC submitted that the proper construction of cl 7.1 is that the Insurers have waived any right to any remedy for pre-inception misrepresentation or non-disclosure, except in relation to Company Securities cover in cl 1.2. However, in relation to Company Securities cover, CIMIC said that the second paragraph of 7.1 is properly construed to limit the 2011 Insurers' rights to situations of fraudulent non-disclosure or misrepresentation, and there are no rights for non-fraudulent non-disclosure/misrepresentation.

139. The reason this is particularly important is the size of the Inabu Settlement and Defence Costs, which arise from a "Company Securities" claim.

140. The 2011 Insurers accepted that they are not entitled to a remedy for non-fraudulent misrepresentations or non-disclosures for non-Company Securities claims. However, they submitted that the proper construction of cl 7.1 is that *all* their s 28(3) rights remain in relation to Company Securities cover. That is, the second paragraph only effects a restriction on how fraudulent conduct must be proved and how, in those circumstances, the insurers' rights may be deployed.

141. On balance, the best available construction of cl 7.1 does not limit the Insurers' rights as CIMIC contended, for the following reasons.

142. First, in the first paragraph before the exception, the exclusion of remedies is very broad: "this policy is not avoidable or rescindable in whole or in part" and "the Insurer shall have no other remedy". AIG conceded that "other remedy" would include remedies under the *IC Act*. Therefore, before the exception, the natural and ordinary meaning of the words in the first paragraph of cl 7.1 is that *all* rights concerning pre-inception misrepresentation or non-disclosure are expressly waived by the Insurer.

143. The exception, in my view, concerns all of the preceding sentence, and therefore operates to provide a complete exception to the waiver of remedies for Company Securities cover claims. That is, the Insurer is expressly preserving *all* remedies for Company Securities claims.

144. Secondly, while the second paragraph is not directly relevant to these proceedings because no fraudulent non-disclosure or misrepresentation is alleged, that part of cl 7.1 is helpful in determining the scope of the first paragraph.

145. CIMIC submitted that the second paragraph only preserves the 2011 Insurers' s 28(3) rights for fraudulent non-disclosure/misrepresentation for Company Securities claims because, if it was broader, it would make no commercial sense to restrict access to remedies for fraud (in terms of proof and deployment), and leave unrestricted the rights for non-fraudulent conduct, as it would render the clause meaningless. Pursuing the fraud remedy would be too onerous and unnecessary where rights existed for non-fraudulent conduct.

146. I do not accept that submission for the following reasons:

    1. Firstly, the use of "if" at the front of the paragraph clearly suggests that there are alternatives to what follows, and so what follows is not the only available remedy.

    2. While inelegant, the intention of the second paragraph appears to limit the Insurers' right to use the s 28(3) remedy to only a particular "Insured", who actually engaged in fraudulent conduct, noting that the definition of "Insured" includes natural persons and companies. CIMIC and Zurich submitted that "Insured" in the second paragraph ought to be read as "Policyholder" on the basis that only the Policyholder owed an obligation of disclosure under s 21 *IC Act*. However, that submission fails to have regard to the use of the language of "any Insured" and "that Insured", when "Insured" and "Policyholder" are defined terms and there has been a conscious decision to deploy "Insured" rather than "Policyholder". This suggests the first paragraph is referring to non-fraudulent conduct in relation to which all rights are excluded, except for Company Securities claims. The second paragraph presumes the availability of all s 28(3) rig hts for all types of claims where there is fraud. Therefore, if an Insured had fraudulently failed to disclose a matter through the Policyholder/Company, then the Insurer would be entitled to use s 28(3) to limit its exposure for a non-Company Securities claim concerning a particular director or officer, just as it could limit its exposure for a Company Securities claim where there was a fraudulent failure to disclose. Secondly, his construction is consistent with public

policy preventing parties from excluding the consequences of their own fraud: *Onley v Catlin Syndicate* [2018] FCAFC 119 at [73]-[79] (Allsop CJ, Lee and Derrington JJ) (High Court appeal pending).

3. Thirdly, had a different meaning been intended, it is likely that the clause would have been drafted differently. It would have been a simple matter of prefacing the second paragraph with words to the effect that the only remedy the Insurer retained in relation to Company Securities cover concerned fraudulent conduct. No such language was used.

147. Fourthly, the proper construction of cl 7.1 can also be tested in the context of the construction of cll 5.1 and 5.3, as all the policy terms ought to be considered together and read harmoniously: *Zhang v ROC Services (NSW)* [2016] NSWCA 370; (2016) 93 NSWLR 561 at 582-583 [89] (Leeming JA, with whom Sackville JA agreed at 608 [254]); *Wilkie v Gordian Runoff* [2005] HCA 17; (2005) 221 CLR 522 at 529 [16] (Gleeson CJ, McHugh, Gummow and Kirby JJ).

148. I consider cl 5.3 below.

Construction of cl 5.3 "Continuity Clause"

149. Clause 5.3 provides:

> Continuity
>
> Notwithstanding Exclusion 3.2 (Prior Claims and Circumstances), cover is provided under this policy for any Claim, or circumstance, which could or should have been notified under any earlier policy, provided always:
>
> (i) the Claim or circumstance, could and should have been notified after the Continuity Date; and
>
> (ii) the Claim shall be dealt with in accordance with all the terms, conditions, exclusions and limitations of the policy under which the Claim, or circumstance, could and should have been notified.

150. Clause 3.2 relevantly provides:

> Prior Claims and Circumstances
>
> The Insurer shall not be liable under any Cover or Extension for any Loss:
>
> ...
>
> subject to Section 5.3 ("Continuity"), arising out of, based upon or attributable to:
>
> (i) facts alleged or the same or related Wrongful Act(s) alleged or contained in any Claim which has been or could have been reported or in any circumstance of which

> notice has been or could have been reported or in any circumstances of which notice has been or could have been given under any policy of which this policy is a renewal or replacement or which it may succeed in time…

151. Clause 3.2 is expressly "subject to Section 5.3 ('Continuity')". Without that express condition, clause 3.2 would have the effect of excluding CIMIC's entitlement to indemnity if facts alleged or circumstances "could have been reported" or "of which notice … could have been given" under any policy of which the current 2011 Policy was "a renewal or replacement or which it may succeed in time".

152. The 2011 Policy was not a "renewal" of the 2010 Policy for the purposes of cl 3.2 because it was not identical; the 2010 Policy was provided by Chartis (AIG) alone. However, I consider the 2011 Policy is a "replacement" of the 2010 Policy as it concerned the same cover. No party raised any submission contrary to this construction to avoid the operation of cl 3.2.

153. CIMIC's primary submission was that the 2012 Notification was properly made to the 2011 Insurers, who are liable for all Losses claimed, and it does not need recourse to the cl 5.3 exception to cl 3.2.

154. Therefore, CIMIC denied that cl 3.2 operated in the circumstances of the Iraq File Note, because cl 5.1 of the 2010 Policy gave CIMIC the right (but not the obligation) to notify of circumstances that were "reasonably expected to give rise to a Claim". However, because Mr Stewart did not believe what he was told as recorded in the Iraq File Note, and because there was no communication of such allegations external to Leighton, there was no expectation within Leighton of a Claim arising and, therefore, cl 5.1 was not engaged in the 2010/11 Policy Period.

155. The 2011 Insurers contended that the exception to cl 3.2 found in cl 5.3 *does* apply to provide CIMIC with cover (should other defences not apply), and they contended for a particular construction of cl 5.3 and, especially, cl 5.3(ii).

156. If the 2011 Insurers are correct and cl 5.3 applies, CIMIC contended that cl 5.3 is a promise by the 2011 Insurers to cover the costs related to the Iraq File Note, because the matters recorded were circumstances that "could or should" have been notified under the 2010 Policy, and the precondition of cl 5.3(i) was satisfied because the circumstances would have been notified after the Continuity Date of 30 June 2005. (Catlin had a specific "defence" based on the 'Continuity date' applicable to its layer, being 30 June 2011, as discussed below at [498]ff.)

157. As detailed above at [137]ff, I do not accept that the 2011 Insurers have expressly waived their s 28(3) rights in cl 7.1 for Company Security claims, and consider this consistent with the proper construction of cl 5.3, which must be read harmoniously with cl 7.1.

158. I consider the better construction of cl 5.3 is that it does not amplify the Insured's rights or support a construction of cl 7.1 that narrows the Insurer's s 28(3) *IC Act* rights as suggested by CIMIC. I do not consider it persuasive that other continuity clauses in other contracts that have been judicially considered are different.

159. Instead, the purpose of cl 5.3 is properly understood as making sure that cl 3.2 does not deny an Insured cover for *every* Claim or circumstance which could have been notified under an earlier policy, regardless of whether that Claim or circumstance would have made a difference to the Insurer's decision to provide cover (in the context of ss 21 and 28 *IC Act*).

160. In the chapeau of cl 5.3, it speaks of "any Claim, or circumstance, which could *or* should have been notified under any earlier policy", with two provisos.

161. However, the provisos at cl 5.3(i) and (ii) do not use "could *or* should", but instead use "and" – "the Claim or circumstance, could *and* should have been notified". There is a difference in the position taken by the parties in relation to the significance of the change from "or" to "and".

162. The 2011 Insurers and CIMIC submitted that "could" and "should" ought to be read distributively, such that:

    1. "could" ought to be read together with "circumstance", because cl 5.1 is permissive in relation to notifying circumstances; and

    2. "should" ought to be read together with "Claim", because cl 5.1 requires (rather than permits) the notification of a "Claim".

It is said that it is not important that there is a change from "or" to "and".

163. In contrast, Zurich submitted that there is significance in the change. It was said that CIMIC's construction cannot be correct because the order of "could" and "should" does not match the order of "Claim" and "circumstance", and instead they would be reversed if the suggested coupling was correct. Zurich submitted that the subclauses (i) and (ii) add an extra requirement, such that, in the situation of a "circumstance", it is necessary that it "could" have been notified for the purposes of the clause 5.1 permissive paragraph based on a subjective belief, but also "should" have been notified because, objectively, it could have been expected to give rise to a Claim, had the insured had proper regard to the information it possessed. This construction would mean fewer circumstances would satisfy the tests in the subparagraphs, because an Insured may not have sufficient substantiation of the circumstances in order to satisfy the requirement of "should". Zurich said that it was only in the 2011/2 Policy Period that CIMIC was in a position to notify the 2011 Insurers because by then "any reasonable person in the insured's position would recognise a real risk of a claim" and satisfy the requirement of "should": *HLB Kidsons (a firm) v Lloyd's Underwriters* [2008] EWCA Civ 1206 at [141] (Toulson LJ).

164. CIMIC's response to this was simply that *Kidsons* was rejected by Meagher JA in *P&S Kauter Investments Pty Ltd v Arch Underwriting at Lloyd's Ltd* [2021] NSWCA 136; (2021) 105 NSWLR 110 at 120 [34]-[35] , and therefore Zurich's submission based on that case goes nowhere. Instead, CIMIC submitted that the clause must be construed in the ordinary way. I accept that submission. I do not consider the parties intended a subjective and objective analysis as submitted by Zurich. Instead, the natural and ordinary meaning does not require such a complex construction.

165. Berkley also raised an alternative construction of the permissive part of cl 5.1, which is relevant to cl 5.3. It submitted that the following elements were required before *any* notification of circumstances (rather than a Claim) "may" be made. The Insured must have:

    1. actual knowledge of "circumstances" with sufficient particularity with respect to dates, the Wrongful Act (if applicable) and potential Insured and Claimant concerned;

    2. an actual anticipation that the circumstances will in fact give rise to that Claim;

    3. an actual reasonable, subjective expectation that it will do so; and

    4. a desire to make a notification pursuant to cl 5.1.

166. This construction was said to arise because the language of cl 5.1 requires reasons for the expectation of the claim and, if those reasons or particulars are not held by the Insured during the relevant policy period, then no notification can be made.

167. Berkley further submitted that, because of this construction, it is not possible for CIMIC to succeed against it, because it never pleaded the subjective expectation and all the reasons for anticipating "that" particular claim.

168. CIMIC's responsive submission was that "reasonably expected" is an objective test focusing on the objective potential of a claim, and the purpose of the phrase is to facilitate cover. CIMIC criticised Berkley's subjective construction because it would be difficult to determine the subjective state of mind of the Insured and go beyond a written notification to investigate such subjective intentions. Instead, it was said the Insured's subjective intentions are plain from the exercise of the right.

169. Further, CIMIC submitted that the sentence that follows in cl 5.1 focuses on the content of a notification, rather than the right to notify. CIMIC submitted Berkley's construction is flawed because it suggests that an insured can never notify circumstances if it does not have **all** the particulars listed, even though it reasonably expects a claim.

170. I consider CIMIC's construction is preferable. It assists an Insured ensure there is no gap in cover because a circumstance can be notified where there is a basis for doing so, and assists an

Insurer in being provided with as much detail as possible about a particular circumstance that may lead to the obligation to indemnify. This construction does not require the Insured to notify every detail to be an effective notification.

171. The 2011 Insurers submitted that Leighton "could" have notified the circumstances of the Iraq File Note in the 2010/11 Policy Period, even though there was no "Claim" in that year. They submitted that CIMIC confuses what happened, which was that Mr Stewart did not notify, with the fact that Leighton "could" have notified the facts of the Iraq File Note. They also submitted that Mr Stewart actually did contemplate a possible claim as discussed further below.

172. As an alternative, Chubb submitted that s 40(3) *IC Act* provided Leighton with a power to make a notification during the 2010/11 Policy Period of "facts that might give rise to a Claim", which is a "deliberately undemanding test": *Euro Pools Plc v Royal & Sun Alliance Insurance Plc* [2019] EWCA Civ 808 at [39] (Gloster LJ, with whom Hamblen and Males LJJ agreed), cited in *DIF III – Global Co-Investment Fund LP v DIF Capital Partners Ltd* [2020] NSWCA 124 at [170]-[171] (Meagher JA, Bathurst CJ and Bell P agreeing). Further, s 40(3) requires "notification of objective matters that bear on the possibility of a claim, rather than matters of belief or opinion as to that possibility": *P&S Kauter Investments Pty Ltd v Arch Underwriting at Lloyds Ltd* [2021] NSWCA 136; (2021) 105 NSWLR 110 at 119-120 [33] (Meagher JA, Bathurst CJ and Bell P agreeing).

173. CIMIC denied s 40(3) *IC Act* is relevant on the basis that to notify pursuant to the legislative power would not be a notification "under any earlier policy" for the purposes of cll 3.2 or 5.3. I do not accept that construction. Section 40(3) clearly contemplates the existence of a contract of insurance and therefore any claim is always made under a policy.

174. While s 40(3) is not incorporated as a contractual term (*Gosford City Council v GIO General Ltd* [2003] NSWCA 34; (2003) 56 NSWLR 542 at 553-554 [37]-[38] per Sheller JA with whom Spigelman CJ and Meagher JA agreed), the Insurers could have drafted the policy terms to exclude the operation of s 40(3), had they wished. They did not. The 2010 and 2011 Policies contemplate the operation of the *IC Act* as it is referred to in, for example, cl 7.1, and was part of the legislative framework within which the parties were operating.

175. While I accept Leighton could have notified under s 40(3), nothing turns on this, as I have found, based on Leighton's state of mind described below at [318], that Leighton could have notified of the contents of the Iraq File Note under cl 5.1 during the 2010/11 Policy Period.

Construction of cl 5.3(ii) – meaning of "limitations"

176. As I am satisfied that the circumstances the subject of the 2012 Notification were circumstances "which could or should have been notified under" an earlier policy, being the 2010 Policy, and cl 5.3 applies, the operation of the promise for cover under that clause must be determined.

177. The 2011 Insurers contended that cl 5.3(ii) means that cover is only provided for losses caught by cl 5.3 up to the Limit of Liability of the 2010 Policy. Those limits have already been exhausted in fact. The 2011 Insurers provided the following reasons in support of the contention:

    1. Clause 5.3(ii) requires the claim to be dealt with in accordance with all terms and "limitations" of the 2010 Policy. The classic "limitation" in an insurance policy is the "Limit of Liability" governed by cl 6.1. Chubb submitted that "limitations" can only be a reference to the specified Limit of Liability, because that word must operate separately from "terms", or, alternatively, the Limit of Liability is a "term" of the Policy.

    2. The purpose of the subclause is that an insured can, in effect, late notify to a later Insurer, but cannot be advantaged by a new Limit of Liability under the later policy, as that would encourage an insured to exhaust the earlier Limit and then notify late under the later policy to obtain a further Limit. It was said that if amounts already paid under an earlier policy are ignored for the purposes of cl 5.3, the Limit of Liability is effectively ignored.

178. The effect of the 2011 Insurers' submission is that the continuity clause operated to make CIMIC's claim subject to the factual operation of cl 6.1 of the 2010 Policy, and payments already made by AIG, Chubb and Liberty under the 2010 Policy must be considered in the availability of an indemnity under the 2011 Policy. If this is correct, AIG, Chubb and Liberty's indemnity obligations were already exhausted under their 2011 Policies.

179. Instead, I accept the submissions of CIMIC (and some of the 2010 Insurers) that, because the 2012 Notification was made under the 2011 Policy, it is the 2011 Policy that must provide indemnity up to the 2011 Limit of Liability. The 2010 Limit of Liability applies for the particular claim, but without regard to any payments made under the 2010 Policy that may have exhausted 2010 liability caps, for at least the following reasons:

    1. While cl 5.3(ii) mandates that the claim is dealt with "in accordance with all the terms, conditions, exclusions and limitations of the policy under which the Claim or circumstance could and should have been notified", the purpose of the clause as a whole was to provide cover for claims that might have been made earlier but were not. The policy holder pays a premium based on the Insurer's assessment of the risk that some claims may be made, in effect, out of time.

    2. The use of the word "limitations" does not add anything to the language of "terms, conditions and exclusions". None of those words are defined terms, and, in contrast, "Limit of Liability" is a defined term and that was not used in cl 5.3.

    3. The parties' objective intentions were that the Insured ought not receive better terms than were offered at the time the claim ought to have been notified and the Insured is restricted by cl 5.3(ii) in its recovery based on the historical terms, but

nonetheless paid pursuant to the current policy. That is consistent with cl 6.1, which refers to the Limit of Liability payable "under *this* policy". Thus, cl 6.1 sets the ceiling of liability for all claims under the 2011 Policy.

4. The phrase "limitations of the policy" in cl 5.3 does not include factual events outside the policy, such as the making of claims and payments under that earlier policy that eroded the size of the available indemnity under that earlier policy.

5. Because the parties knew that the insurers were not the same each year and there was no practical mechanism in cl 5.3 for notification by earlier insurers about payments they had in fact made tells against the 2011 Insurers' construction requiring application of the remaining 2010 Limit of Liability.

6. I consider the 2011 Insurers were protected from an insured intentionally not notifying in the earlier year to obtain the benefit of the 2011 Limit of Liability, by the prohibitions on fraudulent failures to disclose, and/or breaches of obligations of utmost good faith.

180. Therefore, I consider the proper construction is that payment for a cl 5.3 claim is made under the 2011 Policy, but applying the 2010 terms, including the 2010 Limit of Liability, without regard to payments that had in fact been paid pursuant to the 2010 Policy. This means, for example, if a claim was made under cl 5.3 of the 2011 Policy, then the 2011 Insurers were entitled to enforce the 2010 Limit of Liability in relation to that claim, but also the 2011 Limit of Liability overall for all claims in that policy period. This satisfies the language of cl 5.3 requiring that the claim is "dealt with" in accordance with the limitations of the 2010 Policy and that the claim is paid "under this [2011] Policy".

181. Therefore, I consider the better construction of cll 5.3 and 7.1 is as outlined above, with the effect that:

1. CIMIC was entitled to make non-Company Security claims under the 2011 Policy concerning the Iraq File Note by reason of cl 5.3, and the 2011 Insurers were not entitled to rely on s 28(3) *IC Act*, or any other remedy, for the pre-inception failure to disclose or misrepresentation of the Iraq File Note. This is relevant for AFP Investigation Costs and some ASIC Investigation Costs.

2. The 2011 Insurers are entitled to rely on any pre-inception non-fraudulent non-disclosure or misrepresentation (if otherwise made out) in relation to Company Securities cover claims (being the MCI Class Action Defence Costs, Inabu Class Action Defence Costs, and the Inabu Settlement) for the purposes of a s 28(3) reduction in liability.

3. To the extent applicable, CIMIC is entitled to access the financial limit of liability of the 2011 Policy, which is not the actual remaining limit under the 2010 Policy.

Should Leighton have disclosed the Iraq File Note before 30 June 2011?

182. All the 2011 Insurers submitted that Leighton breached its s 21 *IC Act* duty of disclosure prior to entering into the 2011 Policies and this constituted a "relevant failure" under s 27AA *IC Act*. Specifically, they allege that the circumstances surrounding the Iraq File Note were matters known to Leighton that should have been disclosed prior to the inception of the 2011 Policy.

183. The 2011 Insurers submitted that, but for the relevant failure, they would not have entered into the relevant contracts on the same terms: s 28(1) *IC Act*. They submitted they ought therefore to have their liability in respect of the Company Securities claims (the MCI Class Action Costs, Inabu Defence and Inabu Settlement Costs) reduced to nil under s 28(3) .

184. As outlined above, I have found that the 2011 Insurers have not waived their remedies for pre-inception non-fraudulent non-disclosure or misrepresentation for Company Securities claims in cl 7.1. Therefore, it must be decided whether CIMIC did in fact fail to comply with s 21 *IC Act* in relation to Company Securities claims.

185. It was accepted that in order to determine that it failed to comply with s 21 *IC Act*, it was necessary for the 2011 Insurers to demonstrate:

    1. particular facts were known by Leighton; and

    2. a reasonable person in the position of Leighton "could be expected to know" that the facts as found were "relevant to the decision of the insurer to accept the risk and, if so, on what terms" for the purposes of s 21(1)(b) *IC Act*.

What facts were known by Leighton pre-inception?

186. The duty of disclosure is owed pre-inception, and before the relevant Policy terms that may deal with attribution of knowledge (e.g. cl 7.3) came into operation. Therefore, the common law applies, and knowledge of a corporation can be established either by:

    1. Knowledge of the persons who constitute the "directing mind" of the corporation, such as the board of directors: see cases cited in JJ Spigelman, 'Knowledge of a Corporate Insured' (1994) 6 *Insurance Law Journal* 1; or

    2. Knowledge of individuals who are agents of the corporation: *All Class Insurance Brokers (in liq) v Chubb Insurance (No 2)* [2021] FCA 782 at [160]-[162] (Allsop CJ).

187. The relevant knowledge of Leighton for the pre-inception disclosure was at least that of Mr Stewart. By 30 June 2011, being the deadline for Leighton to make disclosure before the commencement of the 2011/2012 Policy, Mr Savage and Mr Wild had left the employ of Leighton. Nevertheless, their knowledge during the 2010/11 Policy Period, and prior to the 2011 inception date, can also be imputed to Leighton: see eg *Tszyu v Fightvision Pty Ltd; Fightvision Pty Ltd v Onisforou* (1999) 47 NSWLR 473 at 527 [244] , where Sheller, Stein and Giles JJA noted

that "knowledge imputed to a company should not be treated as capable of simply being forgotten or lost at the death of a director… A corporation cannot cause itself to shed knowledge by shedding people".

188. The 2011 Insurers submitted that it is sufficient for their case on pre-inception non-disclosure and misrepresentation if I find that Mr Savage represented to Mr Stewart allegations (if not facts) that Leighton Offshore had made, and may in future make, "illegal" overpayments in order to "win" the Iraq contracts.

189. Nevertheless, the 2011 Insurers pressed for findings that the facts recorded in the Iraq File Note were true. They said that can be established by:

    1. the File Note itself, because it is a business record of Leighton;

    2. the oral and documentary evidence; and

    3. inferences drawn from the evidence.

190. I accept that the Iraq File Note is a "business record" within the meaning of section 69 of the *Evidence Act 1995* (NSW) and therefore can be used by the 2011 Insurers in exception to the hearsay rule to prove that the recorded representations by Mr Savage are true. The document was kept by Mr Stewart in the course of his employment with Leighton, even though it was for personal use: *Gordon v Ross* [2006] NSWCA 157 at [38] (Basten JA, with whom Hodgson and Bryson JJA agreed). However, merely because the document is a business record does not mean that the Court must accept the representations are true; there must be a weighing of all the evidence.

191. Most of the other evidence relied on by the 2011 Insurers concerns emails, involving persons at Unaoil, from which it is said references of bribery can be inferred.

Unaoil

192. It is not in dispute that Unaoil was the "NSC" referred to in the Iraq File Note, and a subcontractor who was appointed by Leighton Offshore to do the onshore and offshore security work for the Iraq Phase 1 and Phase 3 contracts. The 2011 Insurers alleged that Leighton Offshore promised to pay Unaoil money pursuant to those subcontracts, so Leighton Offshore could "win" the Iraq Contracts.

193. While the language of bribes was used throughout cross-examination and submissions by the 2011 Insurers, no detail was provided as to what was alleged to have been involved in the "bribery". For example, no party provided any submissions on the operation of "foreign bribery" provisions in the *Criminal Code Act 1995* (Cth) (see eg Div 70) , or how Unaoil assisted Leighton "win" the contracts.

194. AIG submitted in substance that the vice was that Leighton was prepared to pay uncommercial sums to Unaoil for its subcontract work because of Unaoil's "perceived 'influence' and ability to use that 'influence' to help Leighton 'win the project'." The nature of "perceived influence" was not explained in detail, but the suggestion was that the circumstantial evidence could be pieced together to infer that Unaoil could use Leighton's "extra" money to pay people involved in the tender process so that Leighton would "win", and that Mr Waugh and, through him, Mr Savage knew this and communicated it to Mr Stewart on 23 November 2010.

195. There is no direct evidence that Leighton Offshore or Unaoil ever paid money to anyone in either SOC or the Ministry for Oil in order to "win" the Iraq contracts.

196. There are emails that might suggest that, from 2008 or 2009, Unaoil had a form of retainer agreement in place with Mr Oday Al Quoraishi (also referred to as "Ivan") (Mr Oday). Mr Oday had formerly worked in the Ministry for Oil and moved to SOC, where he was tasked by the Ministry to liaise between the Ministry and US Gulf Development Projects (the entity responsible for managing the Phase 1 process with Foster Wheeler) by originally project managing the Phase 1 Contract.

197. An internal Unaoil email in May 2008 recorded a plan to give Mr Oday a position at Unaoil. However, when Mr Oday moved to SOC, another internal Unaoil email dated 18 May 2009 recorded an internal agreement to pay Mr Oday "$5,000 for him [Mr Oday], $1k he needs for presents to people within". I am asked to infer this email establishes that Mr Oday was being paid to bribe people within the Ministry with "presents to people within" with the intention of helping Leighton (and Unaoil) win the Iraq Project works.

198. However, I note that there is no evidence that:

    1. any such retainer was in fact agreed by Mr Oday;

    2. if such a retainer existed, it was still in existence when Leighton's Mr Waugh started negotiating with Unaoil from April 2010;

    3. anyone at Leighton Offshore was made aware of any such retainer;

    4. any money was paid to Mr Oday or to anyone at the Ministry in connection with Leighton Offshore winning the Phase 1 and Phase 3 Contracts.

199. The 2011 Insurers submitted that, at least, it can be inferred that Mr Waugh and therefore Mr Savage had knowledge of Unaoil's corrupt conduct and payments, even though neither of them gave evidence, because of emails and the various MOUs entered into between Leighton Offshore and Unaoil. It is therefore necessary to set out the communications and arrangements between Unaoil and Leighton in some detail.

200. By 30 March 2010, Leighton Offshore had already submitted its priced tender bid at US$623,650,000, and its unpriced commercial bid for the Phase 1 Project. It had previously documented an estimate of the cost of it doing the onshore works itself at about US$42 million.

201. A week later Mr Waugh met Mr Willimont from Unaoil. In an email dated 7 April 2010, Mr Waugh told Mr Gary Schwabe (Strategic Development Manager for Leighton Offshore Middle East) that he:

> … met a guy today named Peter Willimont from Unaoil … he wanted to know if we would be interested in a package proposal for onshore work … I said we were interested but it had to be commercially attractive otherwise we would just stick with doing it ourselves.

Despite the email suggesting Leighton would do the onshore work "ourselves", there was no evidence that Leighton Executives would approve doing onshore work in Iraq, because of concern about security risks to employees. Mr Savage's "New Country Proposal" had stated that Leighton personnel would *not* work in Iraq.

202. On 12 April 2010, Mr Willimont from Unaoil emailed Mr Waugh indicating that Unaoil was preparing an "onshore pipeline installation package to send". He continued:

> With respect to our discussions relating to our proposal to assist with the award of the contract, we understand that you maybe [sic] engaged and limited in what you can do, however we are sure we can make a significant difference to your chances of winning and successfully executing this contract, as explained, we to our knowledge are one of the few groups to contract with SOC and understand all the approval routes and payment idiosyncrasies of this territory, apart from our intimate knowledge of the SOC – Government approval processes relating to this project.

203. The 2011 Insurers said Mr Willimont was proposing a second agreement to provide "services", apart from the proposal to do the onshore work. Mr Waugh appears to have understood the two proposals because in his response on the same day he welcomed the onshore work proposal and rejected "the award services proposal" as "we are not in a position to move it forward in the present circumstances".

204. Shortly thereafter on 25 April 2010, in an internal email to Mr Waugh, Mr Schwabe recorded that Leighton employee, Mr Paul Bond, told Mr Schwabe that "we need to 'invest' in some more influence via the Unioil [sic] connection!" Apparently, Mr Bond was going to call Mr Waugh "to convince Leighton that we need to be talking to Unioil [sic] – he wants to help Leighton win the project!". Mr Waugh responded that he was prepared to speak to Mr Bond and "Unaoil may be able to add some value. Apparently, they are strong in Baghdad." Neither Mr Bond nor Mr Schwabe gave evidence.

205. The 2011 Insurers submitted that Unaoil's "award services proposal" should be found to be "a poorly disguised offer by Unaoil to assist Leighton to win the Phase 1 Contract by making illicit payments to the right people". This is said to have been understood by Mr Waugh because the negotiated MOU for subcontract work, included a promise to provide "support and protection".

206. On 26 May 2010, Mr Waugh and Mr Willimont met in Perth. There was no evidence about what was discussed at this meeting. Around this time, Mr Waugh was providing email updates to his superior, Mr Savage, about the tender process and the final amended bid which was due to be submitted to Foster Wheeler in two days, by 28 May 2010. After the meeting with Mr Willimont, Mr Waugh emailed Leighton Offshore employee, Mr Fergus Eley:

> Fergus
>
> Can you urgently prepare an updated GS [greensheet] for me as follows:
>
> > 1. In the Direct costs, allow an additional USD 20 million for onshore works. This is to allow us sufficient money to go with Unaoil as a package onshore.
> >
> > 2. Please add also into Direct costs, an amount of USD 15 million as a provision for third party vessel for heavy lift.
> >
> > 3. Please adjust the margin percentage to increase margin amount to 88.5 million
>
> This should take our price up to around 690 million
>
> Please get this greensheet back to me asap.
>
> I'll call to discuss.
>
> Thanks

The 2011 Insurers submitted that this email demonstrates that Mr Waugh was wanting to hide money in the "GS" or Greensheet that would be used by Unaoil for improper payments, particularly by including a fictitious "third party vessel for heavy lift" and an increase in Leighton's margin. This is discussed further below.

207. Shortly thereafter on the same day, Mr Waugh emailed Mr Savage:

> Old GS (R4) and new (R5) attached. This follows our discussion earlier today.
>
> I'll call to discuss in a couple of hours.

208. The first ("old") Greensheet contained a total bid price of US$622.9 million. The new Greensheet had an increased total of US$688.7 million, which reflected the changes indicated in Mr Waugh's 26 May 2010 email to Mr Eley.

209. At the same time, Mr Willimont and Mr Waugh were negotiating an MOU between Leighton Offshore and Unaoil. A key feature of the evidence of those negotiations was the formulation of the liquidated damages clause (cl 2.7). On 28 May 2010, Mr Willimont emailed Mr Waugh and stated:

> Russell,
>
> I recd a rewrite from our guys of clause 2.7, as I said in my previous [sic] e-mail this clause needs to be discussed in isolation, as this clause is very important in allowing the our [sic] groups position to be cryistal [sic] clear going forward. Your legal guys will probably have a combined heart attack at this clause - again lawyers for you (on both sides)
>
> We really must allow a little time today to get everything sorted out, as I need to report back to "all" concerned on progress. I must apologies for screwing up your vacation but I am sure in the long run it will be beneficial [sic], maybe a little hard to explain the the [sic] family.....
>
> Best regards
>
> Peter
>
> The alternative Article 2.7 could go something like this!!!!!!!!!!!!!
>
> *"For the avoidance of doubt, and without prejudice to the rights and entitlements of the Parties*
>
> *arising elsewhere under this MOU, non award of a subcontract by LEIGHTON to UNAOIL pursuant to Article 2.6 above, shall entitle UNAOIL to claim liquidated damages for loss arising out of such non performance by LEIGHTON of its obligations thereunder in the sum of US$ [insert] million. LEIGHTON irrevocably, unconditionally and freely agrees:*
>
> > *(a) That after careful consideration by the Parties, the aforementioned sum is proportionate in all respects and, as such, liquidated damages are agreed to be a genuine pre-estimate of loss to UNAOIL,*
> >
> > *(b) That the enforceability of such liquidated damages is not challengeable by LEIGHTON in law, and*
> >
> > *(c) That accordingly such sum would be become payable on demand by UNAOIL as a debt due, fully enforceable by UNAOIL upon any failure to satisfy such debt through summary judgment proceedings, statutory demand or winding up petition as appropriate."*

The reference to "hard to explain to the family" and giving "your legal guys … a … heart attack" was said to further demonstrate that the arrangement was known to be improper.

210. By 28 May 2010, when Leighton had submitted its revised tender with internal provision for $20 million 'extra' to pay Unaoil, in fact no MOU had been signed with Unaoil.

211. On 30 May 2010, internal emails at Unaoil between Mr Willimont and Messrs Ata Ahsani and Cyrus Ahsani demonstrate that Mr Oday had provided Unaoil with information that Leighton's bid was significantly cheaper than Saipem's, and that Mr Oday would call Mr Waugh to "hint that even if R [Waugh] has people in Baghdad, he should contact Basil [Al Jarah at Unaoil] and get his people to provide support and protection". Further, it is recorded that Mr Oday was "keen" for Unaoil to "win the land portion". The 2011 Insurers said these emails demonstrate that Unaoil was trying, with Mr Oday's help, to convince Leighton that it needed Unaoil's help to win the Phase 1 Contract. However, there is no direct evidence that Leighton did need that help at all.

212. Further internal emails at Unaoil dated 30 May 2010 recorded that Mr Oday had told Unaoil that he had talked to Mr Waugh and "relayed the agreed message about knives coming out" and that Mr Waugh was "concerned about getting enough help at the Ministry" and "always wants assurance that we [Unaoil] carry enough clout." On the same day, Mr Waugh emailed Mr Willimont a draft of the MOU in mark up.

213. The "agreed message about knives coming out" may be a reference to an earlier email between Mr Al Jarah, Messrs Ata and Cyrus Ahsani and Mr Willimont, where Mr Al Jarah said:

> As per discussions with AA, I agreed with Ivan [Oday], he calls R [Waugh] and hints that although it's looking good (We are sure he has an idea via FW [Foster Wheeler] leak). However, the knives started to come out in the Ministry, there are certain elements in Baghdad have already started questioning L's track record and experience to take on such an important contract …

There was no evidence about who "AA" was (but may be Ata Ahsani), or what role Messers Jarah, and Ahsani played. It is also not clear what was meant by "knives" coming out in the Ministry and whether this was just an "agreed message" and not true.

214. On 4 June 2010, Mr Willimont replied, "we feel all clauses in the attached MOU should be acceptable to you. The upshot is we really need MOU in place within the next twenty four hours". Mr Waugh's reply was as follows:

> Peter
>
> I will look at the MOU tomorrow. About to board a flight to HK.
>
> I understand your desire to put 20 mill in the LD clause, but I will request you accept 15. When I explained this Ld clause to my boss (not so easy!) I told him it would not exceed 15. I did this on the basis you would want to cover 12 and I gave myself a bit of buffer to 15, but 20 is a bit hard to explain now.
>
> I don't think either of us see this as something that is going to happen, so appreciate if we can leave it at 15.
>
> In return I'll accept 7.5%!

Best regards

Russell

It was said that Mr Waugh's statement that it was "not so easy" to explain the Liquidated Damages clause to his "boss", namely Mr Savage, was because it was actually referencing improper payments, but it made it clear that Mr Savage knew about those payments.

215. Shortly thereafter, Leighton Contractors (Singapore) Pte Ltd (part of LIL) and Unaoil entered into a Memorandum of Understanding (First MOU) dated 31 May 2010 (but probably signed in early June), which contained the following clauses:

    1. Clause 2.2 obliged Leighton, if successful in securing the Iraq Phase 1 Project, to appoint Unaoil as its subcontractor for the onshore construction activities.

    2. Clause 2.6 recorded the agreement between Leighton and Unaoil to enter a subcontract for the all-inclusive price of US$65 million.

    3. Clause 2.12 recorded the agreement that Leighton and Unaoil would "give their full support and benefit of their resources to the objective of achieving award of the PROJECT to LEIGHTON by the CLIENT".

    4. Clause 8.1 contained the liquidated damages clause, which provided that, if Leighton was awarded the project contract and failed to subsequently award a subcontract to Unaoil, Leighton would pay liquidated damages in the amount of US$15 million.

    5. Clause 9 set out the services that would be provided by Unaoil even if Leighton failed to award it a subcontract. Unaoil would assist Leighton with the successful execution and completion of the project by, variously, providing local knowledge and advice on the preferences of SOC (as the client), assisting in arranging meetings and maintaining relations with the SOC, ensuring Leighton was appraised of all requirements the SOC may have in relation to the execution of the contract, providing feedback on and monitoring performance of the SOC, among other things.

216. Nothing was made out of the use of Leighton's Singapore entity in relation to the MOU.

217. The 2011 Insurers put great weight on the liquidated damages clause, submitting there was no basis for that sum of US$15 million, other than to compensate Unaoil for its assistance through improper payments, because there was no legitimate basis justifying liquidated damages in that sum, even though Article 9 of the MOU required Unaoil to provide some services even if Leighton did not award it the subcontract, such as providing "local knowledge" and "advice on the preferences of the client". It was said that the reference in emails to Mr Waugh having trouble explaining to his family and his boss ("not so easy"), demonstrated the improper nature of the liquidated damages clause. However, in his 4 June 2010 email, Mr Waugh referred to his understanding that neither party expected the liquidated damages clause to apply, which would be the case if Unaoil in fact did the

subcontract work. Further, I note that any assistance Unaoil had provided before Leighton submitted its updated bid on 28 May 2010 was not pursuant to any agreement between the parties.

218. In terms of the amount agreed to be paid to Unaoil, the 2011 Insurers submitted that the price was well above the original amount Leighton had budgeted for in its original tender, which was about US$42 million. Leighton Offshore's internal calculation of the price of the onshore work increased by US$20 million referable to Unaoil. There was also the introduction of US$15 million into the Greensheet, which was said to have been falsely allocated to a "heavy lifting vessel" and instead should be inferred to be the value of the "award services", because US$15 million was the liquidated damages sum. Further, Leighton's margin was recorded as increasing in the new tender sum by an extra US$30.1 million.

219. To demonstrate the existence of the "award services" to be provided by Unaoil, reliance was also placed on an email dated 13 June 2010, in which Mr Eley asked Mr Waugh:

> Art 9 – Services Provision in the event of Non-Award. Clause is in our favour. Can we not just pay Unaoil $15m for these 'assistance' services, and execute the project as planned (this being a fall-back if scope cannot be suitably agreed) …

220. On 30 June 2010, Leighton Contractors Singapore signed a final MOU with Unaoil (Second MOU) with a new all-inclusive price of US$77.5 million (an increase of US$11.5 million) and liquidated damages of US$25.5 million (an increase of US$10.5 million). No additional services were being provided by Unaoil, other than the additional work required by Addendum 4.

221. In an email chain dated 5 July 2010, Mr Waugh provided Mr Savage with the final Greensheet for Iraq Phase 1, requesting that Mr Savage sign off on it. Mr Savage then asked, "Which section is the USD15m in?". Mr Waugh replied, "It's in Directs. There is a cost for Heavy Lift Vessel of 15million." This was said to be an attempt by Mr Waugh to hide the Unaoil "award services fees", to Mr Savage's knowledge, even though the liquidated damages sum was now $25.5 million.

222. The 2011 Insurers submitted that Mr Waugh and Mr Savage understood that Mr Oday was actively assisting Leighton, for example:

    1. On 23 July 2010, Mr Waugh circulated within Leighton a copy of the draft Phase 1 Contract prepared by Foster Wheeler and SOC with a comment: "We should not let anyone know we have this". However, he did not identify where he obtained the draft document.

    2. On 27 July 2010, Mr Waugh emailed Mr Savage:

        > Oday has now completed 3 days of discussion with Ministry and is on his way back to Basra. Will not get confirmation til tomorrow, but likely this means he has verbal sanction from Ministry to proceed.

> Expectation is Ministry will take a week to put that in writing, then SOC can start contract discussion with us …
>
> Other good news is that Oday seems to have been successful in getting our advance raised to 20% and the LC [Letter of Credit] back to one singe LC for full CV [contract value]. These details are tentative but are obviously good news.
>
> Will know more tomorrow when he actually arrives Basra and can speak more freely.

Mr Savage responded:

> That's great! Let me know when you can get more.

3. In late August 2010, Mr Waugh attended a meeting with Mr Oday and other SOC and Ministry of Oil representatives.

4. On 1 September 2010, Mr Al Jarah from Unaoil sent Mr Waugh an email indicating that the meeting had been "a formality" since the "decision was already made last Thursday to proceed with Leighton" and that he was:

> … now quietly working on an area that should be of real concern to you; your second payment. Left to natural process this will not happen before March/April '11. However, we are taking steps to ensure that least another 20% is available from Ministry of Finance by end of January '11 … These issues are beyond SOC's capacity no matter how hard they huff and puff. We must work at much higher level.

I was not taken to any evidence that this suggested benefit was achieved or was due to Unaoil's "influence".

223. On 30 September 2010, there was further correspondence between Mr Waugh and Mr Savage about a board presentation summarising the Phase 1 tender. Mr Savage asked, "Is the USD15m in the agency number?". In reply, Mr Waugh stated, "the USD 15m is in directs, bearing in mind it is now USD 10". Mr Savage also queried the line entry of "Agency Support" and was told by Mr Waugh that it was "various fees and charges that we need to pay to operate in Iraq".

224. On 3 October 2010, Mr Savage emailed Mr King an updated version of this presentation for the board meeting planned for 5 October 2010. In that presentation, "Onshore & Security" subcontracts were listed as costing US$80.8 million. However, it also provided that "key subcontracts [were] drafted and out for review".

225. On 8 October 2010, Mr Savage emailed Mr Waugh indicating that he needed a final Greensheet for "Iraq – Quarterly Reviews" and stating that "obviously we need everything in the 'right' place." The 2011 Insurers submitted that Mr Savage was using a code to indicate that the improper payment amount to Unaoil was to be hidden in the Greensheet. However,

these changes were occurring after the board meeting, and there was no explanation why changes would be needed if payments had already been hidden from the board.

226. On 10 October 2010, Mr Waugh was working with Mr Eley concerning the use of Leighton Vessel costs "allocated under Indirects" and a further line entry of "heavy lift vessel" of US$15 million. On 11 October 2010, the updated documents were emailed by Mr Waugh to Mr Savage, copying in Mr Eric Wardle (COO of LIL), explaining the movement of costs.

227. In November 2010, Mr Waugh was hopeful Leighton could win the Phase 3 works by way of an extension to the Phase 1 works, rather than bidding for a new tender. On 10 November 2010, in an email to other LIL staff, Mr Waugh wrote, "From discussions yesterday, I believe it is almost certain that the ITB [invitation to bid] will be withdrawn". On 22 November 2010, Mr Waugh wrote a letter to the Minister of Oil asking to negotiate the Phase 3 work as a variation to the current Phase 1 Contract "to save cost, reduce risks and deliver an improved schedule performance". It appears that, on 23 November 2010, Mr Waugh also met with representatives of the Ministry of Oil in Baghdad. There is no evidence whether Unaoil was involved in that meeting.

228. Around the same time, another MOU was being negotiated between Leighton and Unaoil. On 27 November 2010, a draft MOU for the "JICA deal" (Phase 3 Project) was emailed to Mr Willimont by Mr Waugh (Draft Phase 3 MOU).

229. The Draft Phase 3 MOU contained the following terms:

    1. Clause 2.7 recorded an agreement between Leighton and Unaoil to enter a subcontract for the all-inclusive price of US$75 million.

    2. Clause 8.1 provided for liquidated damages of US$40 million if Leighton Offshore was the successful tenderer and then failed to award Unaoil the subcontract.

230. On 10 December 2010, Leighton Offshore and Unaoil signed the Memorandum of Agreement (Phase 3 MOA) in relation to the Phase 3 project with that US$75 million price.

231. While Mr Waugh had been hopeful that the extension would be granted, avoiding the need for a tender for the Phase 3 work, by January 2011 that hope had faded. On 24 January 2011, Mr Cox emailed Mr Savage:

> Oday is advising that SOC have no time to deal with the variations due to problems with the platform package … He is very upset with us over this and is demonstrating that he is in charge… We need to defuse this situation, we are reliant upon him to push the variations.

There was no evidence as to what the "problems with the platform package" were, which makes it difficult to decipher the email.

232. Mr Savage forwarded Mr Cox's email to Mr Waugh and said:

> Can you speak to Oday on this? Will he really hold us to ransom? We need to be very careful with all this.

The 2011 Insurers relied on this email correspondence to demonstrate Mr Savage's knowledge of improper payments to Mr Oday. However, an interpretation is that Mr Oday was complaining about the "platform package" and indicating that because of those problems, the SOC would not look favourably on a variation being given to Leighton, rather than a tender process for the Phase 3 project.

233. On 13 April 2011, Leighton Offshore and Unaoil agreed to amend the Phase 3 MOA and, on 15 April 2011, the US$75 million sum was revised down to US$55 million, pursuant to a signed Supplementary Agreement No 2. I was not taken to any evidence why this change occurred.

234. On 28 April 2011, Mr Waugh prepared a backdated letter of agreement with Unaoil for additional services in the amount of $5.6 million. The additional services were said to comprise providing general consultancy advice, facilitatory liaison, and arranging meetings with the Trade Bank of Iraq and SOC.

235. On 13 October 2011, Leighton Offshore signed the Phase 3 Contract with SOC and Leighton Offshore and Unaoil entered into an agreement for the Phase 3 Project.

236. CIMIC submitted, and I accept, that the Court should have regard to the need for clear, cogent, or strict proof in relation to findings of serious misconduct: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] 67 ALJR 170 at 171 (Mason CJ, Brennan, Deane and Gaudron JJ); *Briginshaw v Briginshaw* (1938) 60 CLR 336; s 140(2) *Evidence Act 1995* (NSW) . Further, the persons whom the 2011 Insurers allege were engaged in improper conduct have not provided their responses to the allegations being made.

237. I accept CIMIC's submissions that there is insufficient evidence to conclude that the Unaoil MOUs and agreements involved corrupt payments so Leighton could "win" the Iraq work, where they were vetted by Leighton's lawyers, and provided Leighton Offshore with specific commercially justifiable advantages:

    1. Leighton executives did not want their employees doing any onshore work in Iraq, and while the cost of Unaoil's subcontract work was more than if Leighton Offshore had done the work itself, Unaoil doing the work meant that no employees were put at risk. Mr Eley originally estimated the original subcontract works would cost Leighton about US$42 million to do itself. However, that estimate did not include three "major" components which Unaoil provided, namely, substantially more accommodation for personnel, "landfall shore-pull" and "IT equipment and facilities". Further, Unaoil was offering onshore and offshore security (albeit the precise details of security were left to be agreed).

2. Unaoil agreed to act exclusively to assist Leighton, rather than Saipem, the other tenderer. Unaoil had previously been the contractor for another international tenderer that had withdrawn, and therefore appeared to be an appropriate subcontractor for the works.

3. Unaoil was providing connections for Leighton, which was entering a new country; as was submitted that there was a "focus on support arrangements, networks and connections". Despite what was recorded in the Iraq File Note, Unaoil was not SOC's "nominated subcontractor". However, Leighton engaging Unaoil may have been considered a positive part of Leighton's successful tender.

4. In terms of the liquidated damages clause, it only operated if:

    1. Leighton Offshore won the bid; and

    2. Leighton Offshore refused to award the subcontract to Unaoil.

    If the purpose of the liquidated damages clause was to ensure Unaoil's "bribe money" was recouped by it, then it risked that not occurring if Leighton Offshore did not in fact win the tender. The MOUs expressly provided that both parties bore their own risks before tender, and Unaoil was committed to providing further services even if it lost the subcontracts and was paid liquidated damages.

238. Regarding Mr Oday's involvement, as CIMIC submitted, the final decision about the tender was made by the Ministry for Oil, not SOC, and, therefore, not Mr Oday. When the Ministry asked for a discount on Leighton's final bid price, Mr Waugh indicated internally, "We don't have more to give and they need to understand that", which seems inconsistent with the Ministry being prepared to give Leighton the contract because of Unaoil's "influence".

239. Consistently, an internal email at Unaoil dated 8 September 2010 suggested that Mr Oday was not being paid for any assistance:

> Without Ivan's help on the ground, which was coming free we could have trouble

240. Later that same day, Mr Willimont sent an internal email suggesting that Unaoil pay money to Mr Oday to get assistance: "The best medicine for a calm life is a dose of George Washington … why not?? We got a little bit more off of Russell and we need Ivan on the CMMP!!" (The CMMP was the Phase 2 Contract which Leighton did not win). That email could mean that, up to that point, no money had been paid by Unaoil to Mr Oday, because it was only now being suggested. As noted above, there is no evidence that any money was in fact paid to Mr Oday, or that Mr Waugh was ever informed of a plan to pay Mr Oday.

241. Unaoil also complained internally at around the same time that Mr Oday "has his own Agenda". This does not sit comfortably with a conclusion that Mr Oday was doing what Unaoil or Leighton told him to, to "influence" anyone.

242. I do not consider that the May 2010 increase in Leighton's original tender price by US$65 million has been demonstrated to directly relate to hiding improper payments in three false elements, as the 2011 Insurers submitted, namely: (a) overpaying for onshore works, (b) a fictitious vessel and (c) a false increased margin to Leighton Offshore. I deal with each of those in turn.

243. *Overpaying onshore work:* Leighton Offshore had allocated about US$42 million for the original scope of onshore work, so the Unaoil MOU only increased the tender price by a little over US$20 million. That is consistent with Mr Waugh's 26 May 2010 instruction to increase the Greensheet by $20 million for the onshore work. There are reasons why Unaoil may have charged the higher price it did, including the extra services of security that it was providing, and connections to people in Iraq and the information it had that would assist Leighton Offshore.

244. *Fictitious Vessel:* I do not accept that I should find that the US$15 million expressly allocated to a "heavy lift vessel" in Leighton's greensheets was an attempt by Mr Waugh or Mr Savage to hide Unaoil's award services contract fee of that amount.

245. I note that there was no evidence about the details of that vessel and whether it was, in fact, used. However, Mr Waugh's express internal accounting was that Leighton's tender needed to increase by only $20 million for Unaoil "package". It could have been increased further, rather than reference a non-existent vessel, had there been a need to "hide" more money.

246. The Leighton Offshore original internal bid review made express reference to the proposed use of a vessel, the Leighton Eclipse, which suggests that it was always anticipated that a heavy lift vessel was needed well before Leighton was introduced to Unaoil. For example, as early as 22 March 2010, Mr Waugh emailed others within Leighton Offshore about the availability of "LIL barges" to be used as vessels in the Iraq tender.

247. By September 2010, when Mr Savage and Mr Waugh were discussing the presentation to the board about the Iraq bid, the US$15 million for a heavy lift vessel had been altered by Mr Eley into two amounts being US$10 million for heavy lift vessel and US$5 million for "import /export & licence fees". Emails at the time indicated that there were some availability issues with the Eclipse. However, these changes were in fact made after the 4 October 2010 Leighton Board meeting, and therefore it is less likely they were made to hide anything from the Board.

248. On 10 October 2010, Mr Waugh emailed Mr Eley about double checking "Leighton vessel costs", noting that "I know you will in practice change the schedule to adjust utilisation". Further, there is reference to a requirement that one vessel, the Leighton Mynx, had to deliver a certain amount by 30 June 2011, which may have been based on some budget, to which I was not taken. While the 2011 Insurers tried to suggest the introduction of the heavy lift vessel into the Greensheet was because of Mr Waugh agreeing to improper payments with Mr Willimont at Unaoil, it is difficult to be confident of that connection without more. One could equally speculate that originally it was intended to use a Leighton Offshore vessel, but it later became

apparent that another company's vessel might be needed instead, and therefore provision was made in the tender for that cost. There are too many uncertainties to make the finding sought.

249. *Leighton's increased margin:* The final change in bids was an increase in US$30.1 million allocated to Leighton's margin. There is no evidence concerning this aspect. One might speculate that Leighton:

    1. thought it could charge this extra sum in light of the request for the updated bid, or considered a larger tender bid would be acceptable to Foster Wheeler; or

    2. realised it ought to include a further margin in the bid to cover all contingencies, in light of the increased scope of works, because the price had to be fixed and could not be altered later.

Conclusion

250. On balance, I am not persuaded to a requisite standard on the material that any person at Leighton Offshore agreed to pay Unaoil additional money to be used improperly so Leighton could win the Iraq work. The evidence of the relationship between Leighton and Unaoil is limited to emails that leave much unexplained. The agreements may raise questions, but those questions cannot be definitively answered. There is minimal evidence of dealings between Unaoil and the Ministry for Oil or SOC, or between Mr Oday and the Ministries for Oil or Finance. There is certainly no evidence that demonstrates that bribes were actually paid to decision makers or that bribes caused Leighton to win the work.

251. Leighton's tender price was always about US$200 million less than Saipem's, which provided an objective and legitimate reason for Foster Wheeler, SOC and the Ministry of Oil to prefer Leighton's bid.

252. An available interpretation of the material before the Court is that Unaoil had connections with Mr Oday, and possibly other persons involved in the project. Unaoil's involvement with Leighton as its subcontractor, and Unaoil's ability to obtain information, could assist Leighton win the tender ahead of Saipem. This is consistent with Chubb's submission that Unaoil provided "information and guidance concerning the principal's consideration of tenders".

253. However, that still leaves the fact that Mr Savage informed Mr Stewart of the allegations recorded in the Iraq File Note, which Mr Stewart understood as involving "illegitimate, illegal and improper payments", as detailed below. It is, therefore, important to consider Mr Savage' s knowledge when considering Mr Stewart's understanding of the Iraq File Note.

Mr Savage

254. In opening, CIMIC submitted that the focus of the inquiry into Leighton Offshore's awareness for the purposes of the application of the Policies must be on Mr Savage, because he was the first person in the chain of communication that resulted in the Iraq File Note, and formed the

basis of what Mr Stewart then told Messrs Wild and Gregg. It was Mr Stewart's understanding of Mr Savage's statements to him on 23 November 2010 that subsequently informed the state of mind of Messrs Wild and Gregg.

255. Mr Savage was not called to give evidence. The 2011 Insurers adduced evidence of Mr Savage's international travel records from the Department of Home Affairs to prove that Mr Savage currently resides in Australia. Further, Chubb submitted that Mr Savage would be expected to be called by CIMIC, because his evidence would elucidate a particular matter and his absence was unexplained, citing *RHG Mortgage Ltd v Ianni* [2015] NSWCA 56 at [75] ff (McColl JA, Emmett JA and Sackville AJA agreeing). It was submitted that it would be expected Mr Savage be called where his knowledge is the knowledge of Leighton, citing *Payne v Parker* (1976) 1 NSWLR 191 at 201-2 (Glass JA). Accordingly, the 2011 Insurers sought a *Jones v Dunkel* inference to be drawn from Mr Savage's absence.

256. In *Payne v Parker*, a deceased patient's estate sued the deceased's doctor for negligently performing an operation causing death. The issue for the Court of Appeal was whether a *Jones v Dunkel* inference ought to be drawn when neither the estate nor the defendant doctor called as a witness the specialist surgeon, who was engaged by the doctor to perform emergency surgery on the patient after the doctor had performed the first operation. The estate alleged that the specialist had been engaged because of the negligence of the doctor's first operation; the first doctor denied that allegation.

257. Chubb relied upon Glass JA's dissenting judgment, in which his Honour set out nine propositions gleaned from the authorities concerning *Jones v Dunkel* inferences. Proposition 7 deals with whether the missing witness would be expected to be called by one party rather than the other (citations omitted):

> [This] is also described as existing where it would be natural for one party to produce the witness … or the witness would be expected to be available to one party rather than the other … or where the circumstances excuse one party from calling the witness, but require the other party to call him … or where he might be regarded as in the camp of one party, so as to make it unrealistic for the other party to call him … or where the witness' knowledge may be regarded as the knowledge of one party rather than the other … or where his absence should be regarded as adverse to the case of one party rather than the other … It has been observed that the higher the missing witness stands in the confidence of one party, the more reason there will be for thinking that his knowledge is available to that party rather than to his adversary … If the witness is equally available to both parties, for example, a police officer, then condition, generally speaking, stands unsatisfied. There is, however, some judicial opinion that this is not necessarily so … Evidence capable of satisfying this condition has been held to exist in relation to a party's foreman … his safety officer … his accountant … his treating doctor.

258. That proposition is undoubtedly correct, yet it is always necessary to assess the particular situation in determining whether the missing witness ought to have been called by a particular party.

259. I decline to draw a *Jones v Dunkel* inference against CIMIC because Mr Savage was not called to give evidence for the following reasons.

260. Mr Savage could not be said to have been in CIMIC's camp, as may have been the case, had he remained employed. I do not consider that the situation is similar to that in *ASIC v Hellicar* [2012] HCA 17; (2012) 247 CLR 345 at 442-443 [254] (Heydon J), relied upon by Chubb, that CIMIC was "in a position to appeal to ancient loyalties and the companionship of past struggles". Mr Savage is on bail with charges concerning criminal allegations of misleading the CIMIC Board in relation to the Iraq project. In circumstances where it is not clear what evidence will be relied upon by the Australian Federal Police against Mr Savage, it cannot be said that there remains any "ancient loyalty" between him and CIMIC.

261. In *Claremont Petroleum NL v Cummings* [1992] FCA 446; (1992) 110 ALR 239 at 259, Wilcox J refused to draw a *Jones v Dunkel* inference in relation to a former director, finding that there was "no reason to believe that he feels any allegiance or goodwill towards the company or its present management". Similarly, here, while Mr Savage was not terminated from Leighton and instead was made redundant, Mr Wild's evidence was that Mr Savage was not leaving Leighton of his own volition. The documentary evidence in the form of emails emanating from Mr Stewart after he was announced as incoming CEO in late 2010 also indicated that he did not see a continuing role for Mr Savage at Leighton, whether or not he expressed those views openly to Mr Savage.

262. Further, it cannot be said that Mr Savage's evidence would have been any different to that disclosed in the transcript of his ASIC compulsory examination. There, he did not state that he was aware of any corrupt conduct in relation to Iraq. I do not consider that it can be inferred that his evidence, had it been given, would not have assisted CIMIC, or that the failure to call him was unexplained.

263. While Mr Waugh was the person who negotiated with Unaoil and reported to Mr Savage, there is little detail of the substance of communications between those two men, and emails suggest they often spoke on the telephone with no file notes, or at least none is in evidence. On 23 November 2010, Mr Savage was aware from Mr Waugh that he was negotiating with the Ministry of Oil for an extension of the Phase 1 Contract (rather than requiring a bid for that Phase 3 work) at a value of about US$500 million, which was consistent with the Iraq File Note. Shortly thereafter, on 10 December 2010, Leighton signed a Phase 3 MOU with Unaoil with a price (at that stage) of US$75 million and liquidated damages of US$40 million, which was also consistent with the figures in the Iraq File Note.

264. However, those facts do not necessarily mean that Mr Savage understood improper payments had been, or would be, paid by Leighton, rather than understanding that the close connections Unaoil had with Mr Oday and persons working in the Ministry could provide Leighton with useful information about the tender process and assist Leighton's prospects of securing the Iraq Contracts ahead of its only competitor, Saipem.

265. While Mr Stewart expressed concerns about the arrangement with Unaoil that Mr Savage was describing, including drawing an analogy with "the Australian Wheat Board". Very broadly and without seeking to be exhaustive, Australian Wheat Board (AWB) was found to have entered into sham contracts with Jordanian trucking companies for the transport of wheat. Under those contracts, AWB made payments or "transportation fees" to a Jordan-based trucking companies. Those payments were funnelled to the Iraqi Government in breach of UN sanctions to which Australia was party. AWB's conduct caused a Royal Commission, various claims and regulatory proceedings. However, Mr Stewart did not explain his understanding of the similarity between AWB and the Unaoil contracts.

266. There is nothing to demonstrate that Mr Savage accepted that the payments were as Mr Stewart believed. I am also not persuaded on the material before the Court that Mr Savage was actively seeking to hide payments to Unaoil by changing descriptions in various greensheets and presentations.

Ocean King

267. Chubb submitted that it can be more easily accepted that Mr Savage knew that Leighton was making improper payments to Unaoil because Leighton Offshore also had interactions with:

    1. an UAE entity called "Ocean King";

    2. Mr Ramjee Iyer; and

    3. Lye Singapore Pty Ltd.

Chubb submitted that its "Ocean King evidence", which was admitted subject to relevance, demonstrates that Leighton made improper payments to these other entities also. Chubb submitted that the material was capable of rationally effecting the probabilities of a finding about Mr Savage's state of mind concerning the matters represented in the Iraq File Note.

268. CIMIC objected to the voluminous Ocean King material being considered because it was not relevant as Chubb never:

    1. pleaded the circumstances involved;

    2. particularised the documents;

    3. suggested any relationship between Ocean King and Unaoil; or

    4. suggested that payments made to Unaoil were linked to payments to Ocean King.

Further, CIMIC submitted that, had it been pleaded that the Ocean King material supports a finding that the Unaoil payments were made in order to corrupt the tender process, then it would have engaged with those factual issues.

269. While this point was not expressly taken by CIMIC, the only obvious relevance of this evidence of unpleaded facts to whether the Unaoil contracts included improper payments could be by way of tendency reasoning along the lines of:

    1. If the material demonstrates that Mr Savage/Leighton Offshore agreed to contracts with Ocean King involving payments to influence the award of the Iraq Contracts, they can also be used to prove that Mr Savage/Leighton Offshore agreed to contracts with Unaoil that involved payments for the same purpose.

    2. If the material demonstrates that Mr Savage attempted to hide payments to Ocean King to avoid disclosing their improper nature, this can also be used to prove that Mr Savage acted in the same way concerning Unaoil payments.

270. However, such tendency reasoning is only available where the court "thinks" there is "significant probative value" in the evidence tendered for that purpose (s 97 *Evidence Act*), rather than the material being merely relevant: *Taylor v The Queen* [2020] NSWCCA 355 at [122] (Bell P). I am not aware of whether Chubb provided CIMIC with a s 97(1)(a) notice, or an indication of the purpose of the material before the trial.

271. I do not consider the material concerning Ocean King has significant probative value, either in itself or having regard to other evidence adduced. Alternatively, I consider that the evidence ought to be excluded pursuant to s 135 *Evidence Act* because the evidence tends to "ambush" CIMIC: see eg *La Trobe Capital & Mortgage Corp v Hay Property Consultants* (2011) 190 FCR 299; [2011] FCAFC 4 at [72]-[73] (Finkelstein J).

272. Therefore, I do not consider the evidence admissible. However, on the contingency that I am wrong, I consider it briefly below.

273. Chubb submitted that various emails and contracts should be read as demonstrating:

    1. The existence of corrupt agreements between Leighton companies and Ocean King and Singapore Lye;

    2. descriptions in emails of payments "for friend" were references to the improper payments; and

    3. Mr Savage was hiding improper payments to these contractors in various Leighton documentation.

274. Invoices from various subcontractors are explained by Mr Waugh in an email dated 30 March 2010 as for:

    > ... consultancy services ... We need to pay for such services on a monthly basis for a maximum of 6 months during the tender period. This will assure we get all the

> relevant information related to the project that may not be easily gotten or otherwise available.... The idea is we ensure we win this project too so we need to maintain vigilance in regards to info and status.

275. Mr Savage appeared to understand the payments were for information, as in an email on the same date, he asked Mr Waugh to "[p]lease advise final status of fees for Iraq and any new intelligence". This does not mean that improper payments were being made to decision makers.

276. On about 1 April 2010, Leighton Offshore entered into a "Project Services Agreement" with Ocean King. It provided that Ocean King was to provide exclusive services, including "Obtaining for [Leighton Contractors Singapore Pty Ltd] any data and information relating to the Project, the physical construction of the Project or otherwise by whatever means available and providing knowledge that may assist [Leighton] in successfully prequalifying, winning and executing the Project." Further, Ocean King was to provide "support on 'get and win' strategy to assist [Leighton] to secure the Project, and at a price that is acceptable to [Leighton]." On its own, this agreement does not demonstrate Leighton was prepared to make improper payments to win the tender. There is no evidence of what services in fact were provided.

277. After SOC had announced that Leighton was the successful tenderer for Phase 1, on 15 October 2010 Leighton Offshore signed an agreement with Ocean King. This "updated" agreement recorded the earlier Project Services Agreement and support that had been provided, and then recorded the obligation of Ocean King moving forward to "successfully support [Leighton] to achieve successful execution of the project", again including the provision of information, advice on systems of work and operation in Iraq and providing "all required surface positioning, subsea positioning, survey and navigation services for the entire duration of the Project for all vessels". As the tender had already been won by Leighton, there could be no need to make improper payments to Ocean King, and this agreement instead was for work towards the completion of the project and does not assist Chubb's argument.

278. In early 2011, Mr Wild had asked Mr Cox, who had recently joined Leighton, if he had seen any corrupt conduct in Iraq. Chubb did not suggest that Mr Cox was dishonest or corrupt. Therefore, one might have expected, if Mr Cox considered any of Mr Iyer's emails were suspicious in light of Mr Wild's concern, then he would have reported that to Mr Wild. There is no such communication in evidence.

279. On 24 February 2011, Mr Iyer emailed Mr Cox with subject heading "Unaoil" (and again includes reference to "our friend", without identification):

> Got below message from friend, let me know how to respond:
>
> JUST TO LET YOU KNOW THAT THE PEOPLE DOWN HERE INSISTING ON USING THE ILVA PIPES, GETTING THIS APPROVED WILL HELP BUILD A BETTER CASE, SOMEBODY HAS PROMISED THEM THAT UP THERE.

> AS FOR BASTERDS [sic], DON'T BE THEM ANY ATTENTION, THEY DID ABSOLUTELY NOTHING LAST TIME AND WILL NOT BE ABLE TO DO ANYTHING NOW, OUR FRIEND NEED A NEW SUBCONTRACTOR …

280. Mr Cox's response was:

> Thanks Ramjee.
>
> Can I suggest the following:
>
> 1. FW free issue the pipe from ILVA – that way its simple.
>
> 2. I will continue to reject Unaoil position – (Russell and Now David Savage calling to support Unaoil).
>
> 3. New subcontractor would be good. Not very practical at this stage however

281. Mr Cox was also involved in other emails with a Mr Sameh Ali from Unaoil, which he then forwarded to Mr Iyer with the text, "These idiots do not give up", in reference to Mr Ali's report about Mr Al Jarah from Unaoil providing intelligence, including "Oday being the wrong guy" and Unaoil having the "full spec's for the job".

282. Chubb emphasised an email dated 2 May 2011 sent by Mr Iyer to Mr Cox at LIL in answer to a question about the accuracy of the allocation of funds paid to various contractors. Obviously, this was after the 23 November 2010 conversation and after Mr Savage had left Leighton.

283. In that email, Mr Iyer notes that the descriptions given by Mr Muir of Leighton were "correct". For example, Mr Iyer said the statement "$2,660,000 for Fabrication and Installation" to Gulf Petrocon FZC was "correct", and he added a "remark" that it was "for friend". There is no evidence as to what Mr Iyer meant by "for friend", including whether Mr Iyer's first language was English (which would appear unlikely from the emails). Mr Iyer regularly used the word "friend" in emails. For example, he wrote to Mr Cox as "friend" and he also referred to "big friend" in an email, without disclosing who that was. There is also reference to "Amman friend" and Mr Cox's planned trip to Amman, which Mr Iyer warns, "is not going to be comfortable, this issue of delaying the contract signing will be a big mess when you meet everyone in Amman". It is not explained who "everyone in Amman" might be or what the meeting was about. That email about "Amman friend" is in response to an email from William Poole, General Manager, Commercial at Leighton Offshore, asking for a performance guarantee from Ocean King, which does not immediately suggest communication about improper payments.

284. Another email dated 9 May 2011 from Mr Iyer to Mr Cox referred to Mr Cox as "Dear Friend" and forwarded a communication from "our friend", being the Japan Oil Engineering Co Ltd, which was the FEED contractor for the Phase 3 Project (see [52] above). That email merely told Mr Iyer about Leighton's April 2011 profit downgrade announcement and stated: "We are planning to issue a clarification to Leighton about this news and ask them to submit an official

letter to explain the impact on our Project". It appears to be an early warning about a decision that had already been taken by the FEED contractor, and there is no obvious relationship to any improper payments.

285. I consider these emails suggest that Leighton Offshore was relying on various entities (such as Ocean King) to provide information in relation to the Iraq project, in addition to their construction services. Those entities were not necessarily supportive of each other if the emails are taken at face value (eg Mr Iyer using the description of "basterds").

286. While the subcontractors in Iraq were providing Leighton with traditional subcontracting services together with "agency" or "information services", it is not clear:

    1. Whether the information that subcontractors provided was sourced from government officials or was accurate or had been "paid for";

    2. Whether engaging particular subcontractors provided any real advantage to Leighton Offshore;

    3. Whether the only other tenderer, Saipem, was privy to exactly the same information as Leighton Offshore;

    4. Whether any money was paid to decision makers so that Leighton Offshore could "win" the Iraq Contracts.

287. Even having regard to the Ocean King material, I would not be persuaded to the requisite standard on all the evidence, that Mr Savage knew of or approved of making improper payments to Unaoil to ensure that Leighton Offshore "won" the work.

What did Mr Stewart believe?

288. The Iraq File Note was subject to various interpretations. One interpretation was Mr Stewart did not believe Mr Savage was being truthful when he reported that the Phase 1 Contract in Iraq had been "won" by paying a nominated subcontractor $87 million, which was more than the work was worth.

289. Broadly, CIMIC submitted that the contents of the Iraq File Note did not need to be disclosed to the 2011 Insurers because any suggestions it was true ought be "discounted" because:

    1. Mr Savage's words on 23 November 2010 were incredible or impossible and Mr Stewart and others did not believe them and instead thought Mr Savage was trying to compromise Mr Stewart; or

    2. Mr Stewart misunderstood what he was being told.

290. There was faint suggestion that the Iraq File Note was not an accurate record, but I do not consider there is any basis for such a conclusion. Mr Stewart's evidence was that the File Note is not a verbatim recording of what was said, but that Mr Stewart recorded what he genuinely believed Mr Savage had said. Mr Stewart did in a few places attempt a verbatim recitation of what was said by using double quotation marks. Mr Stewart was also in the habit of taking notes in meetings. Mr Stewart said he made the File Note so he could protect himself against any allegations that might be made against him and because he was concerned about what Mr Savage had told him. In those circumstances, there is no reason to question whether Mr Stewart recorded his understanding accurately.

291. The 2011 Insurers submitted, and I accept, that a logical reason why Mr Savage went to see Mr Stewart about the Phase 1 Extension/Phase 3 Contract at the time Mr Waugh was negotiating with the Ministry of Oil was because it was understood in Leighton by November 2010 that Mr Stewart was the person acting in the role of CEO, even though he had not formally succeeded Mr King. Further, the Procurement Guidelines required Mr Savage to seek authority from the CEO for any tender for more than A$500 million, and the Phase 1 Extension/Phase 3 Contract was for a sum of over US$500 million. Therefore, the meeting ought not to have been surprising for Mr Stewart from that point of view. The meeting also touched on matters other than Iraq.

292. Mr Stewart was cross-examined by counsel for AIG on behalf of the 2011 Insurers. Berkley made an application to cross-examine Mr Stewart after that cross-examination. I only allowed Berkley's counsel to ask Mr Stewart non-leading questions for the reason that Berkley's position was completely aligned with CIMIC's primary case, and, in those circumstances, it would have been inappropriate to allow Berkley to cross-examine Mr Stewart, in order to lead further evidence in chief orally. I do not consider any of the questions asked or answers given during the further questioning of Mr Stewart by Berkley changed the substance of Mr Stewart' s evidence.

293. Mr Stewart recorded not only what Mr Savage said to him, but what he said in response, including his questions of Mr Savage. However, despite the detail of the File Note, Mr Stewart did not record that he distrusted Mr Savage or was worried about being compromised, nor did he record that he told Mr Savage that he did not believe him. Instead, in the subsequent telephone conversation recorded, he told Mr Savage that he should "go for it" if Mr King had approved it.

294. While he did not expressly record that he considered the overpayment of the contractor "illegal" or a "bribe", Mr Stewart accepted in cross-examination that he thought the concept Mr Savage was talking about was "illegal", "illegitimate" and "improper", and that Mr Savage was saying that there was an opportunity to make an overpayment to a nominated subcontractor so that future work could be "won".

295. Mr Stewart considered Mr Savage's proposed dealings with the subcontractor to be similar to the situation with the AWB and he also accepted that, should Mr Savage implement the concept he was proposing, then it would expose Leighton and its directors to serious legal trouble and possible claims. However, Mr Stewart's understanding of the similarity between the AWB situation and what Mr Savage was proposing was not explained by him.

296. Mr Stewart refused to accept that Mr Savage was "corrupt", despite agreeing that Mr Savage had told him he wished to do something criminal and that he appeared to be the kind of person who would enter into an unlawful subcontracting arrangement to win the Phase 1 Contract, whether he had the approval of Mr King or not.

297. Generally, Mr Stewart was not an impressive witness. He refused to agree to propositions about his understanding in relation to various emails unless they were verbatim, even if the propositions were obvious. For example, he was asked whether an email describing company equipment being taken without payment was an email describing "theft". Because the word "theft" did not appear in the email he would not agree to the proposition. When asked about other emails suggesting obvious propositions, he gave answers such as, "I don't think it refers to that necessarily".

298. He was very reluctant to agree that he considered Mr Savage was trying to hide wrongdoing in relation to the Leighton Eclipse issues (where there had been an improper use of Leighton materials for a third party), despite his own contemporaneous emails having no other obvious meaning. He was also very reluctant to accept that he considered Mr Savage's management of Leighton International's governance processes unacceptable, despite his emails in 2010 and 2011 to that effect, but finally agreed that "it may be".

299. I do not consider Mr Stewart's evidence was intentionally dishonest, however, I do consider he was trying to give answers that would distance him from any suggestion that he was aware that Mr Savage had actually engaged in corrupt conduct in Iraq or that he was somehow complicit in any wrongdoing. Where issues are disputed, I have preferred the documentary evidence to the extent it is inconsistent with Mr Stewart's evidence.

300. I consider that Mr Stewart interpreted what Mr Savage had told him in a reasonable way, and that saying that payments to a subcontractor were above market price and would help Leighton "win" the contract, could suggest bribery.

301. Immediately after the in-person meeting, Mr Stewart spoke to Mr Wild. Mr Wild reported that Mr Stewart told him on that day:

> Savage has come to me to talk about a tender in Iraq and he wants to put a fee on the job, a bribe.

Mr Wild said he responded:

Tell him to fuck off. He is just setting you up.

302. Mr Stewart could not recall the words he used when speaking to Mr Wild, but considered Mr Wild's recollection might be accurate. Mr Stewart then told Mr Wild that he would call Mr Savage to tell him words to the effect that he would not agree to the payment of a bribe.

303. Mr Stewart recorded he said to Mr Savage "I will think about it" and "I am not comfortable but understand the plan". I do not consider this is consistent with Mr Stewart believing Mr Savage was "setting him up" or that Mr Stewart did not believe him. Further, if saying he "would think about it" was actually Mr Stewart's tactic to terminate the conversation, as he suggested in cross-examination, then it would seem unlikely Mr Stewart would have then recorded himself as continuing the conversation by asking "How we pay?", and the recorded answer was "proportional to our payments". (I note that the meaning of that response was not explained to me.) There would have been no need to seek further information if he did not believe what was being said or wanted to bring the conversation to an end quickly.

304. While nothing turns on it, I do not accept Mr Stewart's oral evidence that in the face-to-face meeting he told Mr Savage that he did not support the payment. It is not recorded in the File Note, and, had he said that in person, the subsequent phone call that is recorded would have been unnecessary.

305. In his statement Mr Stewart said he did not consider bribery was something Mr Savage would engage in, or that he was "corrupt" even though he did not trust Mr Savage and what Mr Savage was saying was incredible and not true. Mr Stewart agreed in cross examination that Mr Savage had told him he wished to do something criminal and that he appeared to be the kind of person who would enter into an unlawful subcontracting arrangement to win the Phase 1 Contract, whether he had the approval of Mr King or not.

306. In cross-examination, he gave the following further evidence:

> Q: Well do you accept that you understood, at this time, that what Mr Savage had put to you was a proposal that he genuinely wanted to pursue?
>
> A: Correct, he was pursuing it, and the whole conversation was, in order to secure it, he would have to make this payment.
>
> ...
>
> Q: And you understood that Mr Savage wanted to enter into such a subcontract, correct?
>
> A: That's correct?
>
> ...

Q: And you were not comfortable with that arrangement because you understood that Mr Savage was proposing to enter into an arrangement that would have been illegal, correct?

A: That's correct.

Q: And you understood that that was something that Mr Savage genuinely intended to do, correct?

A: I don't know if he genuinely intended to do it, I can only record what he told me; I don't know what he genuinely intended to do.

Q: You told me before lunch that you did believe he genuinely intended to do it, didn' t you?

A: That's what he told me.

Q: And you believed him?

A: I believed what he was telling me.

307. Therefore, logically, as Mr Stewart accepted Mr Savage was saying he proposed to make an improper payment to win the extension contract, I consider Mr Stewart must have considered it a possibility an improper payment had already been made to win the Phase 1 Contract, as Mr Savage was representing.

308. Significantly, Mr Stewart's evidence was that he also told Mr Sasse about his conversation with Mr Savage, and that he did not believe Mr Savage. However, that is inconsistent with Mr Stewart telling Mr Sasse in the days following 23 November 2010 to keep what Mr Savage had said in mind when he was investigating the Leighton Eclipse misconduct issue, a project for which Mr Savage was responsible. By 23 November 2010, Mr Stewart wanted to reopen the investigation into the improper use of Leighton materials for a third party in connection with Leighton Eclipse (which Mr Stewart accepted was theft during cross-examination) and he was suspicious that Mr Savage was involved in improper conduct. Mr Stewart said the following in cross-examination:

Q. You told Mr Sass to bear in mind your conversation with Mr Savage and ascertain whether Leighton International was doing business in a similar manner in other places.

A. I asked Mr Sasse to be aware of the conversation he was leading in the investigation, which had again recommenced in relation to the Singapore project, with the same individuals involved.

Q. You told Mr Sasse to keep your conversation with Mr Savage in mind and ascertain whether they are doing business in other places in this manner, didn't you?

A. Yes, that's correct.

> Q. You asked Mr Sasse, during the course of his other investigations, to flush out if there was anything otherwise going on.
>
> A. That's correct.
>
> Q. You said that to Mr Sasse, or rather gave Mr Sasse those instructions, because you understood at this time that Mr Savage had proposed to enter into an illegal arrangement in Iraq. Correct?
>
> A. That's what he proposed, yes.
>
> Q. You told Mr Sasse to bear that conversation in mind and ascertain whether Leighton International was doing similar things elsewhere, because you thought that Mr Savage may well have made improper payments to win the Phase 1 contract.
>
> A. I can't recall those exact words, but certainly Mr Sasse was going to Singapore to have an investigation into the issues surrounding the Eclipse, and I told him to look out for, be aware of other arrangements that may be similar on that project.

309. Mr Stewart's warning to Mr Sasse is consistent with his concerns about Mr Savage's conduct generally and recording the detail in the File Note, including that he told Mr Savage he did not agree to the proposal about the Iraq extension contract.

310. I am not persuaded that Mr Stewart had any real concerns about Mr Savage compromising him in any way. As at 23 November 2010, there was nothing to suggest that Mr Savage was acting with malice towards Mr Stewart in meeting with him, as the incoming CEO, and updating him about matters, including the Phase 1 Contract and possible extension. Mr Stewart's evidence was that he had *not* decided at that time that Mr Savage had no future in the company, which, if true, would make it less likely Mr Savage felt any need to use the conversation to obtain an advantage or better secure his position. Further, it is difficult to understand how Mr Savage telling Mr Stewart that Leighton Offshore had engaged in overpayment of a subcontractor to win work and had a similar opportunity could in any way "compromise" Mr Stewart. It clearly compromised Mr Savage if what he was suggesting was corrupt conduct. The easiest way for Mr Stewart to avoid compromise would have been to tell Mr Savage that he did not approve, which he recorded he later did.

311. Mr Wild gave evidence that he did not believe the allegations were true, and had he thought they were true, then he would have taken steps to investigate them. He also gave evidence that, following his conversation with Mr Stewart, he assumed that Mr Savage would be terminated, and that Mr Stewart would "deal with it", and that is why he did not take any further steps.

312. Mr Wild considered Mr Savage was dishonest. For example, he considered Mr Savage had, prior to November 2010, overstated profits on other Leighton Asia projects for his own financial advantage. Further, Mr Wild had concerns that Mr Savage was involved in misconduct in relation to the Eclipse. Mr Wild also considered Mr Savage was capable of making illegal payments to win contracts, even though he did not believe Mr King would

have approved such a payment. While Mr Wild said his reaction to what Mr Stewart told him on 23 November 2010 was that Mr Savage was trying to set up Mr Stewart, he accepted that he did not carefully consider the situation at the time.

313. However, in late January 2011, Mr Wild did ask Mr Peter Cox, who had recently joined Leighton and was working in Iraq with Mr Savage: "There's been no improper payments or anything made on [the Phase 1 Contract], have there?". He was asked about this in cross-examination:

> Q. You asked that question because you remembered that Mr Savage had said, in November 2010, that a bribe was paid. Correct?
>
> A. Yeah. I certainly would have remembered that. I'm not sure that was the whole reason for my asking the question. That's all.
>
> Q. You agree with me that it was, at least, part of the reason why you asked that question.
>
> A. Yeah, sure, sure.
>
> ...
>
> Q. It's not a question you would ask anyone without a reason, is it?
>
> A. No, no.
>
> Q. And the reason you asked Mr Cox that question is that you thought that a bribe might have been paid to win the first Iraq contract.
>
> A. No, as I just said - I mean, that could well have been part of my reason for asking, and I suspect it was. But I was also - also, I believe, in hindsight, referring to other improper payments, because there was an issue with, as we discussed earlier, with Mr Savage's work about various other improper payments. So, I'm not sure, now, and I can't say, categorically, what my reasoning was, whether it was wholly or partly the bribe, or wholly and partly, or partly the other issues. But certainly, the bribe. I knew - I knew the discussion was Savage, so that could well have been in it, yeah. And I suspect it was part of it. But 12 - 12 years later, I just can't be sure.
>
> Q. You agree with me that you wouldn't have asked that question of Mr Cox, who you just met, unless you thought it was a realistic possibility that improper payments had been made in Iraq.
>
> A. That's true, true.
>
> Q. And you'd agree with me, then, that--
>
> A. Sorry, let me just add to that. Improper payments - one type of improper payment is a bribe. Another type of improper payment is the sorts of payments that were made on the barge affair in Malaysia. They are also improper payments, in my view.

Q. So, when you say, the sorts of improper payments that have been made on the barge affair, are you referring there to suppliers paying Leighton staff to place orders with them?

A. Well, suppliers, QA people, which was a big issue on the barges - QA people getting paid to sign off on work that probably shouldn't have been signed off, which was an issue on the barges. And there was a whole range of possibilities of people - money flowing around a project other than just the one you referred to as a bribe. There were many other opportunities, you know.

Q. All those other improper payments that you referred to, though, they're all bribes, aren't they?

A. They're bribes to QA officials, yes, you know. The word "bribe" would cover them all, yeah, sure, yeah.

Q. You accept that when you had this conversation with Mr Cox, you must have thought that there was a possibility, Mr Savage had paid a bribe to win the Iraq contract.

A. I don't think - I don't know that that was my thinking at the time. I was - I'd met a new guy working in an area where this sort of thing was possible, and I was partly making the point to him that, you know, this is not what we do. But there was also a question, if you like, in that - in that question, you know.

Q. You weren't sure whether it had happened or not.

A. Sure, sure. I couldn't be sure, yeah.

I consider Mr Wild's state of mind was also that he could not be sure whether Mr Savage had told Mr Stewart the truth or not about payments in relation to the Phase 1 Contract.

314. In late 2010, Mr Wild and Mr Stewart also found other conduct by Mr Savage was questionable and demonstrated a "dramatic departure from the current approvals", and that in many cases Mr Savage's management was "incompetent and maybe even unacceptable from a governance perspective".

315. In early 2011, when investigating LIL, Mr Wild came across four subcontract agreements in relation to the building of dams in Malaysia, in which he knew Mr Savage was involved. The payment for each agreement was expressed as 5% of the total contract value. Mr Wild considered the obligations of the subcontractor were ill-defined and those features might indicate bribery according to the Department of Foreign Affairs and Trade guides. Mr Wild therefore took the decision that Leighton should withdraw from that project, which it did. I do not accept Mr Stewart's oral evidence that he did not understand Mr Wild's emails at the time concerning the dams project and Mr Savage's want of ethics and instead consider this is an example of Mr Stewart seeking to distance himself from Mr Savage's conduct.

316. By March 2011, both Mr Wild and Mr Stewart's emails demonstrated that they considered that they were "tidying up a trail of unprofessional and dishonest behaviour by David Savage".

317. Consistent with concerns about issues of ethics in the organisation, in June 2011, when Mr Stewart was the new CEO, the company appointed Mr van der Laan to a newly created position of Chief Risk Officer and Group General Counsel. One reason for the appointment, according to Mr Stewart, was to prevent another "repeat of Mr Savage".

318. I make the following findings:

    1. Mr Stewart and Mr Wild understood what Mr Savage was saying in the 23 November 2010 meeting as amounting to Leighton making improper payments in connection with the Iraq Contracts. Mr Stewart understood the payments were bribes even though Mr Savage did not say as much. They did not know whether what Mr Savage was saying was true or not.

    2. Mr Stewart told Mr Savage he did not give his permission to progress a negotiation involving what he considered "illegal" payments to subcontractors. He may have assumed that Mr Savage would obey that instruction, however, he did not take any steps to investigate the Iraq contracts, even though he had the ability to do so. However, both Mr Wild and Mr Stewart took the positive step of asking others about potential misconduct in Iraq, which is consistent with them having concerns that what Mr Savage said was possibly true.

    3. Mr Stewart and Mr Wild did not believe that Mr King had approved overpayments to win the Phase 1 Contract. Even so, the fact that Mr Savage was a COO of LIL and was, to Mr Stewart and Mr Wild's knowledge, instrumental in projects that were causing Leighton serious ethical issues into 2011, meant that Mr Savage's statements proposing these payments was something significant for the business and, as Mr Stewart accepted, if true, could have negative consequences for Leighton.

319. While it is not necessary to make any findings in great detail about why Mr Stewart did not investigate Mr Savage's statements, his reasons may have included:

    1. As soon as Mr King ceased as CEO, Mr Stewart and Mr Wild intended to restructure the Leighton Group and to reduce Mr Savage's authority within it, so he could no longer make final decisions about tenders without Mr Wild's approval. That would mean, even if he stayed at Leighton, Mr Savage's past conduct could not continue. In fact, early into Mr Stewart's time as CEO, Mr Savage resigned, and Mr Stewart may have considered he could not cause any further harm thereafter and investigations into Iraq could wait, or not happen at all.

2. As soon as he became CEO, Mr Stewart faced a number of other significant issues, including a dramatic profit downgrade of about $900 million that had to be announced to the ASX and then defended to ASIC.

320. For completeness, I note that Mr Stewart's evidence was that he also told Mr Gregg about his conversation with Mr Savage, but Mr Gregg was not called to give evidence. I do not draw any adverse inference in that regard, as there is no reason to expect that Mr Stewart told Mr Gregg anything significantly different to what he recorded in the Iraq File Note or said to Mr Wild.

Section 21(1)(b) IC Act – a reasonable person

321. The insured's duty of disclosure in section 21 *IC Act* and authorities on its interpretation are set out above at [127]ff.

322. For the 2011 Insurers to succeed in their defence, they require at least findings that:

1. Mr Stewart had been told about the matters identified in the Iraq File Note, and he was not sure whether they were true or not, which I have already found above; and

2. A reasonable person in the position of CIMIC would have known the possibility of the truth of those matters was relevant to the Insurers' decision whether to grant cover and the terms of such cover, a finding I am prepared to make as outlined below.

323. AIG relied on *Lynch v Hamilton* (1810) 128 ER 15, where it was held that an insured was required to inform an insurer of a rumour concerning the safety of an insured vessel, even where the rumour was groundless, because the safety of the vessel would be a matter relevant to the insurer's decision to grant cover or not and the premium at which such cover would be granted. I am unaware of any Australian cases citing or adopting *Lynch* .

324. CIMIC submitted that there was a "clear demarcation between intelligence external to CIMIC with supporting evidence and internal assertions where no evidence is proffered" and that the information in *Lynch v Hamilton* was external.

325. I do not accept such a demarcation is decisive. Whether the facts or premises upon which an opinion is based are true is merely one consideration in assessing a broad question of fact in s 21(1) *IC Act*. "Internal" information may nonetheless be relevant to an insurer's decision to accept risk because of other factors, such as the subject matter of the opinion and the identity of the person holding the opinion: *Prepaid Services v Atradius Credit Insurance* [2013] NSWCA 252 at [98]-[100] (Meagher JA, with whom Macfarlan and Emmett JJA agreed). This conclusion is also consistent with the nature of investigations cover. Investigations may be commenced

following rumours: see eg *Brotherton v Aseguradora Colseguros* [2003] EWCA Civ 705 at [15]-[34] (Mance LJ with whom Buxton and Ward LLJ agreed). Substantial defence and investigation costs may be incurred early on, whether or not allegations against the insured are true and whether or not claims are eventually successfully litigated against an insured.

326. I consider that a hypothetical reasonable person in the position of Leighton would have considered that the allegation by the relevant COO of an agreement to pay (and the further opportunity to agree to pay) a nominated subcontractor at above market price, so that Leighton Offshore could "win" the contract for the Iraq work, was a matter that ought to have been disclosed to the Insurers pre-inception of the 2011 cover, as those facts, if true, could clearly give rise to losses that would be covered by the 2011 Policy. I have reached that conclusion because:

    1. It is objectively reasonable that the matters recorded in the File Note, if true, were very serious and could lead to Losses as defined in the 2011 Policy.

    2. The statements were made by the COO responsible for the contracts in question and were far removed from a mere rumour by a third party, without first-hand knowledge. There could be no guarantee that such conduct, if true, would avoid detection and public disclosure.

    3. Very soon after the Iraq File Note was disclosed to Leighton's lawyers in late 2011, the information was provided to the Australian Federal Police. In February 2012, an ASX announcement about the issue was made, and then the 2012 Notification was made. In an April 2012 internal Leighton presentation, it was noted that there had been four Board initiated reviews, including reviews of Leighton's Risk Management Practices and Tender Practices. When those steps were taken, Leighton did not know whether the allegations in the Iraq File Note were true or not. Nevertheless, those steps were taken on legal advice that it was appropriate to do so. To my mind, that demonstrates conduct of a reasonable hypothetical insured with the knowledge of the allegations recorded in the Iraq File Note.

    4. Mr Stewart actually considered the seriousness of what was being communicated because he compared what he was told with the AWB, and he knew that, if Mr Savage was telling the truth, it could lead to claims against the company.

Pre-inception misrepresentation

327. The 2011 Insurers pleaded that, in addition to the failure to disclose, Leighton made an actionable misrepresentation in its 27 May 2011 Proposal for 2011/2012 cover sent to AIG.

328. I accept that the Proposal and the signed Declaration amounted to a representation by Leighton that, after having made enquiries of all appropriate staff, it was not aware of any facts which might give rise to a claim against any of its directors or officers, apart from facts which were included. Appropriate staff who should have been consulted included Mr Stewart (who signed the declaration), Mr Wild and Mr Gregg, who all knew about what Mr Savage

had told Mr Stewart. Because no reference was made to the Iraq File Note facts, Leighton made a misrepresentation to AIG.

Effect of Leighton's breach of the duty of disclosure and misrepresentation

329. As I have found there was a relevant failure to comply with s 21 *IC Act*, and there was a misrepresentation by Leighton pre-inception of the 2011 Policy, the next issue is the effect of s 28(3) *IC Act*. Under s 28(3) , the insurer's liability is "reduced to the amount that would place the insurer in a position in which the insurer would have been if the relevant failure had not occurred."

330. At the hearing, the 2011 Insurers relied upon evidence from their underwriters in support of the proposition that, had they been notified, they would not have entered into the 2011 Policy on the same terms, without excluding possible claims attributable to the Iraq File Note facts. For the same purpose, the 2011 Insurers also placed reliance on what they did after the 2011/12 Policy Period to demonstrate that, once the Iraq File Note became known, they included specific matter exclusions to deal with its risks. They therefore submitted that their liability for Company Securities claims should be reduced to nil.

331. In contrast, CIMIC submitted that the 2011 Insurers could not demonstrate that they would not have entered into the 2011 Policies on the same terms and, therefore, there ought to be no reduction for the purposes of s 28(3) .

332. No party made any submissions about an intermediate possibility, whereby the 2011 Insurers' liability was reduced to less than nil.

333. I consider the position of each 2011 Insurer below.

AIG

334. AIG emphasised the position it took in response to matters that were in fact disclosed by Leighton prior to the inception of the 2011 Policy, and what it in fact did after the 2012 Notification.

335. As to matters that were disclosed prior to the 2011 Policy inception, AIG noted that, on 11 April 2011, Leighton announced to the market a profit downgrade, and the prospect of a possible shareholder class action. In response, AIG restructured the terms of Leighton's policy which was to expire on 30 June 2011. Rather than continue as the sole primary insurer for a total indemnity of $20 million, AIG only offered to co-insure Leighton on the primary layer, for either $15 million of a $45 million limit of indemnity or for $15 million of a $30 million limit of indemnity. This restructure reduced AIG's exposure to the heightened risks associated with the newly notified matters disclosed since the last renewal.

336. In the 2011 Policy, AIG also increased the retention for Company Securities claims to $1 million, compared with the prior year's retention of $250,000. Additionally, the premium almost tripled from $132,000 for the 2010 Policy to $345,000. AIG contended that these changes indicate that, even without the "spectre of bribery", AIG perceived the risk of insuring Leighton to be higher in the lead up to the 2011/12 Policy year compared to the previous year, and it took steps to reduce its exposure.

337. On 30 June 2011, being the day on which the 2010 Policy expired, Leighton notified AIG of circumstances that "may give rise to a claim", being the investigation by the Australian Competition and Consumer Commission into Nextgen Networks Pty Ltd, a Leighton subsidiary. In response, AIG advised Leighton that it formally withdrew its renewal terms, shortly before confirming that AIG agreed to grant cover for the 2011 Policy, subject to certain additional conditions.

338. AIG submitted that the fact that the terms of the 2011 Policy it offered differed materially to the terms of the 2010 Policy (on account of the matters, facts and circumstances newly notified to AIG before the 2011 Policy was written) corroborates evidence given by Mr Suplina, the AIG underwriter responsible for the Leighton account. Mr Suplina's evidence was that, had the Iraq File Note been disclosed, AIG would have excluded any claims arising from the 2012 Notification from cover under the 2011 Policy.

339. This might have been done by way of a bribery exclusion, a specific matters exclusion, or "ringfencing" matters related to the Iraq File Note within the 2010/11 Policy period. Mr Suplina gave evidence that AIG's usual course of action when confronted with a notification concerning possible bribery or corruption was to write terms so as to avoid future exposure to claims relating to such allegations.

340. AIG also emphasised what it in fact did after the 2012 Notification to demonstrate its likely response, had the information been provided earlier. In April 2012, internal email correspondence at AIG indicated a growing awareness that the circumstances in the Iraq File Note may have "further repercussions, such as Leighton being unable to operate in certain Middle East jurisdictions" and that a "Bribery Exclusion" was being considered, amongst various other options.

341. Consistent with that concern, in June 2012, AIG did not offer a policy similar to the 2011 Policy in the 2012/13 year and instead proposed different terms, including an express exclusion of claims arising from the Iraq File Note. When Leighton refused to accept those terms, AIG ceased to be the primary insurer. Instead, AIG agreed to underwrite an excess policy in 2012/13 for 40% of $25 million excess of $200 million, with an express exclusion of claims arising from the Iraq File Note in the following terms (emphasis added):

> It is agreed that Section 5 *Exclusions- Applicable to All Insuring Clauses* is amended by adding the following:

(c) based upon, arising from or in consequence of the circumstances cited in the document titled "LEIGHTON HOLDINGS LIMITED – D&O Premium Summary / Claims Review" Policy Period 2010 – 2011 Claim / Circ Notified item 2. **Alleged Bribery**, Policy Period 2010 – 2011 Claim / Circ Notified item 6. **Profit downgrade**, and/or Policy Period 2011 – 2012 Claim / Circ Notified item 3. **Alleged Bribery, or the same or any substantially similar fact, Wrongful Act or circumstances underlying or alleged therein**.

342. CIMIC submitted that AIG could not demonstrate that it would not have entered into the 2011 Policy on the same terms, had there been a disclosure of the Iraq File Note and, therefore, AIG has not established relevant prejudice for the purposes of s 28(3) :

    1. CIMIC submitted that AIG did not call to give evidence everyone, who formed part of the decision-making process in June 2011, and that Mr Suplina was likely to place considerable weight on the views of more senior people. CIMIC submitted the absence of those witnesses allows an inference to be drawn that, had the more senior staff been asked, they would not have insisted upon changes to the terms of the 2011 Policy to address any Iraq notification made pre-inception.

    2. It was also said that Mr Suplina's evidence is of no utility because it is hypothetical and based upon unproven assumptions, namely that there had been:

        1. an allegation of bribes to government officials in two countries;

        2. an allegation that there was overpayment of services provided by wholly owned government entities;

        3. the identification of a file note as part of the ASIC investigation into the profit downgrade; and

        4. a referral of the matter to the Federal Police who were conducting an investigation and a concurrent investigation being conducted in Iraq.

    3. Finally, CIMIC submitted that AIG's attitude in 2012 could not be assumed to be the same in June 2011, because the situation had changed. In June 2012, AIG was concerned to avoid a third full year loss and AIG "[looking] like dopes", which was not the case in June 2011, because there had not been the previous years of issues. It was said that it could not be concluded that AIG would have implemented a specific matters exclusion. CIMIC submitted that financial exposure, rather than the character of the alleged conduct, was of significance to AIG. CIMIC placed importance on the fact that AIG did not expressly exclude the 2011 profit downgrade and submitted that AIG would have taken a similar approach to the disclosure of the Iraq File Note.

343. I prefer AIG's submissions and accept Mr Suplina's evidence that the response to a disclosure depends on the type of claim, and an allegation concerning bribery was something "which we

give zero tolerance to", unlike an allegation concerning a breach of continuous disclosure obligations or a profit downgrade notification which "is not necessarily criminal". As AIG submitted, this is commercially reasonable, because if AIG had attempted to impose a general exclusion in relation to profit downgrade notifications, that would largely reduce the benefit of the Company Securities insurance cover offered.

344. It was not necessary for AIG to call every person involved in the decision-making process. Mr Suplina was able to give evidence about AIG's attitude to various risks. Mr Suplina was the original underwriter of the Leighton account and continued to be the underwriter or senior underwriter of that account until the 2011/12 renewal. He was involved in the renewal process for the 2012/13 period, when he made joint recommendations with Ms Carol Makhoul, who at that time held the role of Senior Underwriter.

345. I do not accept that the assumptions given to Mr Suplina were inappropriate or not demonstrated; the assumptions were in effect that Leighton had taken the steps it did between November 2011 and February 2012 before the inception of the 2011 Policy, and Mr Suplina gave evidence about what AIG would then have done.

346. Given the changes AIG implemented in response to earlier notifications, and what it did after the 2012 Notification, I consider it likely that AIG would have avoided the risks associated with the 2012 Notification, had it been disclosed.

347. It follows that, as subsequent and excess insurers, Chubb, Catlin and Liberty would have had the benefit of adopting or endorsing AIG's terms, with an exclusion for the Iraq related matters. In addition, they would have had the opportunity to consider the effect of the notification and assess their own positions in relation to it. I consider the evidence of the other insurers below.

Chubb

348. Chubb relied on Mr Ingram's evidence, who was the underwriter responsible for approving cover under the 2011 Policy. Mr Ingram's evidence was that disclosure would have led to enquiries of Leighton and, at the very least, Chubb would have offered cover with a "specific matters" exclusion for any claim arising from the payment of bribes or proposed bribes as referred to in the Iraq File Note. He explained the reasons for his concern in detail, which included the seniority of those allegedly involved, and the concern that there was an allegation of past bribery, together with proposed further bribery.

349. Like AIG, Chubb's offer of cover for the 2012/13 period after the 2012 Notification in fact included a specific matters exclusion for any claims in "any way connected with" the allegations in the Iraq File Note.

350. CIMIC made various submissions in response:

1. First, the decision by the Leighton Board in November 2011 to proceed with an internal investigation and AFP Referral was because the Iraq File Note was "read cold … 'cold' in the sense that the people that read it had no background in the dealings and conversations with which it related", and the Iraq File Note ought instead be considered by those who were part of the subsequent chain of communication regarding the Iraq File Note following the 23 November 2010 conversation; Mr Stewart and Mr Wild did not consider allegations to be credible and therefore they were not considered disclosable.

2. Secondly, Chubb failed to call employees working below Mr Ingram to give evidence, and these people formed a critical part of the decision-making process in June 2011, as Mr Ingram was dependent upon their recommendations. CIMIC submitted an inference could more easily be drawn that Chubb would have proceeded on the same terms even if the 2012 Notification was made pre-inception.

3. Thirdly, Mr Ingram's key assumptions were not established. The assumption was that, had the Iraq File Note been disclosed, then someone within Chubb would have informed Mr Ingram of its contents either by giving him a copy or an accurate summary of it. However, CIMIC argued that there is no proof that the allegations in the File Note were sufficiently significant to warrant Mr Ingram being informed, consistent with that assumption.

4. Fourthly, Chubb did not identify with any specificity the terms of the clause that would have comprised the particular exclusion. Mr Ingram's evidence was that the terms would, at the very least, have included a specific matters exclusion.

5. Finally, Chubb did not include a specific matters exclusion for the 2011 profit downgrade that was notified to the ASX, and similarly, had the Iraq File note been disclosed, there would not have been an exclusion.

351. I accept Chubb's submission that it was not necessary for Chubb to call all those involved in the decision made by Mr Ingram; his evidence was sufficient to establish the likely approach of Chubb. I also consider that the allegations were objectively of a nature that would cause an insurer to take steps to exclude ongoing liability, as Chubb in fact did later. The profit downgrade is not comparable in terms of seriousness to allegations of foreign bribery. Further, I do not consider it necessary for Chubb to identify precisely how the matters would have been excluded. Instead, I accept that Chubb would not have taken on the risk, had there been a disclosure.

Catlin

352. For the reasons outlined at paragraphs [498]ff, I consider that the Catlin excess policy is not engaged in relation to the notification of the Iraq File Note, and therefore Catlin is not required to indemnify CIMIC for related losses. As a result, it is not strictly necessary to determine whether Catlin, as an excess insurer, would have bound cover on the terms of the

2011 Primary Policy, without including specific liability exclusions for losses attributable to the Iraq File Note, had they been notified pre-inception. Nevertheless, for completeness, I consider Catlin's evidence.

353. Catlin submitted that, as excess insurers, it would have adopted the terms of the primary policy, including any specific exclusions. Catlin therefore submitted that it is not possible to determine what it would have done without first making findings about the counterfactual terms of the primary policy. That is, if I am satisfied that the primary layer insurers would have included a subject matter exclusion, I should conclude that Catlin would have picked up the exclusion in its excess policy. Accordingly, Catlin adopted the submissions of AIG and Chubb as to the reasons why it should be found that they would not have entered into the 2011 Primary Policy without an appropriate term excluding cover for the subject matter of the Iraq File Note. The underwriter responsible for the Catlin policy, Mr Powell, gave evidence that, had there been disclosure, he would have quoted and bound cover on AIG's primary terms, which would have included the additional exclusion.

354. Catlin also relied on Mr Powell's evidence that, had Catlin been notified of the Iraq File Note, it would not have entered into the 2011 Policy on terms that would mean Catlin would have had to bear the related risk. Even if the 2011 Policy did not contain a specific subject matter exclusion, Mr Powell's evidence was that he would have intended that Catlin would not bear the risk, and he would have included an appropriate exclusion for the Catlin excess layer. It was submitted that this course of action makes common sense and therefore reflects a reasonable underwriting approach. Moreover, it is said that this same approach to safeguarding Catlin against a disclosed risk was in fact undertaken by Mr Powell in circumstances where Leighton had made a disclosure of other circumstances pre-inception of the 2011 Policy.

355. Also consistent with this approach, Catlin included by way of endorsement to the 2012/13 Policy an exclusion to the bribery allegations:

> **Specific Matters Exclusion**
>
> ...
>
> The Insurer shall not be liable to make any payment under the Policy based on, arising from or attributable to any Claim or Investigation in any way connected with:
>
> (a) item 2 titled "Alleged Bribery" in policy period 2010-2011; or
>
> (b) item 6 titled "Profit downgrade" in policy period 2010-2011; or
>
> (c) item 3 titled "Alleged Bribery" in policy period 2011-2012,
>
> disclosed in the document headed "Leighton Holdings Limited – D&O Premium Summary/Claims Review" disclosed to the Insurer by email dated 14 June 2021.

356. Finally, Mr Powell gave evidence that, had Leighton notified the 2010 Insurers during the 2010 /11 Policy Period, then it is likely that he would have caused Catlin to enter into a policy on the same terms as were contained in the Catlin 2011 Policy, because the 2010 Insurers would have been liable, rather than Catlin.

357. CIMIC submitted that Mr Powell's position that notification to the 2010 expiring insurers was adequate protection for Catlin against claims that may have been made leads to the conclusion that the s 28(1) *IC Act* gateway was not satisfied, and s 28(3) cannot be engaged, as Catlin would not have made any changes to its Policy.

358. CIMIC also argued that Mr Powell's assumption was not a workable assumption for a claim for relief under s 28(3) . The assumption was, among other things, that Leighton was aware of a possible breach of its Code of Ethics that, if substantiated, may contravene Australian law. CIMIC submitted that Mr Powell had interpreted part of the Iraq Notification without its key factual disclosure of the AFP referral and investigation, which had been drafted by persons other than Mr Stewart, who was Leighton's relevant "mind" for the purposes of the s 28(3) case . It is said that this assumption of a state of mind attributed to Leighton in 2012 is meaningless.

359. I consider that AIG would have excluded the risk of the Iraq File Note and Catlin would have had the benefit of that exclusion in an excess policy. Additionally, I accept that Catlin would have protected itself in other ways, had there been a pre-inception disclosure, such that Catlin can reduce its liability to nil, pursuant to s 28(3) *IC Act*.

Liberty

360. Mr MacLean and Mr Thomas, two of Liberty's underwriters for the 2011 Policy, gave evidence that they would not have agreed to Liberty entering that policy on the terms it did, had a disclosure been made, and instead they would have required the policy to contain a specific matters exclusion. Indeed, this kind of exclusion was included by way of endorsement to the 2012 Policy in the same form referred to at [355] above.

361. Mr MacLean considered bribery allegations in relation to a large listed public company to be a serious matter and therefore he would have wanted a specific matters exclusion, so that, in the event of any later claim or investigation connected with the alleged bribery, only one policy was available to Leighton. Further, Mr MacLean's evidence was that he would have ascertained the position of the primary insurer and any specific matters exclusion, as he would likely follow such exclusion. Without such an exclusion, he would have had concerns and referred the file to Mr Thomas and another referral underwriter.

362. Mr Thomas' evidence was similar, and he would not have been prepared to offer cover without an exclusion, even if the primary insurer had not included one.

363. CIMIC submitted:

1. First, that there is no proper basis for finding that, in 2011, the subject of the 2012 Notification would have indicated any realistic chance of losses of a magnitude that would reach the Liberty $40 million excess attachment point, and therefore, it would be unlikely that Liberty would have been concerned with the notification.

2. Secondly, that the assumptions given to Mr MacLean and Mr Thomas were not valid. Those assumptions were the external communication of the circumstances, such as a referral to the Federal Police, the AFP investigation and the investigation conducted with external lawyers. CIMIC submitted that all those matters were incapable of being disclosed before 30 June 2011.

3. Thirdly, that the fact the 2012 Notification was not referred to in the work-up document prepared by Mr MacLean and provided to Mr Thomas in 2012 for the policy renewal, other the general reference to the matters notified, suggests that it was not an issue of concern for Liberty in 2012, and so equally Liberty would not have been concerned, had it received the same or similar notification in the year prior.

364. I prefer Liberty's submissions. Mr Thomas' evidence was that the work up document was not the totality of matters considered. Mr MacLean had considered and positively highlighted a draft of the proposed specific matters exclusion dealing with the Iraq bribery allegations when that was circulated. The failure to include an exclusion for the 2011 profit downgrade was not determinative, as it was a completely different issue to bribery. Mr Thomas placed particular emphasis on the type of conduct the subject of the hypothetical notification, noting that "[i]n behavioural issues [such as bribery], you will often put a specific matters exclusion on it, or a specific event exclusion on it." As with the criticisms of the assumptions put to Mr Suplina for AIG, I do not accept that the assumptions given to Mr Thomas and Mr MacLean were inappropriate or not demonstrated. I also consider that Liberty would have had the benefit of AIG's primary policy terms that excluded liability relating to the Iraq File Note matters.

Conclusion

365. I consider the evidence supports the 2011 Insurers' case that, had there been disclosure of the information concerning the Iraq File Note, the 2011 Insurers would not have entered into the 2011 Policies on the same terms, without including liability exclusions for losses attributable to the Iraq File Note. The precise form of those exclusions is not relevant to that conclusion; *some* sort of action would have been taken in response to the notification. CIMIC's submissions largely avoided this point and do not go as far as suggesting that *no* action would have been taken, such that the terms of the 2011 Policy would have been *exactly* the same.

366. As noted above, I was presented by the parties with only a binary choice, and there is no evidentiary basis for making an intermediate determination. Applying s 28(3) *IC Act*, I consider the 2011 Insurer's liability for Company Securities claims should be reduced to nil.

Do the payments made by CIMIC fall within the meaning of cl 4.21 "Loss"?

AFP Investigation Costs

367. There was no dispute that the AFP Investigation was relevantly connected to the 2012 Notification, so as to attract the operation of the deeming provision in cl 5.4.

368. The proper construction of cl 7.1 means the 2011 Insurers' defence of non-disclosure does *not* operate against the AFP Investigation Costs. There is no dispute between CIMIC and any of the 2011 Insurers that the AFP Investigation Costs are a "Loss" for the purposes of cl 4.21 of the 2011 Policies, or that they arose out of the February 2012 Notification pursuant to the deeming provision in cl 5.4.

369. Accordingly, CIMIC is entitled to an indemnity of the total sum of those costs, before the limitation defence is considered: see [440]ff. The quantification of costs and interest payable will be determined as part of the Separate Hearing.

ASIC Investigation Costs

370. In a s 30 *ASIC Act* notice dated 1 May 2014, ASIC indicated the production sought related to "suspected contraventions" of the following provisions:

> a) Sections 181, 184 and/ or s 1307 of the *Corporations Act 2001* ('the Act') by the directors, officers and/ or employees of Leighton Holdings Limited ('LHL') and/ or its subsidiaries in or about 2009-2011 in relation to payments made by LHL and/ or its subsidiaries to third parties during 2009-2011 to secure contracts in Iraq (including, but not limited to, contracts awarded to LHL or its subsidiaries on or about 23 October 2010 and 14 October 2011.)
>
> b) Sections 200B, 208(1) and/ or 182 of the Act by LHL, its subsidiaries and/ or their directors and officers, and/ or (Ex- LHL CEO) Wallace King in or in connection with fees, benefits, and/ or payments made to King by LHL (or its subsidiaries) in the period 2010 to 2012.
>
> c) Sections 180,182, 184 and/ or s 1307 by the directors, officers and/ or employees of LHL and/ or its subsidiaries in connection with payments made by LHL and/ or its subsidiaries to a Dubai based company, Asian Global and Trading FZE, in or around August 2011.

d) Sections 1308, 1309, 1041H and/ or s 674 of the Act by LHL, its subsidiaries and/ or their directors, officers and/ or employees by virtue of the extent of disclosure made by LHL to the ASX relating to the sale by its subsidiary Leighton International Limited of a 35% portion of its Indian operations to Welspun Infra Projects Pvt Ltd ('Welspun') in or about April 2011.

371. On 3 September 2014, a further paragraph was inserted into the ASIC Notice:

> e) s180, 181, 184 and/or s 1307 of the *Corporations Act 2001* ('the Act') by directors, officers and/or employees of LHL and/or its subsidiaries in or about 2009-2011 in relation to payments made by LHL and/or its subsidiaries to third parties 2009-2011 to secure a contract in Tanzania valued at approximately USD$66.48 million and awarded to LHL's subsidiary on or about 24 August 2010.

372. Therefore, the 1 May 2014 notice concerned matters related to Iraq (paragraph (a)) and other matters not related to Iraq (paragraphs (b)-(e)).

Iraq Investigation

373. Between March 2014 and March 2017, ASIC investigated Leighton in relation to possible breaches of the *Corporations Act* due to payments made to third parties to secure the Iraq Contracts as suggested in paragraph (a) of the May 2014 notice. There was no dispute between the parties that the Iraq Investigation in paragraph (a) was within the meaning of Loss and caught by the 2012 Notification.

374. That investigation led to section 19 and 33 notices under the *ASIC Act* and to CIMIC paying the associated fees, costs and expenses on behalf of certain officers, namely Messrs Cox, Savage, Stewart, Wild, King, Faulkner, Humphris, Johns, Mortimer, Murray, Seidler, van der Laan, White, Kent, Gregg, Clewett, and McKay and Ms Howse.

375. There was no contest that ASIC was an "Official Body" (cl 4.22) and the ASIC Investigation was an "Investigation" (4.18(iv)(b)) and, therefore, a "Claim" under cl 4.5(ii), which made the Insurer liable to indemnify for "Loss". The effect of the deeming provision in cl 5.4 of the 2011 Policy deems the Iraq Investigation to be a Claim 'made' at the time of the 2012 Notification, and, therefore, the 2011 Insurers are liable to indemnify CIMIC. Quantification of the costs and interest will be determined at the Separate Hearing.

Non-Iraq Investigation(s)

376. CIMIC also responded to what was termed the "Non-Iraq ASIC Investigation", in paragraphs (b)-(e) of YES KEEP (e) ASIC's May 2014 notice. That investigation involved various section 19 notices issued under the *ASIC Act* to various persons, namely Messrs Cox, Savage, Stewart, Wild, King, Faulkner, Humphris, Johns, Mortimer, Murray, Seidler, van der Laan, White,

Kent, Gregg, Clewett, and McKay, and Ms Howse and concerned investigations into suspected contraventions of the *Corporations Act* in connection with:

1. payments made in its Asian operations (Asian Global Investigation) and

2. disclosures made to the ASX concerning Leighton International's sale of a 35% portion of its Indian operations (Welspun Investigation).

377. The key issue is who, as between the 2011 Insurers and Chubb (as 2013/14 Primary Insurer), should bear these costs. This turns principally upon whether the ASIC Investigation is best characterised:

    1. as Chubb submitted, as one investigation, which was notified to the 2011 Insurers in the 2012 Notification, or

    2. as AIG, Liberty and Catlin submitted, separate and unrelated investigations, some of which were not connected to that Notification. The latter was CIMIC's final submission as well, even though it was pleaded as its alternative case. CIMIC is understandably ambivalent as to which insurer provides an indemnity.

378. Chubb submitted that the ASIC Investigation is properly characterised as a single "Investigation" for the purposes of the 2011 Policy (that is, one "investigation … into the affairs of a Company") and that, if any aspect of the ASIC Investigation arises out of the 2012 Notification, its entirety is deemed to be commenced during the Policy Period and an indemnity must be provided by the 2011 Insurers.

379. Chubb focused on the singular nature of the investigation and contended that the fact that the "Official Body" (ASIC), investigates more than one allegation of wrongdoing and the investigation expands over time does not mean it ceases to be a single Investigation. Chubb argued that the use of the phrase "affairs of the Company" in the definition of an "Investigation" strongly suggests that the simultaneous investigation by an official body of a number of allegations is a single Investigation.

380. Chubb suggested that commencement of a formal investigation occurs when a matter is accepted for formal investigation by the relevant enforcement team, citing *Schlaepfer v Australian Securities and Investments Commission* [2017] FCA 1122 at [7] (Wigney J) which, in turn, refers to s 13 *ASIC Act* . Chubb referred to White J's decision in *Australian Securities and Investments Commission v Sigalla (No 2)* [2010] NSWSC 792 at [78] for the proposition that "[t]here is nothing … which limits the scope of the investigation once the power to investigate is enlivened, except that the investigation be what ASIC thinks is expedient for the due administration of the corporations legislation". Chubb contended that if further matters for investigation are added, the correct conceptual framework is that the same formal investigation is taken to have expanded. That is, it remains one single investigation.

381. I am not persuaded by Chubb's submissions that all of ASIC's investigation ought to be considered a single investigation for the purposes of the 2011 Policy. That ASIC used the same

notice to gather information about different issues within Leighton does not, in my view, equate to there being only one Investigation for the purposes of the 2011 Policy. The Non-Iraq Investigations concerned separate, unrelated transactions and the adequacy of Leighton's public disclosures about those matters. I accept Liberty's submission that the language of the Policy was intended to require a factual connection between the notification drafted by Leighton and the Investigation.

382. In my view, the deeming provision in cl 5.4 of the 2011 Policy requires a clear relationship between various claimed Losses and the notified circumstances. The words used in cl 5.4, especially "arising out of" and "based upon", suggest the focus ought to be upon the subject matter of the Wrongful Act described in the notification: *AIG Australia Ltd v Kaboko Mining Ltd* [2019] FCAFC 96 at [56] (Allsop CJ, Derrington and Colvin JJ). The 2012 Notification was not expressed so widely as to include the Non-Iraq Investigations.

383. This is a similar situation to the case of *Kajima UK Engineering Ltd v The Underwriter Insurance Co Ltd* [2008] Lloyd's Reports 391 (*Kajima*) relied upon by AIG, Liberty and Catlin. The professional indemnity policy there obliged the insured to give notice of "circumstances which might reasonably be expected to produce a claim" (at [16]). In February 2001, the insured, a building contractor, provided a notification that some problems had been identified in a building and that an investigation was "underway to identify/confirm cause and potential affect/risks" (at [22]). The issue was what the notification covered (at [100]). Other problems with the building emerged over the period 2002 to 2006.

384. At [105], Akenhead J said it was clear that the investigation notified in February 2001 was into an identified subject matter:

> It was not and was not intended to relate to any other investigation. It was not a "stand-alone" or abstract investigation. It was not a general investigation into what was perceived as some general "can of worms". No general problem was known or believed to exist at the time of the notification or indeed up to the expiry of the TUIC insurance cover.

385. At [108], the Court found:

> The fact that, over the period 2002 to 2006, a number of other defects emerged of more or less seriousness does not enable, somehow, the notified circumstances to be expanded. Many of those defects seem, although I make no final finding about them, to have been discovered coincidentally. The notified circumstances could not be expanded by the later discovery of unrelated defects or damage which were not the subject matter of the notification.

386. Akenhead J concluded at [111(d)]:

> It is insufficient that there was a historical "continuum" of investigation by various parties which coincidentally revealed a number of defects or deficiencies which have not or may not have anything, to do with the notified circumstances.

Further, the original notification was not wide enough to cover "laterally or coincidentally discovered matters" (at [111(e)]). The final conclusion was at 412 [111(g)]:

> That relationship does not arise because later investigations, even if into the notified circumstances, happen to reveal other defects which have no relationship to the notified circumstances.

387. Although *Kajima* has not been cited in Australia, I consider it applicable in these circumstances.

388. The fact that the ASIC Investigation expanded over time to cover other matters relating to the affairs of the Leighton companies does not bring them within the deeming effect of cl 5.4, because they do not have the relevant connection to the subject matter of the 2012 Notification.

389. I also accept, as Liberty submitted, that it is improbable that the parties intended Cover under the 2011 Primary Policy to be determined arbitrarily by the administrative decision-making of a third party. Merely because ASIC used, for its own administrative convenience, the same notice to gather information about entirely different matters, does not dictate that there is only one Investigation for the purposes of the Policy.

390. Chubb does not dispute that if it is unsuccessful in persuading me that the Non-Iraq Investigation Costs are part of one ASIC Investigation, then it is liable for those sums pursuant to the 2013/14 Policy, and I so order. The applicable retention for that claim is $1,000,000 (Schedule, Item 4) and the applicable interest is considered below.

MCI Class Action Defence Costs

391. On 4 October 2013, MCI commenced representative proceedings against CIMIC in the Supreme Court of Victoria (First MCI Class Action). CIMIC first notified the 2011 Insurers on 9 October 2013. CIMIC made its first payment on 20 January 2014. The First MCI Class Action was permanently stayed by the Victorian Court of Appeal on 7 September 2015: *Melbourne City Investments Pty Ltd v Leighton Holdings Limited* [2015] VSCA 235.

392. On 14 April 2015, MCI commenced fresh representative proceedings against CIMIC (Second MCI Class Action). There was no evidence of when CIMIC first notified the 2011 Insurers about the Second MCI Class Action. CIMIC made its first payment on 22 May 2015. On 19 February 2019, the Second MCI Class Action was discontinued: *ACN 161 046 304 Pty Ltd (Formerly known as Melbourne City Investments) v CIMIC Group Limited* [2019] VSC 48.

393. Both MCI Class Actions concerned substantially similar allegations of CIMIC breaching its continuous disclosure obligations under s 674 *Corporations Act* as well as misleading and deceptive conduct under ss 708A and 1041H. Those allegations arose from matters detailed in the Iraq File Note, the AFP Referral and CIMIC's ASX media releases.

394. All the 2011 Insurers accepted that the MCI Class Action Defence Costs were within the meaning of "Defence Costs" and therefore "Loss" in cl 4.21 and, for the purposes of cl 5.4 (Deeming Clause), arose out of the facts or contraventions of Australian law alleged or described in the AFP Referral and/or the circumstances of the subject of the 2012 Notification.

395. However, the 2011 Insurers are entitled to rely on any non-fraudulent non-disclosure or misrepresentation in relation to the MCI Class Action Defence Costs for the purposes of a s 28 (3) *IC Act* reduction in liability to nil.

Inabu Settlement Sum

396. There was no dispute that the Inabu Class Action amounted to a "Securities Claim" (cll 4.31 – 4.32), alleged a "Wrongful Act" (cl 4.37(ii)), and was therefore a "Claim" (cl 4.5(i)(c)). Like the MCI costs, it was also not in dispute that it bore a relationship to the 2012 Notification. Instead, the dispute raised by the 2011 Insurers was that on the proper construction of "Loss" it was for CIMIC to prove that the settlement sum was "reasonable", which it has failed to do.

397. As I have found that the 2011 Insurers *have* established a defence under s 28(3) *IC Act* and that liability should be reduced to nil, it is not necessary to consider this issue. However, if I am wrong, I consider that the Inabu Settlement Sum was reasonable.

398. CIMIC denied that the Policy requires it to prove the settlement was "reasonable". However, it submitted that if it is required to do so, then it has proved as much through the material to which I was taken in submissions, being primarily the negotiations that took place in the lead up to settlement, including the position papers prepared and offers made, which are summarised below:

    1. Inabu's Position Paper dated 16 November 2018 alleged that it was confident it would be able to prove loss and damage and "on an aggregate basis across the class this will lead to a very substantial judgment against CIMIC … in accordance with usual practice [the class] remains open for judgment purposes".

    2. CIMIC's Position Paper dated 10 December 2018 denied that there was any merit to Inabu's claims and indicated that Inabu would likely not establish market-based causation. It also stated that Inabu's quantum evidence was flawed and incorrectly inflated the quantum of its own loss.

    3. The first mediation took place on 18 and 19 December 2018 on a closed class basis with a claim around $90 million, without the parties reaching agreement.

4. In a report to its insurers on 3 February 2019, CIMIC's lawyers advised that Inabu had offered to settle for $50 million inclusive of costs and CIMIC had counter-offered for $21 million. The counter offer lapsed. The letter stated that "CIMIC intends to consider any offers made by the Applicant carefully and having regard to its evaluation of the risks of proceeding".

5. The second mediation took place on 6 February 2019. Inabu's offer moved to $41.4 million and CIMIC had moved to $25 million.

6. Inabu's offer of $41.4 million was formalised in a letter dated 11 February 2019, which also restated the fact that there was a larger case against CIMIC:

> Of course, as you are aware, the class is only limited to registered group members for the purposes of any settlement before judgment and we will seek damages for the whole of the open class through the court process ... That potential exposure, for the whole of the open class, exceeds $500million including interest using the loss methodology for which the applicant contends and $330 million including interest using the methodology for which the respondent contends.

7. Around that time, CIMIC also obtained the ASIC examination transcripts of Messrs King, Wild and Stewart and informed Inabu that it would call Messrs King, Wild and Stewart as witnesses in its case.

8. On 27 June 2019, Inabu made a further offer to settle for $38m inclusive of costs and interest. The offer lapsed.

9. CIMIC successfully applied to strike out parts of the applicant's Further Amended Statement of Claim, which concerned allegations of underlying knowledge as insufficiently clear. In *Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Ltd* [2019] FCA 1480.

10. On 20 December 2019, the proceedings were settled on the basis that CIMIC paid Inabu $32.4 million, subject to Court approval, which was given on 28 April 2020.

399. Throughout the mediation process, CIMIC endeavoured to update all its insurers, who took different positions in relation to indemnity for the settlement:

    1. Each of AIG, Chubb, Catlin and Liberty had refused to indemnify CIMIC under the Policy prior to the opportunity to settle arising.

    2. Whilst Catlin ultimately declined to indemnify in relation to the settlement and reserved its rights if CIMIC did not accept Inabu's final offer, it previously said "the Insured should act at all times as a prudent uninsured and take all necessary steps to obtain a settlement of the Inabu proceedings on the best available terms".

3. Liberty declined to indemnify, stating "in acting as a prudent uninsured CIMIC has a duty to take all steps reasonably available to obtain the best possible resolution of the claim. Liberty considers that this includes settling the Inabu Proceedings for up to $38M …".

4. Berkley stated that it considered a failure to settle the Inabu Class Action for the sum of $38 million would constitute a breach of cl 5.5 and would also breach CIMIC's duty to mitigate and minimise its loss and damage was well as breach of its duty to act in utmost good faith.

5. Zurich directed CIMIC to act as a prudent uninsured and mitigate its loss with regard to any potential settlement of the Inabu claim, noting "[a]ny failure by CIMIC in this respect may create coverage impediments, and Zurich and CGU expressly reserve their rights in this regard".

400. *All* the 2011 Insurers had an interest in the issue because the Settlement Amountwould, if payable, exhaust the 2011/2012 primary layer comprising Chubb and AIG as co-insurers, the Catlin layers (if Catlin was otherwise liable), and then erode the Liberty layer.

401. The debate centred around the construction of cl 4.21 of the 2011 Policy, which defines insurable "Loss" in the following terms (emphasis added):

> **any amount which an Insured is legally liable to pay resulting from a Claim, Defence Costs**, and any other awards of damages (including any court order to pay compensation for damage resulting from a contravention of any statute or legislative provision and punitive and exemplary damages), awards of costs or **settlements (including claimant's legal costs and expenses).** pre- and post judgment interest on a covered judgment or award, fines and pecuniary penalties and the multiplied portion of multiple damages.
>
> "Loss" in the case of an Insured Person, shall also include Investigation Costs, Asset and Liberty Expenses, Bail Bond and Civil Bond Premium, Prosecution Costs and Extradition Costs…

402. The 2011 Insurers submitted that "settlements" is properly construed to mean "reasonable settlements" in reliance on authority including *Vero Insurance v Baycorp Advantage* [2004] NSWCA 390 (*Vero*); *Weir Services Australia Pty Limited v AXA Corporate Solutions Assurance* [2018] NSWCA 100 (*Weir*) and *Delta Pty Limited v Mechanical and Construction Insurance Pty Limited* [2019] QCA 62 (*Delta*).

403. Chubb submitted that the definition of Loss should be read so that the reference to "settlements" is treated as serving to make clear that it is a type of loss that may fall within the description "amounts which the Insured is legally liable to pay resulting from a Claim" and, accordingly, are losses for which indemnity is available. Chubb submitted that, on this reading, an indemnity is confined to amounts that the Insured is legally liable to pay, being

settlements which are objectively reasonable. Counsel for AIG accepted that the Inabu Settlement was reasonable, and also adopted Chubb's submissions.

404. CIMIC advanced a different construction of cl 4.21 based on the listing structure of the definition of 'Loss', so that "settlements" was not qualified by the general reference early in the clause to an amount the Insured "is legally liable to pay". Accordingly, CIMIC submitted that settlements are an independent subject matter and by payment of the settlement, CIMIC had established its entitlement to indemnity. CIMIC submitted the authorities including *Vero* are distinguishable, because those cases contained different wording and involved the importation of reasonableness into "legal liability" or "liability" for settlements.

405. In support of this construction, CIMIC pointed to existing protections of the insurer's obligation to indemnify being triggered by *any* settlement including, sham or otherwise unreasonable settlements, which would mean the qualification of "reasonableness" was commercially unnecessary.

    1. The insurers had a right to participate fully in the defence and in the negotiation of any settlement that involves or appears reasonably likely to involve the Insurer making payment under the policy under cl 5.5;

    2. It was a claims condition that in the event of a Claim, each Insured takes reasonable steps to reduce or diminish any loss under cl 5.5;

    3. In a dispute between the Insurer and Insured over whether a claim should be settled or defended, the Insurer is obliged to refer the matter to Senior Counsel for determination under cl 5.6;

    4. The Insured's entry into a settlement agreement was subject to the prior written consent of the Insurer (which shall not be unreasonably delayed or withheld) under cl 5.6; and

    5. The policy was subject to an implied term of utmost good faith pursuant to s 13 *IC Act* (which was not alleged by the 2011 Insurers).

These arguments about alternative protections are similar those made at first instance in *Baycorp Advantage Ltd v Royal and Sun Alliance Insurance Australia Limited* [2003] NSWSC 941 at [22] (Einstein J), which were not accepted as a basis for rejecting the qualification of settlements being "reasonable".

406. None of the 2011 Insurers suggested that CIMIC was not entitled to enter into the settlement with Inabu, nor that CIMIC breached any of the claims' conditions or the utmost duty of good faith. Accordingly, it is not necessary to consider CIMIC's submissions that any reliance placed by the 2011 Insurers on a claim's condition would be barred by the doctrines of election, waiver or estoppel: see *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 at 10 (Gleeson CJ and Crennan J).

407. The remaining question is whether the Settlement Sum falls to be indemnified and, if so, whether in whole or in part.

Is reasonableness required?

408. There was no dispute that the 2011 Insurers repudiated their liability (assuming it existed) to indemnify for this particular loss. No 2011 Insurer submitted that CIMIC needed to establish it would have been liable to Inabu in a judgment, had it not settled the claim. Therefore, there is no need to consider the distinction that has been raised in some authorities between the "Settlement is Liability" and "Settlement is Irrelevant" approaches (see Kirsty Sutherland, 'An Uneasy Compromise: An Analysis of the Effect of a Settlement Reached by an Insurer with a Third Party Claimant vis-à-vis his or her Insurer' (1998) 9 *Insurance Law Journal* 257 at 260, 263; Nigel Rein, 'Liability Policies: The Relationship of the Claim against the Insured and the Insured's Claim on the Insurer' (1994) 6 *Insurance Law Journal* 193 at 204). Instead, the only issue is whether on the proper construction of cl 4.21 the settlement must be "reasonable".

409. While the reference to "settlements" in cl 4.21 is not expressly qualified by the word "reasonable", I am nonetheless satisfied that, properly construed, cl 4.21 is to be read as including a requirement of reasonableness for the following reasons.

410. The clauses in *Vero, Weir* and *Delta* provided:

1. In *Vero,* the clause was expressed as indemnifying "the amount (whether determined by judgment or settlement) which an insured person is legally liable to pay in respect of a claim".

2. In *Weir,* the clause read "We will pay all amounts that you become legally liable to pay by way of compensation for …" [the policy did not include express reference to settlements].

3. In *Delta,* the clause read "MECON will provide indemnity for all amounts which you become legally liable to pay …" [the policy did not include express reference to settlements].

411. I accept that there are some differences in those clauses to cl 4.21. First, all three cases concerned the insured seeking payment for settlement sums. However, only *Vero* involved a Directors and Officers policy, as here, whereas *Delta* and *Weir* concerned general liability policies.

412. However, I note that the consideration in *Vero* and *Weir* of whether the words of the policy required reasonable settlements was obiter. In *Vero,* the case was resolved on an earlier issue, being the construction of the specific terms of the settlement deed and the insurance policy.

The construction of the Inabu Settlement Deed was not put in issue by any party (nor was it in evidence). In *Weir,* the insurer conceded that liability encapsulated a reasonable settlement.

413. In substance, cl 4.21 is sufficiently similar to the clauses in *Vero, Weir* and *Delta* , and therefore I should follow the established constructions of substantially similar terms or clauses: *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 at 520 (Gibbs CJ); *Vero Insurance Ltd v Power Technologies Pty Ltd* [2007] NSWCA 226 at [148] (Beazley JA, Campbell JA and Harrison J agreeing).

414. Furthermore, it is not necessary to determine whether CIMIC is correct in submitting that cl 4.21 should be read as a list with the effect that "settlements" is untethered from the prefacing words "any amount which an Insured is legally liable to pay resulting from a claim …". This is because even if cl 4.21 is read as a list, the starting words of the clause capture settlements because "Claim" is defined broadly to include a "mediation … seeking compensation or other legal remedy". The settlement plainly resulted from, in the sense of being causally connected to (Derrington and Ashton at 497, 509), the mediation involving Inabu's claim for "compensation or other legal remedy". It is accordingly unnecessary to examine the interaction between those prefacing words and the subsequent reference to "settlements". The explicit reference to "settlements" was inserted by the drafter for the avoidance of doubt and to ensure nothing was left out of the breadth of the definition of "Claim": see eg *Tokio Marine & Nichido Fire Insurance Co Ltd v Holgersson* [2019] WASCA 114 at [54]-[55] (Buss P, Beech and Pritchard JJA); *Allianz Australia Insurance Limited v General Cologne Re Australia Limited* [2004] NSWCA 433 at [18] (Spigelman CJ, with whom Beazley and Bryson JJA agreed). That is not to suggest "settlements" is surplusage, rather, it is necessary to give effect to the plain and ordinary meaning of the prefacing words of cl 4.21, which then apply the meaning of "legally liable" to settlements.

415. I consider that the settlement sum is required to be reasonable, and it is therefore necessary to consider what a reasonable settlement sum is. CIMIC submitted that the settlement sum was reasonable *in its entirety* but, as a fall-back position submitted that if the total sum was not considered reasonable, the Court should decide the reasonable amount payable rather than the sum being reduced to nil in accordance with *BNP Paribas v Pacific Carriers* [2005] NSWCA 72 at [260]-[263] (Giles JA).

Onus

416. There was a debate over who bears the onus of proving a settlement was reasonable. CIMIC submitted that the 2011 Insurers carried the onus of demonstrating the settlement was unreasonable and could only refuse indemnity on the basis of alleging disentitling conduct which was not pleaded. The 2011 Insurers submitted the onus lay with CIMIC to establish that the settlement was a reasonable settlement because it is the party relying on the settlement as proof of its loss.

417. I am satisfied that CIMIC bears the onus of proving reasonableness: *Unity Insurance Brokers Pty Ltd v Rocco Pezzo Pty Ltd* (1998) 192 CLR 603at 608-609 (McHugh J) and the cases there cited (*Unity Insurance*) and, for the reasons below, has discharged that onus.

What amount is reasonable?

418. In support of its submissions that the settlement sum was reasonable, CIMIC tendered many documents from the Inabu proceedings which variously indicated the nature of the litigation, material served by the parties, the positions taken by the parties and the chronology leading up to the settlement. CIMIC also drew attention to ASIC Transcripts of interviews with Messrs King, Wild and Stewart, to which the parties to the Inabu Class Action had access. Those transcripts demonstrate Mr Savage's limited recollection of the circumstances surrounding Iraq.

419. There was no dispute as to the principles of determining reasonableness, which are helpfully summarised in *Delta* at [36] (Fraser JA):

> To establish a liability, a settlement "must not only be reasonable but also bona fide". [Vero Insurance Ltd v Baycorp Advantage Ltd [2004] NSWCA 390, [68]]. The question of reasonableness is to be determined, "based on a reasonable assessment of the risk faced by [the insurer] if the [third party] claims were to proceed to trial and judgment" [CGU Insurance Limited v AMP Financial Planning Pty Ltd (2007) 235 CLR 1, [24]]. The settlement "must reflect the plaintiff's true prospects of success if the proceedings had been conducted with care and skill ... ." [BNP Paribas, above, [17]] The insured is "required to have regard to the proper interests of the insurer and [can] not claim indemnity under the policy in respect of amounts payable under a settlement which [does] not reflect, by its terms, a reasonable evaluation of the prospects of a successful defence to a third party's claim." [The Distillers Company Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd (1973-1974) 130 CLR 1, 32]. Monies paid for an ulterior purpose, that is a purpose "extraneous to the risks insured against", will mean that there is not such a bona fide settlement of a liability [Distillers Bio-Chemicals, above, pp 32-33]. In the Distillers Bio-Chemicals case, Gibbs J gave examples of extraneous reasons which might motivate an insured to settle: monies paid to avoid adverse publicity or to relieve a parent company of its part in liability for a dangerous product [Distillers Bio-Chemicals, above, p 32]. It is not that such matters make the settlement unreasonable generally: they may provide sensible commercial reasons to settle. But in terms of the rule currently under discussion, these extraneous motives mean that the settlement is not reasonable because it is not a bona fide or accurate measure of liability in the action.

420. In addition, the following principles are relevant:

    1. The reasonableness of a settlement amount is an objective question: *Unity Insurance* at 608-609 (Brennan CJ) 618 (McHugh J), 627 (Gummow J) and 656 (Hayne J).

2. Whether the settlement was reasonable is to be determined having regard to the material that was available to the parties at the time of settlement, not by reference to material later obtained that may demonstrate a different result: *Unity Insurance* at 653 (Hayne J); *White Industries Qld Pty Ltd v Hennessey Glass and Aluminium Systems Pty Ltd* [1999] 1 Qd R 210 at 218 (Pincus J). The settlement sum must reflect the true prospects of success if the proceeding had been conducted with due care and skill: *Protec Pacific v Steuler Services* [2014] VSCA 338 at [747] (Tate, Santamaria and Kyrou JJA) (*Protec Pacific*).

3. There is to be a reasonable assessment of the risk faced if the claims were to proceed to trial and judgment: *CGU Insurance Limited v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 at [24] (Gleeson CJ and Crennan J).

4. It is relevant whether the insured made sufficient inquiries and had sufficient information available to it to warrant the compromise that was reached: *Unity Insurance* at 653 (Hayne J).

5. It is relevant whether the negotiations were conducted with proper care and skill: *BNP Paribas v Pacific Carriers Limited* [2005] NSWCA 72 at [17] (Handley JA).

6. The fact that proceedings were lengthy, complex and would be costly if not settled cannot alone establish reasonableness: *Protec Pacific* at [817] (Tate, Santamaria and Kyrou JJA).

7. There is a range within which a settlement amount will be reasonable because of the inherent uncertainty of outcomes: *Unity Insurance* at 653 (Hayne J).

421. Having regard to the material available to the parties as at 20 December 2019 when settlement was reached, I consider the following factors favour the conclusion that the settlement was reasonable, contrary to Chubb's submissions.

422. First, there is no suggestion that CIMIC's conduct during the course of the settlement negotiations was other than bona fide or that CIMIC had entered into the settlement for any extraneous purpose.

423. Secondly, CIMIC made numerous inquiries of its insurers, who suggested CIMIC settle for up to $38 million or to face possible consequences under the policy (Liberty, Berkley and Zurich) and to settle for the "best available terms" (Catlin). The fact that CIMIC's sophisticated and legally advised insurers advised it to settle for less than a particular sum, and CIMIC ultimately achieved an even better settlement, points in favour of reasonableness.

424. Thirdly, I am not satisfied that CIMIC was driven to settlement because it considered it was unlikely to succeed in its defence in the Inabu proceedings. CIMIC submitted it pursued settlement, not because its defence was bound to fail, but because, in light of the uncertainty and novel nature of legal issues in play, coupled with the risk of a large pay-out, the settlement was considered a safer choice. As counsel for CIMIC submitted:

> [W]hen one enters into a settlement, you're engaged in a somewhat predictive exercise of what a Court may make of the case the applicant. That's not an exercise where you are working from the premise of trying to sort out what the truth is, but considering the range of outcomes, that a decision maker may come up with, should the case go all the way. For a plain and obvious reason, in a case like the Inabu proceedings, there is always a range of outcomes and a range of reasonable price, to avoid the uncertainty of that outcome.

425. Uncertainty alone in the sense of legal complexity of the claim does not establish reasonableness (*Protec Pacific* at [817]), and uncertainty in relation to novel issues of law does not only or inherently favour a plaintiff. Counsel for CIMIC submitted that Inabu's case was circumstantial and, having regard to the state of the pleadings and other circumstances at the time of the settlement, CIMIC had certain forensic advantages. It had succeeded in part in obtaining a strike out of parts of Inabu's pleadings relating to the underlying knowledge held by CIMIC, and was planning to call Messrs King, Stewart and Wild to assist it challenge the underlying awareness case advanced by Inabu.

426. These matters do not demonstrate that Inabu's claim necessarily had weaker prospects against CIMIC, such that the settlement sum was unreasonably large. The factual findings I have made in relation to the awareness of senior executives in Leighton in 2010 are a strong factor in favour of reasonableness and are likely to have been recognised by CIMIC as a possible outcome in the Inabu proceedings. CIMIC conducted its negotiations with due care and skill by not rushing to accept Inabu's offer of $38 million made on 27 June 2019. Instead, CIMIC continued to seek forensic advantages and leverage in its negotiations by filing the interlocutory strike out application on 31 July 2019. On balance, I consider Inabu's prospects to be a neutral factor.

427. Fourthly, while there was no evidence of legal advice on prospects given to CIMIC, the High Court was divided on whether such evidence is critical: *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603. Brennan CJ considered that advice received by the settling party is not, in itself, evidence of reasonableness of the amount (at 608-609). McHugh J considered it "vital" (at 616). Hayne J said (at 653):

> [W]hether a party to litigation has received advice to settle may be important in deciding whether that person's conduct in settling the case was reasonable but, standing alone, the fact that a litigant was advised to settle at a particular figure reveals little or nothing about whether the settlement reached was reasonable. This is not to say that evidence may not be led that such advice was given and adopted; it may. But evidence of that kind does not conclude the issue. What will usually be much more important is the reasoning that supported the advice that was given for that will ordinarily will ordinarily reveal why it was thought reasonable to compromise the claim as it was.

428. Hayne J's view has been adopted by intermediate appellate courts: *AMP Financial Planning Pty Ltd v CGU Insurance Ltd* [2005] FCAFC 185 at [120] (Emmett J, with whom Moore J agreed). In *B NP Paribas v Pacific Carriers Ltd* [2005] NSWCA 72 at [249], Handley JA considered such

evidence would "ordinarily be essential" whereas Giles JA (with whom Sheller JA agreed) considered the more relevant evidence was the reasoning supporting the advice (at [249]).

429. However, CIMIC's correspondence to the insurers does highlight CIMIC's lawyers' reasoning: *BNP Paribas* at [249] (Giles JA with whom Sheller JA agreed); *Unity Insurance* at 653 (Hayne J). For example, CIMIC's lawyers wrote to the 2011 Insurers via Marsh on 27 August 2019:

> ... there may be an opportunity, with a contribution from Insurers, to resolve the Inabu Proceeding by way of negotiated settlement with the Plaintiff ... In the event that CIMIC does not receive a contribution from Insurers and the Inabu Proceeding is not settled, there is a risk that the outcome at trial will be worse. There is also a risk that any future offer of settlement by the Plaintiffs (if it is made) will be higher than the last offer ... If, with an interim contribution, the Inabu Proceeding can be resolved, that will be for the benefit of all Insurers. The downside risk will be minimised.

430. I am satisfied that one of the reasons for CIMIC settling the proceedings was a concern, known by its lawyers, that its exposure at trial would likely be greater than the settlement offers being made.

431. Finally, the Inabu proceedings were being conducted on an open class basis, whereas the mediation and negotiations were conducted on a closed class basis. Accordingly, as was submitted, the possible exposure could be a substantial sum which, Inabu foreshadowed, "exceeds $500 million". However, this only slightly points in favour of reasonableness, as a comparison between the settlement amount and the amount of the claim cannot be anything more than a general indication of what the parties saw as the risk of continuing the litigation: *Unity Insurance* at 653 (Hayne J).

432. Overall, I consider the Inabu Settlement amount was, in its entirety, within the range of reasonableness, and, but for my findings in relation to the duty of disclosure, would have constituted an indemnifiable "Loss".

Inabu Class Action Defence Costs

433. CIMIC also sought the costs incurred in defending the action (Inabu Class Action Defence Costs). All the 2011 Insurers accepted that these costs were caught within the meaning of "Loss" under cl 4.21. However, they are also caught by my findings relevant to the Inabu Settlement.

Gregg Prosecution Costs

434. On 7 January 2017, Mr Gregg was charged with offences under s 1307(1) of the *Corporations Act* f or engaging in conduct that resulted in the falsification of company books and records.

Specifically, the conduct related to a payment instruction relating to two payments made to a Dubai entity, Asian Global Products, and Trading FZE in the sum of US$15 million in August 2011, and an agreement to buy and sell between Leighton and the aforementioned entities dated 1 August 2011. A court attendance notice issued on 9 January 2017 was in evidence.

435. In 2019, Mr Gregg was convicted of the offences and sentenced. However, the verdict was later quashed, and an acquittal entered: *Gregg v R* [2020] NSWCCA 245.

436. It was common ground that the prosecution of Mr Gregg constituted a criminal proceeding which alleged a "Wrongful Act" (2011 Primary Policy cl 4.37(i)) and was therefore a "Claim" (2011 Primary Policy cl 4.5(i)(b)). Around 8 May 2017, CIMIC notified the 2011 Insurers of the Gregg Prosecution.

437. The 2011 Insurers differed in their submissions on the connection between the Gregg Prosecution Costs and the 2012 Notification. While Chubb admitted the connection, each of AIG, Catlin and Liberty denied the connection.

438. There is no dispute that the Gregg Prosecution bears a relationship to the ASIC Investigation into Asian Global matters (part of the Non-Iraq Investigations), which was subject of notices issued by ASIC during the currency of Chubb's 2013/14 Policy.

439. I have already determined that the Non-Iraq Investigations had no relevant connection to the "Wrongful Act" described in the 2012 Notification. Since the Gregg Prosecution only bears a relationship to the Non-Iraq Investigations, it follows that the Gregg Prosecution also does not have the requisite connection to the 2012 Notification for the associated costs to amount to Loss under cl 4.21 under the 2011 Policy, because there is no basis for the application of cl 5.4. Therefore, Chubb is liable for these costs under the 2013/14 Policy and quantum of the costs and interest will be the subject of the Separate Hearing.

Limitation Defence

440. The 2011 Insurers relied on a limitation defence against CIMIC's claim. No detailed submissions were made on this issue by any party. All parties accepted that CIMIC's claim was in contract and attracted a limitation period of 6 years under s 14(1)(a) *Limitation Act 1969* (NSW) (*Limitation Act*). It followed that, at most, CIMIC's claim could be statute barred in respect of a "fairly modest" part of CIMIC's total loss which accrued prior to 8 June 2014 (6 years before CIMIC commenced proceedings). Although Liberty submitted that the dispute is over the sum of $375,654.84, questions of quantification will be determined at the Separate Hearing.

441. The only issue is fixing the accrual date of CIMIC's cause of action. CIMIC put forward three alternative accrual or breach dates:

1. When the relevant 2011 insurer declined reimbursement in respect of the particular loss following CIMIC's request for payment or assertion of its entitlement;

2. When it became unreasonable for the insurer to withhold payment of the amount sought (picking up language of the entitlement to interest under s 57 *IC Act*); or

3. When CIMIC made the relevant payments.

442. The 2011 Insurers made various submissions:

1. AIG submitted that CIMIC's cause of action accrued at the date the loss was incurred (that is, paid) or, alternatively, the date that CIMIC sought indemnity for that particular loss. AIG relied upon cl 5.8 which provides that the obligation to indemnify "Defence Costs" and "Investigation Costs" (among others) arises "promptly after sufficiently detailed invoices for those costs are received by the Insurer" to submit that if any invoices were provided by CIMIC prior to 8 June 2014, they are not recoverable.

2. Liberty maintained the cause of action accrued when loss was incurred, that is, where a payment was made by CIMIC for an amount for which indemnity was sought.

3. Chubb adopted both of AIG and Liberty's submissions.

4. Catlin did not maintain a limitation defence. Catlin conceded that CIMIC would not be statute-barred as against their insurance layer. This is because, first, under the 'first-past-the-post principle', the only loss which CIMIC claims against Catlin is $10 million of the Inabu Settlement Amount and secondly, CIMIC's claim against Catlin could not have accrued before CIMIC became liable to pay that settlement amount, being either the date of the 20 December 2019 when the Settlement Deed was signed or 2 April 2020 when the sum was approved. Ultimately, nothing turns on this because I have found the 2011 Insurers have succeeded in the defence of non-disclosure and CIMIC is not entitled to recover the Inabu Settlement Amount.

443. The date of accrual is not the same for all insurance contracts. However, recently, in *Globe Church Incorporated v Allianz Australia Insurance Ltd* (2019) 99 NSWLR 470; [2019] NSWCA 27 at [209]-[210] (*Globe Church*), Bathurst CJ, Beazley P and Ward JA explained:

> [209] Absent a provision in an indemnity insurance policy that makes lodgement of a claim a condition precedent to liability, the concept of a promise to indemnify (to make good the loss or to hold harmless against loss) in the context of a property damage insurance policy is such that the promise is enlivened when the property damage is suffered. Unless it be necessary for there to be a claim made on the insurer to give rise to the liability, it is at the point of property damage that the insured has not been held harmless against the loss and (leaving aside any defences that might be

> raised on such a claim) would be entitled to sue to enforce the promise to indemnify. Such a claim is recognised as being a claim for unliquidated damages (albeit that the amount necessary to make good the loss is to be calculated in accordance with the basis of settlement clause in the policy).
>
> [210] Thus, unless the making of a demand is a condition precedent to liability, all the essential facts required to be established by the insured to enforce the indemnity will by then have occurred and accordingly the cause of action for unliquidated damages will be complete. It follows that the cause of action accrues on the happening of the property damage (the insured event).

444. Unlike in *Globe Church* and other cases that have taken a similar position in finding accrual upon the suffering of Loss, CIMIC's claim does not concern a property damage policy or personal injury policy.

445. In any event, I consider on a proper construction of the 2011 Policy, the Insurers promised to make payment upon notification, rather than upon CIMIC incurring a loss. Subclauses in cl 5 speak to the obligation of indemnity and provide references to timing, and even though they are not entirely clear, they appear to expect notification before the obligation to pay is triggered.

446. First, cl 5.1 provides (emphasis added):

> The Covers provided under this policy are granted solely with respect to Claims first made against or by an Insured during the Policy Period … **only if such Claims have been notified to the Insurer as soon as practicable** …

The clause is expressly limiting those circumstances in which the insurer will provide cover to "only" those claims which have been "notified to the Insurer as soon as practicable". Therefore, if there is no notification, or tardy notification, then cover will not be provided.

447. Secondly, cl 5.8 provides that the Insurer "will advance … Investigation Costs … promptly after sufficiently detailed invoices for those costs are received by the Insurer". This specifies the type of information required before costs are "advanced".

448. Thirdly, cl 5.9 provides that the insurer "will pay Loss … in the order in which such Loss is presented to the Insurer for payment." I appreciate that the definition of "Loss" does not require that the insured has in fact paid out money, but merely become legally liable to pay. Nevertheless, this clause speaks of "presentation" of evidence of such legal liability as a requirement before the insurer will in fact pay.

449. I consider this a case where the contract has made notification of loss a condition precedent to the insurer's liability: *Globe Church* at 514. The relevant breach of contract occurred when the insurer failed to "promptly advance" the costs after receipt of the invoices concerning a claim that was notified "as soon as practicable".

450. No submissions were made on the proper construction of "prompt". I consider each breach occurred 1 month after presentation of invoices. However, where, as here, the 2011 Insurers had repudiated the obligations to indemnify for any Loss, the provision of invoices was pointless, and accrual can be taken as 1 month after CIMIC incurred the loss by paying invoices.

451. This means that any payments made by CIMIC prior to 8 May 2014, which accrued on 8 June 2014, are statute barred.

Interest

452. CIMIC has sought interest on unpaid costs pursuant to s 57 *IC Act*. As I have found that:

    1. the 2011 Insurers are liable to pay CIMIC in relation to the Iraq ASIC Investigation Costs and the AFP Investigation Costs; and

    2. Chubb is liable to pay CIMIC in relation to the Non-Iraq ASIC Investigation Costs and the Gregg Prosecution Costs,

below I determine when interest for those payments commences. I also consider when interest would be payable for other costs, on the assumption that I am otherwise wrong about the insurers' liability.

453. The Separate Hearing will determine the quantum of interest based on the rate of interest prescribed by regulations over the relevant period: s 57(3) *IC Act*; *Insurance Contracts Regulations* 2017 (Cth) r 10.

454. Section 57 *IC Act* provides:

> (1) Where an insurer is liable to pay to a person an amount under a contract of insurance or under this Act in relation to a contract of insurance, the insurer is also liable to pay interest on the amount to that person in accordance with this section.
>
> (2) The period in respect of which interest is payable is the period commencing on the day as from which it was unreasonable for the insurer to have withheld payment of the amount and ending on whichever is the earlier of the following days:
>
> (a) the day on which the payment is made;
>
> (b) the day on which the payment is sent by post to the person to whom it is payable.
>
> (3) The rate at which interest is payable in respect of a day included in the period referred to in subsection (2) is the rate applicable in respect of that day that is prescribed by, or worked out in a manner prescribed by, the regulations.

(4) This section applies to the exclusion of any other law that would otherwise apply.

(5) In subsection (4):

"law " means:

(a) a statutory law of the Commonwealth, a State or a Territory; or

(b) a rule of common law or equity.

455. The purpose of s 57 was outlined by Derrington and Colvin JJ in *LCA Marrickville Pty Ltd v Swiss Re International Se* [2022] FCAFC 17 at [247] :

> Like more general powers to award interest, the provision is intended to compensate a successful insured for the detriment of being kept out of money to which it is found to have been entitled: *Elders Ltd v Swinbank* (2000) 96 FCR 303 at 312 [32] . That purpose is qualified by the acceptance of the practical need of an insurer for time to determine that it is liable: ALRC Report at 196 – 197 [319].

456. Pursuant to s 57(2) *IC Act,* it is a question of fact in determining the date it became unreasonable for the insurers to withhold payment. Interest is then payable between that date and the date when payment is eventually made: s 57(3) *IC Act*. Accordingly, post-judgment interest is calculable by reference to the interest under the *IC Act*, rather than post-judgment interest provisions in governing state legislation: s 57(4) *IC Act*; *Fruehauf Finance Corp Ltd v Zurich Australian Insurance Ltd* (1993) 32 NSWLR 735 at 743-744 (Giles J); *NRMA Insurance Ltd v Tatt* (1989) 92 ALR 299 at 315 (McHugh J).

457. What is a reasonable time turns on an objective assessment of the factual circumstances of each case: see eg *O'Neill v FSS Trustee Corporation as Trustee of the First State Superannuation Scheme* [2015] NSWSC 1248 (Slattery J).

458. In *Bankstown Football Club v CIC Insurance Ltd* (unreported, Sup Ct, NSW, 17 December 1993), Cole J held:

> A reasonable period is to be given to the insurer to investigate and determine its position but if it adopts an incorrect position in relation to its obligation to pay under the policy, that, in my view, does not mean that simply because that incorrect position is adopted on a bona fide basis, it becomes reasonable for the insurer to decline to pay the sums otherwise due. That seems to me to be the correct interpretation of section 57(2), particularly in circumstances of section 57(1) of the Act , where an insurer is liable to pay to a person an amount under a contract of insurance.

Cole J's reasoning has been approved or applied in eg: *LCA Marrickville Pty Ltd v Swiss Re International* [2022] FCAFC 17 at [242]-[250] (Derrington and Colvin JJ); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 410 (Brennan CJ, Dawson, Toohey and Gummow JJ).

459. The Insurer's refusal to pay the claim cannot extend the period of reasonableness to the point of adjudication: *Fitzgerald v CBL Insurance Ltd* [2014] VSC 493 at [415]-[416] (Sloss J).

460. A more complex claim will usually point in favour of a longer time until unreasonableness is found: see eg *Elilade Pty Ltd v Nonpareil Pty Ltd* (2002) 124 FCR 1 at 38 (Mansfield J) (reasonable for the insurer to have withheld payment for just over 11 months investigating inundation); *Mel in v Mutual Community General Insurance Pty Ltd* (1991) 6 ANZ Ins Cas 61-057 (three months was reasonable to investigate a house fire).

461. My findings in relation to interest are summarised in the table below. I note the table includes findings which are not strictly necessary by reason of my findings in relation to the construction and operation of cl 5.1.

Cost Category	**First Payment**	**Accrual Date (1 month after payment)**	**Interest**
AFP Investigation Costs	13 April 2015	All payments within time	3 months from first payment (13 July 2015) Upon the accrual date of each subsequent payment
ASIC Investigation Costs (Iraq only)	30 July 2013	Any payments made before 8 May 2014 are out of time. This includes part of the AFP Investigation Costs.	6 months from first payment (30 January 2014) Upon the accrual date of each subsequent payment. Any sum paid between 30 July 2013 and 8 June 2014 is out of time. The interest payable in relation to those payments is also out of time.
			6 months from first payment (30 January 2014)

ASIC Investigation Costs (Non-Iraq)	30 July 2013	Any payments made before 8 May 2014 are out of time. This includes part of the AFP Investigation Costs.	Upon the accrual date of each subsequent payment. Any sum paid between 30 July 2013 and 8 June 2014 is out of time. The interest payable in relation to those payments is also out of time.
Gregg Defence Costs	21 February 2016	All payments within time	6 months from first payment (21 August 2016) Upon the accrual date of each subsequent payment
Gregg Witness Costs	11 April 2017	All payments within time	2 months from first payment (11 June 2017) Upon the accrual date of each subsequent payment
First MCI Class Action Costs	20 January 2014	All payments within time	3 months from first payment (20 April 2014) Upon the accrual date of each subsequent payment
Second MCI Class Action Costs	22 May 2015	All payments within time	2 months from first payment (22 July 2015) Upon the accrual date of each subsequent payment
Inabu Settlement Amount	7 July 2020	All payments within time	From date of first payment (7 July 2020)
Inabu Defence Costs	6 January 2017	All payments within time	4 months from first payment (6 May 2017) Upon the accrual date of each subsequent payment

462. The dates of first payment claimed are:

    1. For the AFP Investigation – 13 April 2015;

    2. For the ASIC Investigation – 30 July 2013.

463. Having regard to the type of case here and the probable issues which had to be investigated in relation to the Iraq File Note, the present case is obviously complex, and a longer time is appropriate until unreasonableness arises. However, the deeming provision in cl 5.4 demonstrates that it was envisaged that claims might arise which involve common facts and, as such, would require less duplication in the resources allocated to investigating subsequent aggregated claims.

464. None of the 2011 Insurers suggested that CIMIC failed to provide information reasonably required by the Insurer to investigate the claim: *LCA Marrickville Pty Ltd v Swiss Re International* [2022] FCAFC 17 at [248] (Derrington and Colvin JJ); Peter Mann, *Mann's Annotated Insurance Contracts Act* (7th ed, 2016, Lawbook Co) at 524.

465. AIG and Chubb began making payments to CIMIC from 15 October 2013 and 18 December 2013 respectively. Although payments subsequently stopped, the fact of payment clearly demonstrate that AIG and Chubb had, by the time of those payments to CIMIC, investigated the claim sufficiently to form the view that the 2011 Policy responded to the Claim. The fact that those payments were stopped because the 2011 Insurers changed their legal position can be ignored for this inquiry insofar as it relates to a failed defence or amounts to an internal reason for the 2011 Insurers to subsequently resist payment, regardless of the Insurer's bona fide beliefs: *LCA Marrickville* at [248] (Derrington and Ashton JJ); *HIH Casualty & General Insurance Ltd (in liq) v Insurance Australia Limited (No 2)* [2006] VSC 128 at [9] (Bongiorno J). In accordance with *CIC Insurance,* there is a presumption that the insurer was at all times deemed to know of that obligation as ultimately determined.

466. I am not persuaded by CIMIC's submission that interest should run from its first payment of the Iraq Investigation Costs and AFP Investigation Costs. Instead, interest is calculated with regard to the "day on which it was unreasonable for the insurer to withhold payment of the amount *after it had become liable to pay it in response to a claim*": *Sayseng v Kellogg Superannuation Pty Ltd* [2007] NSWSC 857 at [7] (Nicholas J) (emphasis added).

467. Having regard to the need to allow the insurer some time to investigate and determine its position, I consider it would be objectively reasonable for interest to begin to run from:

    1. 30 December 2013, being 6 months after CIMIC's first payment of the ASIC Investigation Costs, and from accrual of each of CIMIC's payments thereafter

that date. However, because of the *Limitation Act* defence, the 2011 Insurers are not liable for payments before 8 May 2014, which accrued on 8 June 2014; and

2. 13 August 2015, being 3 months after the CIMIC's first payment of AFP Investigation Costs, and from accrual of payment thereafter. A shorter time has been allowed in respect of the AFP Costs because of the underlying facts giving rise to the Loss were the same.

Non-Iraq ASIC Investigation Costs

468. For the same reasons, I would allow interest to run for non-Iraq ASIC Investigation Costs from 6 months after the first payment by CIMIC and from the date of accrual of every later payment.

Gregg Defence and Witness Costs

469. I have found Chubb liable for the Gregg Defence Costs and Gregg Witness Costs (under the 2013/14 Policy. Even if I am wrong and the 2011 Insurers are liable, interest is payable by some insurers. This issue was not the subject of substantive submissions by the parties.

470. On 9 January 2017, following investigations, the CDPP commenced criminal proceedings against Mr Gregg for offences under s 1307 *Corporations Act* , alleging he had falsified books, specifically through a payment instruction relating to two payments to be made to Asian Global Projects and Trading FZE in the total sum of $15,000,000 (USD) and an Agreement to Buy and Sell between Leighton Holdings Limited and Asian Global Projects and Trading FZE.

471. CIMIC made first payment of the Gregg Defence Costs on 21 February 2016 and Gregg Witness Costs on 11 April 2017. The hearing commenced on 27 November 2017 and concluded on 15 December 2017.

472. The subject matter of the Gregg Prosecution was not related to the Iraq File Note. I do not consider the scope of the inquiry for Chubb was overly complex. I consider that interest should begin to run, not from the date of first payment, but from:

    1. 21 August 2016, being 6 months after the first payment of the Gregg Defence Costs, and accrual of every subsequent payment;

    2. 11 June 2017, being 2 months after the first payment of the Gregg Witness Costs, and accrual of every subsequent payment.

MCI Class Action Costs

473. If, contrary to my conclusions, the 2011 Insurers are also liable for the Company Securities claims, I consider interest for the MCI Class Action Costs below.

474. For the same reasons, which were detailed in relation to the AFP and non-Iraq ASIC Investigation Costs, I consider interest should run from:

    1. 20 April 2014, being 3 months after the date of first payment of the First MCI Class Action Costs, and from accrual of each subsequent payment. By March 2014, the 2011 Insurers already received notification concerning the Iraq File Note for over 2 years and the MCI actions involved the same factual basis. However, because of the *Limitation Act* defence, payments and interest are only payable after 8 June 2014.

    2. 22 July 2015, being 2 months after the first payment of the Second MCI Class Action Costs, and from accrual of each subsequent payment. A shorter period is allowable in circumstances where the Second MCI Class Action made similar allegations to the First MCI Class Action, which had already been the subject of investigation by the 2011 Insurers.

Inabu Settlement Amount

475. If, contrary to my conclusions, the 2011 Insurers are also liable for the Company Securities claims (MCI Defence Costs, Inabu Settlement Amount and Inabu Defence Costs), I consider, as submitted by CIMIC, that interest should begin to run from 7 July 2020, the date on which CIMIC paid the Inabu Settlement amount in full.

476. Liberty accepted that interest can run from that date because, unlike the other cost categories, there had been substantial communication between CIMIC and the 2011 Insurers prior to CIMIC incurring the Loss.

Inabu Defence Costs

477. If, contrary to my conclusions, the 2011 Insurers are also liable for the Company Securities claims, I consider interest for the Inabu Defence Costs below.

478. The Inabu proceedings commenced on 24 November 2016. CIMIC first notified the 2011 Insurers of the Inabu proceedings on 10 November 2016. CIMIC made its first payment of the Inabu Defence Costs on 16 January 2017.

479. For the same reasons which were detailed in relation to the AFP and non-Iraq ASIC Investigation costs, I am not persuaded that interest should run from the date of first payment on 16 January 2017.

480. By the time the Inabu proceedings commenced, the 2011 Insurers had already investigated the First and Second MCI Class Actions. The Inabu proceedings involved largely similar allegations, and, in my view, this means it was reasonable for the Insurer to use less time to investigate this claim. In those circumstances, I am satisfied that interest should begin to run 4 months after first payment of the Inabu Defence Costs, namely from 16 May 2017, and then from accrual for every subsequent payment.

Retention under 2011 Policy

481. CIMIC and Liberty (the only Insurer who engaged in the issue) accepted that there is one retention figure for related claims in accordance with cl 6.2 and the aggregation clause (cl 5.4), however they disagreed on what that figure is.

482. Clause 4.30 defines Retention as "the applicable amount specified in Item 8 of the Schedule". Item 8 of the Schedule to the 2011 Policy relevantly provides:

> Loss from any Securities Claim: $1,000,000
>
> Loss from any other Claim: $100,000
>
> (No Retention is applicable to Loss of any Insured Person other than as provided for in Section 6.2).

483. Clause 6.2 provides:

> The Insurer will only pay for any amount of Loss which is in excess of the Retention. The Company will be liable for the Retention as specified in Item 8 of the Schedule which will remain uninsured. A single Retention will apply to all Loss arising from any Claim specified in Section 5.4 ('Related Claims or Circumstances').
>
> If any Company is legally permitted or required to indemnify an Insured Person, but fails to do so within 30 days, then the Insurer shall advance all Loss within the Retention which will be repaid by the Company to the Insurer as soon as reasonably practicable.

484. Clause 5.9 provides:

> The Insurer will pay Loss covered under this policy in the order in which such Loss is presented to the Insurer for payment...

485. The 2011 Policy provides no clear mechanism for selecting the higher or lower sum, if the sum of a single aggregated Claim mixes different Claim types.

486. CIMIC submitted the appropriate retention figure for all Losses arising from the Iraq File Note is $100,000, because the aggregated Claim here includes both Securities Claims and

other Claims, and the retention ought be the lower sum on the basis that it is consistent with its nature as a limitation on cover and, if it were necessary, the application of the contra proferentem rule ought to be applied in CIMIC's favour.

487. Because of my findings that the 2011 Insurers are not liable to pay CIMIC for Securities Claims associated with the Iraq File Note, it is unnecessary to determine the proper construction of the retention sums applicable in different situations. The only claims which I have found are payable and, thus, enliven the retention under the 2011 Policy, are the Iraq Investigation Costs and the AFP Investigation Costs. These are not claims relating to Company Securities. Accordingly, there is a single applicable retention figure of $100,000.

488. Where there are only aggregated "other" Claims or Securities Claims, then the applicable retention sum is obvious. It is only where there is an aggregated Claim, which comprises a mixture of "any other Claim" and "any Securities Claim", that an issue of construction arises as to whether to apply the higher or lower retention amount.

489. Were it necessary to decide the retention applicable to a mixed type aggregated Claim, I would have found in favour of Liberty's figure of $1,000,000 with the effect that Item 8 in effect ought to read: "Loss from any Securities Claim $1,000,000 *or aggregated Claims which include a Company Securities Claim*".

490. Liberty was the only Insurer to make submissions on the retention sum, as the difference between $100,000 and $1,000,000 could have impacted on its excess layer. Because the issue is the choice between constructions, there is no need to deal with onus of proof. Further, because a commercial construction is possible, contra proferentum has no work to do.

491. The reasons for this construction include:

    1. Merely because the Securities Claim has been mixed with non-Securities Claims, does not change the nature of the Claim or the applicable retention available for Securities Claims.

    2. It is more consistent with the commercial objective of a retention clause, including to "impose some incentive on the insured to act prudently and to take steps to avoid suffering loss": WIB Enright and RM Merkin, *Sutton on Insurance Law* (4th ed, Lawbook Co, 2015) at 209 [16.860].

    3. Objectively, the parties appear to have anticipated that a higher sum of Loss would follow from Securities Claims based on the $1,000,000 retention sum chosen. It is also clear from the definition of Securities Claim that the insurer is exposed to a wide risk, as it extends to claims against any "Company" which is defined as Leighton Holdings and its subsidiaries (cl 4.26; Item 1 of the Schedule). The presence of a Securities Claim in an aggregated claim suggests an overall larger amount of Loss, which would tell against the lower retention sum having been intended.

4. On CIMIC's construction, an insured would almost invariably have the benefit of the lower $100,000 retention figure. This is because, under cl 5.9, the Insurer pays Loss in the order in which it is presented for payment. Thus, if they occurred at the same time, an insured could present "any other Claim" rather than a "Securities Claim" first and obtain the benefit of only the $100,000 retention, even if a "Securities Claim" was aggregated to it thereafter. It is not likely that commercial parties would have agreed to the retention sum being determined according to when the Insured presented a Loss for payment, or the random order of the aggregated Claims arising from the same facts.

5. Finally, it is difficult to imagine many scenarios in which the underlying factual circumstances giving rise to a Securities Claim are not accompanied by "any other Claim", particularly when regard is had to the breadth of the definition of "Investigation" in cl 4.18. This again would mean, on CIMIC's construction, the $1,000,000 retention would be a rarity.

492. Accordingly, if (contrary to my findings) the 2011 Insurers are liable for the Company Securities claims (in addition to the other costs), then a retention of $1,000,000 is applicable.

493. Having determined the applicable retention, there remains the residual issue of whether the applicable retention applies at every layer, or whether there is one retention overall for the aggregated claim.

494. No detailed submissions were made, however, CIMIC appeared to suggest there is one retention overall. In its written submissions, it suggested the existing sum of Loss in the 2011 tower was $45.67 million "after deduction of $100,000 retention". The alternative view is that the retention applies at every excess layer. Although it was not directly addressed by the Insurers, Arch and Dual said:

> ... on any reasonable view - bearing in mind that the lion's share of its case relates to securities claims - the retention should be $1 million. The difference between those two might not mean much to many people in this room, but in circumstances where my maximum liability is 1.14 million, that 900,000 is pretty important.

495. The Excess Policies do not provide for their own retention figure. Instead, the insuring clause in the 2011 Excess Policies (cl 1.1) provides:

> We agree to insure the Insured on the same terms as the Primary Policy except as specifically set out in this Excess Layer Policy and any attached endorsements.

496. Similarly, the insuring clause in the 2010 Excess Policies (cl 2.3) provides:

> Except as may otherwise be provided by this policy, this policy is subject to the same terms, conditions and limitations as are contained in or as may be added to the

Primary Policy and, to the extent coverage is further limited or restricted thereby, to any other Underlying Policies. In no event will this policy grant broader coverage than would be provided by any of the Underlying Policies.

497. Absent a different retention term in the 2011 and 2010 Excess Policies and endorsements, the retention in the excess layers is subject to the applicable retention in the Primary Policy. As I have determined the applicable retention in the Primary Policy is $1,000,000, it must apply at each layer.

Catlin's Cross Claim

498. Catlin broadly adopted the position of the other 2011 Insurers in relation to CIMIC's claim, but also raised a defensive cross claim concerning the "Continuity Date" for the 2011 Excess Policy.

499. On 30 June 2011, Leighton and Catlin Australia Pty Ltd, on behalf of Syndicate 2003 (Catlin), entered into a contract of excess directors' and officers' liability insurance for the period between 4pm on 30 June 2011 and 4pm on 30 June 2012. This policy was for $10 million excess of a $30 million primary cover co-insured by Chartis Australia Insurance Limited and AIG. As noted above, AIG succeeded to the obligations of Chartis under the 2011 Primary Policy.

500. Catlin submitted that:

    1. the agreement between Leighton and Catlin included a continuity date of 30 June 2011; or alternatively

    2. the Marsh Excess Wording adopted by Catlin ought to be rectified to contain that continuity date of 30 June 2011, rather than a promise by Catlin that it adopted all the terms.

501. Stephen Hunter of Marsh was Leighton's broker and agent organising various insurance cover from 30 June 2011, which was the date on which the existing 2010 Policy would expire.

502. On 16 June 2011, Mr Hunter wrote to Mr Powell, a senior underwriter at Catlin, and copied Mr Yeung, another underwriter at Catlin. In this email, Mr Hunter confirmed that Leighton would be proceeding with Chartis as the lead insurer together with ACE. He asked Mr Powell to consider various layers of participation and sought "your terms/support for this option(s) as soon as possible." The document that accompanied that email noted that the policy wording would be Chartis D&O Gold Directors & Officers Liability and Company Securities Insurance Wording (09-09). A continuity date of 30 June 2005 was indicated.

503. It appears that Mr Powell and Mr Yeung worked on a quote using an internal D&O Model document, which noted various details, including the proposed start date of the cover of 30

June 2011, and noted that the "underlying terms and conditions" included "Continuity Date 30 /6/2005".

504. On 21 June 2011, Mr Powell sent Catlin's excess layer quotation to Mr Hunter. No continuity date was listed in that quote. However, it stated: "Wording: Marsh Excess Layer Wording". The Marsh Excess Layer Wording included in cl 1.1:

> We agree to insure the insured on the same terms as the Primary Policy except as specifically set out in this Excess Layer Policy and any attached endorsements.

The Catlin quotation did not include any endorsements.

505. On 22 June 2011 at 11:58 am, Mr Hunter acknowledged receipt of that quotation, and on 30 June 2011, he sent an email stating:

> I am pleased to confirm that we have received formal instructions from the client to bind the following lines with your company for 2011: First Excess $10 mill xs $30 mill layer – 100%. Premium to layer $100,000 net plus charges. Catlin premium $100,000 net plus charges.
>
> Please now find attached formal placing slip for your confirmed 2011 participation.
>
> Could you please sign, date and stamp the placing slip and return this to me by email as soon as possible.

506. The Placing Slip included:

> Further to the negotiations in respect of this insurance, will you please sign, date and apply your company stamp at the end of this document to show acceptance and binding of the cover as specified and return a copy of this slip to us within 7 days.

507. The Placing Slip specified cover on terms including:

    1. an excess wording described as "Marsh Excess Wording"; and
    2. a 'Continuity Date' of "30 June 2005", which was the continuity date in the primary policy.

508. On 30 June 2011 at 12:24 pm, Mr Yeung emailed a response to Mr Hunter indicating that he had amended the Continuity Date from 30 June 2005 to 30 June 2011 for Catlin's layer, and he also asked about an endorsement on the Placing Slip that had not been included in the original Chartis terms provided by Marsh.

509. At 12:36 pm that day, Mr Hunter replied, "OK (this is as agreed)", in relation to the change of continuity date and indicated the other endorsement was an error that could be deleted. That same day, Mr Yeung emailed to Mr Hunter a signed, dated

and stamped version of the Placing Slip with initialled hand-written amendments, as follows:

Excess Wording:	Marsh Excess Wording
Continuity Date:	~~30 June 05~~ 30 JUNE 2011
Insuring Clauses:	Management Liability Investigation Extradition Outside Directorship Assets and Liberty Public Relations Expense Company Securities
Extensions:	New Subsidiary Discovery Lifetime RunOff for Retired Insured Persons CorporateGuard Advisory Panel
Endorsements:	1. Executive Accident Protection 2. Major 15% Shareholder Exclusion – Ownership and Board position at time of Wrongful Act 3. Subsidiary Definition Joint Venture Amended 4. ERISA Exclusion 5. Lifeboat Protection – Other Insurance 6. Marsh Endorsement ~~7. Worldwide Territory/Global Liberalisation~~ DELETED
Brokerage:	0%
Premium:	$100,000 plus charges
Security	100% Catlin Australia Ltd

FOR: CATLIN AUSTRALIA LTD

Signed .....

Date 30/6/11

Company Stamp ..... CATLIN AUSTRALIA PTY LTD ABN 64 108 319 786

510. On 18 July 2011, Leighton paid the Catlin premium without querying the changes on the Placing Slip.

511. On 8 September 2011, Catlin provided Marsh a stamped copy of the "Marsh Excess Wording" without any endorsements. As noted above, the Marsh Excess Wording provided that the primary policy wording was adopted, which included the 2005 continuity date.

512. Catlin submitted that its contract contained a continuity date of 30 June 2011 and, on that basis, CIMIC cannot have any claim against it pursuant to cl 5.3, which would not be satisfied with that continuity date.

513. CIMIC submitted that the amended continuity date does not operate as the Catlin parties suggest because:

    1. Leighton did not agree to the changed date because Mr Hunter and/or Leighton did not know what was being suggested by Mr Yeung was a variation of the quotation, which had been "accepted" and had not included any change to the proposed 2005 continuity date; and/or

    2. the stamped copy of the "Marsh Excess Wording" sent by Catlin confirmed the 2005 continuity date, because it did not include any endorsement with a different continuity date.

514. Mr Powell gave evidence that the common practice was that continuity was commenced at the time that the insurer first came on risk on a continuous basis and that he would only apply an endorsement if the continuity date was to be different to Catlin first coming on risk.

515. There was no evidence that Mr Yeung had read the quote that Mr Powell had sent, so he could not confirm whether the quote expressly specified a continuity date consistent with the inception date. He did agree that it would have been necessary for Catlin to expressly seek an amendment to the continuity date if it was to differ from the Primary Policy wording. His evidence was that when he amended the Placing Slip to change the continuity date, he did so on the understanding that the internal view at Catlin was that the continuity date ought to be the inception date.

When was the Catlin Policy formed?

516. Formation of an insurance contract and whether such a contract ought to be rectified is governed by common law and equity; s 7 *IC Act* preserves the operation of any other law not the express subject of the legislation.

517. CIMIC's argument was that the agreement was struck when the Catlin quote was accepted by Mr Hunter's first email on 30 June 2011, and therefore the Placing Slip was not an essential requirement of formation. The argument was that the signature and stamp were mere formalities that did not affect the true legal position between the parties.

518. There is some authority and commentary to the contrary. For example, the 4th edition of *Sutto n on Insurance Law* notes at [9.50] footnote 22:

> It is usually said that under Australian law a contract is made when and in the place where the offer is accepted. In the context of insurance, the acceptance may take the form of the signature on a slip or the issue of a letter of acceptance or cover note or policy. Cf *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] QB 856.

519. In *General Reinsurance Corporation v Forsakringsaktiebolaget Fennia Patria* [1982] QB 1022 at 1037 , Staughton J held at first instance in the context of slips which have no qualification as to its binding character, such as the title "quotation slip":

> [A]s soon as an underwriter has put his initials on a slip, he is bound by what he has subscribed. If a loss occurs the next day, he must pay.

That finding was subsequently approved in the Court of Appeal decision by Kerr LJ, with whom Slade and Oliver LLJ agreed, in *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] 1 QB 856 at 866 (*Fennia Patria*). *Fennia Patria* has been approved in Australia (albeit in the context of reinsurance contracts). For example, in *HIH Casualty and General Insurance Ltd v Riunione Adriatica Di Sicurta SpA* [1999] VSC 336, Mandie J found at [29] that the reinsurance agreement was made when the underwriter executed the slip.

520. Catlin submitted that the signature and stamp were critical and that the parties did not intend to be bound until Catlin had applied its signature and stamp. In those circumstances, it was said that the parties only became bound after the handwritten changes and signature and stamp by Mr Yeung.

521. Although Catlin's submissions are consistent with the line of authority from *Fennia Patria,* ther e is a distinction between the instant case and those authorities. Here, there was no evidence about any usual custom or practice between these particular parties, or generally. Catlin submitted that I need not be concerned with custom and practice. Rather, it was said the applicable continuity date for Catlin could be determined by the application of general contract principles. CIMIC agreed.

522. Working from general principles, there are two relevant possibilities:

    1. the quotation was an offer capable of acceptance, and it was accepted by Mr Hunter and the stamp and signature on the Placing Slip were not essential; or

    2. the email from Mr Hunter introducing the requirement of formality was the offer, which could only be accepted by signing and stamping an agreed Slip.

523. It is not in dispute that payment of the premium is not essential to formation and instead is part of required performance.

524. I accept Catlin's submissions. Mr Hunter's email asked, "Could you please sign, date and stamp the placing slip and return this to me by email as soon as possible", and the Placing Slip indicated that signature was "to show acceptance and binding of the cover as specified". This objectively indicates that Leighton, through its agent, required the insurer to "accept" that it was bound to provide cover as specified.

525. Before acceptance was provided by Mr Yeung, Mr Hunter clearly agreed to the amended continuity date sought by Mr Yeung. There is no evidence that Marsh or Leighton raised any concern about Catlin's continuity date at any time prior to the current dispute.

526. In relation to the signed Marsh Excess Wording, this cannot overcome the signed and stamped Placing Slip and needs to be read consistently with the Placing Slip. It was not within the power of Catlin to unilaterally amend the continuity date in September 2011 back to the June 2005 continuity date after the agreement had been struck by the Placing Slip in June 2011.

Rectification

527. On the contingency that this conclusion is wrong, I consider below Catlin's "fall back" cross claim, seeking rectification of the Marsh Excess Wording to include a continuity date of 30 June 2011.

528. Recently, in the context of an insurance contract, Lee J summarised rectification principles in *Quintis Ltd (Subject to Deed of Company Arrangement) v Certain Underwriters at Lloyd's London Subscribing to Policy Number B0507N16FA15350 (No 2)* [2021] FCA 327 at [41]-[42] (citations omitted):

> [41] ... the purpose of the equitable remedy of rectification is to make a contractual instrument conform to the true agreement of the parties where the writing by common mistake fails to express that agreement accurately.... The rationale of the remedy is the avoidance of an unconscientious departure from the common intention of the parties to an agreement .... Indeed, in ordering rectification, courts operate to relieve the conscience of the respondent, and thereby to assist the applicant, by seeking to hold the parties to their actual intentions. ...As Story J explained in *Commentaries on Equity Jurisprudence as Administered in England and America* (13th ed, 1886) (at 168–9 [155]):
>
> > A Court of Equity would be of little value if it could suppress only positive frauds, and leave mutual mistakes, innocently made, to work intolerable mischiefs contrary to the intention of parties. It would be to allow an act originating in innocence to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake to resist

> the claims of justice under the shelter of a rule framed to promote it. In a practical view there would be as much mischief done by refusing relief in such cases as there would be introduced by allowing parol evidence in all cases to vary written contracts.
>
> (Citation omitted).
>
> ...
>
> [42] However, it has also long been accepted that there are limits to equity's intervention. As the Relevant Insurers correctly submitted, it is no place of equity to relieve a mistake in a document where this would amount to writing a new agreement for the parties .... This limitation is commonly reflected in the maxim that equity "mends no man's bargain" .... In the case of rectification, equity "does not alter the bargain itself; it merely alters the written record of the bargain" ... . This is because the equity of rectification is concerned with defects in the recording, not the making, of an agreement.

529. The objective evidence prior to the 30 June 2011 emails was all one way: the continuity date was no different to the date in Chartis' standard wording. However, the 30 June 2011 emails completely changed that position. Of particular importance was the email from Mr Hunter, stating that Mr Yeung's proposed date change to 30 June 2011 was "OK (this is as agreed)". The use of "as agreed" in the past tense demonstrates that Mr Hunter considered that the date change had already been agreed before that email. No one from Leighton, nor Mr Hunter, gave evidence that the 2011 continuity date was not in fact agreed. Mr Powell and Mr Yeung considered a 2011 continuity date was applicable to Catlin's excess layer.

530. Where Mr Hunter has clearly expressed the "common intention" of the parties, rectification is necessary to avoid a departure from that position. Therefore, I would alternatively find that the Marsh Excess Wording ought to be rectified for the Catlin excess policy to record a continuity date of 30 June 2011.

531. The effect of the conclusion is that cl 5.3(i) operates for the Catlin excess contract by reasoning "the Claim or circumstance could and should have been notified after 30 June 2011". The effect is that the Catlin excess policy is not engaged in relation to the consequences of the notification of the Iraq File Note.

AIG's Cross Claim

532. AIG contended in its cross claim that, to the extent it is liable to indemnify CIMIC, both of Berkley and Swiss Re are liable to contribute as the third and fourth excess insurers of the 2010 Policy, and, as the primary and first to third excess layers have already been exhausted due to the 2013/14 Payments, Berkley and Swiss Re are next in line for any further claims to be indemnified under the 2011 Policy.

533. AIG submitted that, as both the 2010 and 2011 Policies answered CIMIC's claim for indemnity, a right of contribution would arise when one insurer pays a claim, which the other is also liable to indemnify: *Albion Insurance v Government Insurance Office* (1969) 121 CLR 342 at 350-352 (Kitto J, with whom Windeyer J agreed) (*Albion*). It is well-established that there must be a degree of coordination between the liabilities for a claim for contribution to succeed. In *Albion* , at 350 Kitto J (with whom Windeyer J agreed) noted that "...persons who are under co-ordinate liabilities to make good the one loss (e.g. sureties liable to make good a failure to pay the one debt) must share the burden pro rata".

534. The test commonly applied to assess whether liabilities are coordinate, meaning that a right to contribution in equity arises, is whether the liabilities are of the same nature and to the same extent (*Caledonian Railway Co v Colt* (1860) 3 Macq 833 at 844 (Lord Chelmsford); *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* [1987] SLT 345 at 358 (Lord Ross); *Burke v LFOT Pty Ltd* (2002) 209 CLR 282; [2002] HCA 17 at 752 [15] (Gaudron ACJ and Hayne J), and at 758 [50] (McHugh J). Therefore, what is essential in an insurance context is that each of the relevant policies cover the same risk, which has given rise to the claim.

535. As detailed above, I have found that Leighton could have notified of the Iraq File Note under the permissive paragraph of cl 5.1 of the 2010 Policy because, through Mr Stewart, it knew of the facts asserted in the Iraq File Note and could have reasonably expected such facts would give rise to a claim.

536. AIG submitted that Leighton's failure to notify during the 2010 Policy period was an *omission*, to which s 54 *IC Act* could apply, so that Berkley and Swiss Re would be prevented from refusing to pay a claim under their respective 2010 Excess policies (citing *FAI General Insurance v Australian Hospital Care* (2001) 204 CLR 641 at [14]-[16], [22], [25]-[26], [35] and [45]-[46] (McHugh, Gummow, Hayne and Kirby JJ) (*FAI General Insurance*) and *Antico v Heath Fielding* (1997) 188 CLR 652 at 669 (Dawson, Toohey, Gaudron and Gummow JJ) (*Antico*)).

537. In *FAI General Insurance* at [88] , the majority confirmed that s 54 *IC Act* would prevent an insurer from denying a claim on the basis that an insured had failed to give notice of circumstances during the policy period, even where the claim was made after that policy period had expired. In *Antico* , the High Court found that the insured's failure to seek the insurer's consent before proceeding to defend claims made against him was an omission under s 54. Dawson, Toohey, Gaudron and Gummow JJ stated at 659 that "section 54 is clearly remedial legislation". The section must therefore be "beneficially construed so as to provide the most complete remedy of the situation with which they are intended to deal [but consistent with] the actual language employed" (citing *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638 (Mason, Brennan, Deane and Dawson JJ)). Applying this construction at 669-670, the term "omission" under s 54 was construed as not limited to the insured's failure to discharge an obligation, but covered cases where the insured had failed to exercise the "right, choice or liberty" to take certain actions as allowed under the contract. Therefore, the insured's failure to notify a claim under a 'claims made and notified' policy is an 'omission' under section 54.

538. AIG contended that, as an insurer, it can rely on section 54 to establish, for the purposes of a contribution claim, that another insurer is liable to indemnify the insured for the same loss if it were sued as the insurer. AIG relied upon the decision in *Watkins Syndicate v Pantaenius* (2016) 244 FCR 5; [2016] FCAFC 150 at [50]-[53], where Allsop CJ, Rares and Besanko JJ found that s 54 was available to an insurer for the application of the principle of contribution. They said: "The creditor can choose one; and that one has a claim in contribution against the other. Natural justice and equality underpin the right. So, no overly technical approach should be taken. The separate obligations may have different sources (here contract, and contract modified in operation by statute). The question is whether the obligations can be characterised as of the same nature and to the same extent: see *HIH Claims Support Ltd v Insurance Australia Ltd* (2011) 244 CLR 72 at [39]."

539. Analogously, AIG submitted that Leighton could have made a late notification to the 2010 Insurers, and merely because it has not, does not deprive AIG of a right to contribution from Berkley and Swiss Re.

540. AIG submitted it is therefore appropriate for Berkley and Swiss Re to contribute, by way of equitable contribution, 50% of any sum for which it is liable.

541. Berkley and Swiss Re defended the cross claim on three bases:

    1. First, Berkley submitted that AIG had not pleaded the material facts that would entitle it to the relief that it seeks;

    2. Secondly, Berkley and Swiss Re submitted that Leighton had no right to notify a claim to Berkley during the 2010/11 Policy Period and therefore there is no co-ordinate liability; and

    3. Thirdly, Berkley submitted that AIG's cross claim is barred by s 14(1)(a) of the *Limitation Act*.

542. In terms of the pleading, Berkley submitted that AIG has asserted a conclusion that "it was reasonable for CIMIC to expect that a Claim would arise from the Iraq File Note or the facts, matters and circumstances recorded in the Iraq File Note", and that it did not understand the case it needed to meet, and/or said that AIG ought to be held to its pleading. Berkley submitted that AIG ought to have pleaded that CIMIC "had an actual, subjective, reasonable expectation that the Circumstances will give rise to a specific Claim of the kind envisaged by the Policy to give rise to a Claim" and the reasons for the actual anticipation of that specific Claim.

543. AIG pleaded in its Commercial List Cross-Claim Statement at paragraphs [25]-[28] that:

    1. Mr Stewart, Mr Savage, and CIMIC had "actual knowledge of the facts, matters and circumstances recorded in the Iraq File Note"; and

2. it was reasonable for CIMIC to expect that a Claim would arise from the Iraq File Note, or the facts, matters and circumstances recorded in it.

544. I consider AIG's pleading provided Berkley with all that was needed to understand the case brought by AIG and I reject the pleading complaint.

545. Secondly, Berkley submitted that, on the proper construction of cl 5.1, CIMIC did not have the ability to elect to notify the 2010 Insurers of the circumstances of and included in the Iraq File Note because it did not "subjectively and reasonably expect" they would give rise to a Claim, because to exercise such a right would also have required knowledge of reasons for such an anticipated Claim and the particulars as to "date, Wrongful Act (if applicable) and the potential Insured and Claimant concerned" as identified in cl 5.1.

546. Berkley submitted that it was not demonstrated (nor pleaded) that any relevant person at Leighton had the expectation of a Claim and, therefore, the right to notify had not arisen.

547. Similarly, Swiss Re argued that there is no co-ordinate liability between the policies, and instead liability was alternative, because it would never have been possible for CIMIC to seek indemnity from both the 2011 and 2010 Insurers by notification of the same circumstances *at the same time*, because the terms of the policies speak to when Claims are "first made". Therefore, assuming it was otherwise possible, Swiss Re submitted CIMIC always had to make a choice whether to make a Claim to one of the two insurance towers, rather than both. This is said to have been an election by CIMIC between inconsistent positions and AIG cannot obtain any benefit from that election. (The election argument of the 2010 Insurers is dealt with below at paragraphs [581]ff.)

548. It is common ground that whether the Loss is covered by both Policies is to be determined at the time of the 'insuring clause event': *AMP Workers Compensation Services (NSW) Ltd v QBE Insurance Ltd* (2001) 53 NSWLR 35; [2001] NSWCA 267 at [17] (Handley JA, with whom Mason P and Beazley JA agreed). In *AMP Workers* , an employee suffered injuries in a motor vehicle accident and sued another employee who was found to be the negligent driver of the vehicle, which was owned by their employer. The relevant CTP insurer (QBE) indemnified the negligent driver and successfully obtained contribution from the workers' compensation insurer (AMP) on the basis of double insurance. The Court noted that, at the time of the accident, both the driver and his employer were liable to the passenger and that the employer, if it had been sued, would have had a right to indemnity under the AMP policy and the QBE policy. AMP was therefore liable to contribute to the judgment sum, since payment by QBE to the claimant employee relieved it of the obligation to pay a claim by the employer under its policy.

549. Events subsequent to the insuring clause event will not affect the right of another insurer to seek equitable contribution: *QBE Insurance (Australia) Ltd v Lumley General Insurance Ltd* (2009) 24 VR 326; [2009] VSCA 124 at [70] . In *Lumley* , Neave and Dodds-Streeton JJA and Kyrou AJA

noted (at [70]) that: "[t]he fact that, subsequently, the second insurer ceases to be liable under its policy because the common insured has been indemnified by the first insurer under its policy does not extinguish the first insurer's right to contribution".

550. Swiss Re submitted that the relevant insuring clause event here is the making of the Claim, because the 2010 and 2011 Policies are 'claims made' policies, and the focus is on when claims are "first made"; cl 5.1 sets out the temporal limit as "Claims first made against or by an Insured during the Policy Period, or applicable Discovery Period, or accepted as such in accordance with Section 5.4". It was further said that the actual decision made by CIMIC to notify the 2011 Insurers is not irrelevant as an event occurring after the insuring clause event, because the 2010 and 2011 Insurers' liabilities are alternative rather than concurrent.

551. I do not accept Swiss Re's submissions. There is no question that the doctrine of equitable contribution operates on contracts of indemnity: *Albion* at 346. If an insured is indemnified under one contract of indemnity, the other insurer's liability in respect of the same loss is discharged, so it is therefore impossible for two insurers to, in fact, be simultaneously liable for the same loss or that consecutive policies can become in effect concurrent. AIG accepted that it would be impossible for Leighton to "first make" the same claim twice.

552. In my view, the steps taken by Leighton to enforce its indemnity under one policy, and not the other, are subsequent events, which do not affect the existing right of an insurer to seek contribution from the other. AIG incurred the liability to indemnify Leighton at the time of the 2012 Notification. That is, the 2012 Notification "triggered" the Policy. However, because of its knowledge during the 2010/11 Policy Period, I consider that Leighton could have notified the 2010 Insurers of the circumstances of the Iraq File Note under the 2010 Policy, and if it had done so, the 2010 Insurers could have been liable for the losses later incurred by CIMIC.

553. Therefore, Leighton had a choice to seek indemnity under either the 2010 Policy *or* the 2011 Policy, given that each insurer had insured against the same risk. It is this choice that informs the availability of the equitable right of contribution.

554. Swiss Re also submitted that even if it was wrong concerning co-ordinate liability, the Swiss Re 2010 Policy did not respond at the time of the relevant insuring clause event, which provided that Swiss Re's obligations "shall apply after all applicable Underlying Insurance [defined as, effectively, the primary 2010 Policy and the first to third layer excess policies] … has been exhausted by actual payment under such Underlying Insurance."

555. Swiss Re submitted that at the time of the insuring clause event, if taken to be the knowledge or discovery of facts giving rise to a right to notify, the condition triggering Swiss Re's liability had not been satisfied and Swiss Re was, at best, contingently liable. Further, it was said that the limit provided by Berkley in the 2010/11 Policy year has not been exhausted, and therefore it cannot be said that "all applicable Underlying Insurance" has been "exhausted by

payment". I consider this a matter to be determined after any Separate Hearing that determines quantum, which will determine what each of Swiss Re and Berkley must contribute, if anything.

556. Further, Swiss Re contended that if AIG is liable in its capacity as the primary insurer in 2011, Swiss Re's liability under the Swiss Re 2011 Policy would be triggered by the exhaustion of Underlying Insurance. Therefore, it will have borne that liability, and it would not have been required to do so if a timely notification of circumstances had been made under the 2010 Policy. As a result, if AIG is able to rely on s 54 to obtain contribution, Swiss Re will have to bear liability in relation to the claim twice, and this double exposure to the same liability is prejudice of the type contemplated by s 54(1). That prejudice can be cured by reducing any prima facie liability imposed by s 54(1) on Swiss Re under its 2010 Policy to nil: *Ferrcom v Commercial Union Assurance* (1993) 176 CLR 332 at 343 (Brennan, Deane, Dawson, Gaudron and McHugh JJ).

557. AIG responded to this submission by accepting that if a right of equitable contribution arose and was able to be enforced, then Swiss Re, if it were ever sued under the 2011 Policy in respect of the losses which could have been the subject of a claim under the 2010 Policy, would have the same right of contribution. I agree with this submission and do not think the prejudice suggested by Swiss Re would arise. It is not accurate to say that Swiss Re would have to pay twice; it would have the same rights of contribution afforded to AIG if there were other claims falling into a similar category in the future.

558. Finally, Berkley submitted that the claim is statute barred because the appropriate limitation period is 6 years based on a claim in contract: s 14(1)(a) *Limitation Act* . However, AIG does not sue for breach of contract, but rather equitable contribution. No specific limitation period applies to a claim for equitable contribution: *DIF III – Global Co-Investment Fund v Babcock & Brown International Pty Limited* [2019] NSWSC 527 at [187] (Ball J); appeal dismissed [2020] NSWCA 124 .

559. The question is whether equity would apply a common law limitation period by analogy, even though Berkley did not make any such submission.

560. AIG suggested that the most appropriate analogy would be the limitation period that applies to a claim for contribution between tortfeasors under section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) . The limitation period for such a claim between tortfeasors is specified in section 26 *Limitation Act* as the earlier of:

    1. 2 years from the date of judgment given against the party seeking contribution, which has obviously not yet occurred; or

    2. 4 years from the date of the expiry of the limitation period for the principal cause of action, which is CIMIC's claim against AIG. AIG brought its cross claim on 14

August 2020. The limitation period for CIMIC's claim could not have expired by 14 August 2016, because the 2011 Policy on which CIMIC sues only took effect on 30 June 2011.

561. On 30 June 2022, Berkley sought leave to provide further submissions concerning AIG's oral reply submissions concerning limitation. Leave was opposed by AIG. Having regard to authorities, including *Carr v Finance Corporation of Australia Ltd (No 1)* (1981) 147 CLR 246 at 258 (Mason J), I was not prepared to grant leave:

    1. The application was well after the close of the submissions on 3 June 2022. On the final day of hearing, I asked all parties, including both counsel for Berkley, whether there was "anything else". No application was made at that point for leave to respond to AIG's submissions.

    2. There was no evidence of "exceptional circumstances" to justify leave being granted for further submissions.

    3. The judgment was well advanced at the time of the application and would have caused further delay, which would negatively impact on the timely provision of reasons.

562. Berkley's limitation defence fails.

563. I accept that, if necessary, AIG is entitled to equitable contribution of 50% from Berkley and Swiss Re. Berkley is liable to contribute up to its limit of liability under the 2010 Third Excess Policy and Swiss Re is liable to contribute the balance. Quantum will be determined at the Separate Hearing.

2010 Primary Policy

564. The 2010 Insurers broadly defended CIMIC's claim for a declaration against them on the basis that CIMIC could not late notify under cl 5.1 of the 2010 Primary Policy, because Leighton did not hold the requisite knowledge during the policy period.

565. Other defences were also raised:

    1. Berkley and Zurich raised defences based on CIMIC's pleading and election.

    2. Berkley, Zurich, Arch and Dual submitted the declaration sought against the 2010 Insurers was hypothetical and therefore would not be made in the Court's discretion and was also subject to a limitation defence.

3. Arch and Dual also raised a factual reason why no declaration ought to be made, namely that the Losses incurred will not reach their layer of insurance, unless the Gregg Prosecution Costs are payable by the 2010 Insurers, which was said ought not be the case.

Each argument is considered below.

Is CIMIC prevented from bringing its alternative claim against the 2010 Insurers?

566. Contrary to submissions made by some 2010 Insurers, I do not consider CIMIC is prevented from bringing its alternative claim for the reasons below.

CIMIC's Pleadings

567. Throughout the hearing, Berkley vigorously and repeatedly submitted that CIMIC's pleadings were "manifestly, patently and completely, unequivocally bad."

568. In essence, Berkley's submission was that CIMIC could never notify under the 2010 Policy cl 5.1, because CIMIC would have needed the "knowledge and the actual subjective expectation and actual subjective reasoned anticipation of a specific claim" and CIMIC failed to plead any material facts that could support a contention that it had such right during the 2010 Policy Period.

569. CIMIC was said to have made admissions contrary to possessing that actual subjective expectation, because of its express denial in its Further Amended Commercial List Statement (FACLS), in particular paragraph 187, which provided (emphasis added):

> [187] In the alternative to paragraphs 160-186 above, if (as is variously alleged by [the 2011 Insurers] *and denied by CIMIC*) the Court finds that the AFP Investigation Costs, the ASIC Investigation Costs, the MCI Class Action Defence Costs and, the Inabu Class Action Defence Costs and/or, CIMIC's liability to pay the Inabu Settlement Amount and/or the Gregg Prosecution Costs arose from 'circumstances that could and should have been notified' under the 2010 Policies ... then (and for the purposes of the claim pleaded at this paragraph 187 and in paragraphs 188-190 below only) CIMIC says that it remains entitled to give notice of the circumstances referred to in the Iraq File Note and the fact of its creation to each of [the 2010 Insurers] in their capacity as the Insurers for the Third, Fourth, Fifth and Sixth 2010 Excess Policies, in accordance with the 2010 Notification Clause and the 2010 Deeming Clause (including as those terms were incorporated into each of those Policies) and s54(1) of the Insurance Contracts Act .

570. Both Zurich and Berkley submitted that the alternative case pleaded by CIMIC in these proceedings is "strange" and departs from usual practice because, the alternative claim does not rely on the same facts in support of an alternative legal argument.

571. Accordingly, Berkley submitted no cognisable cause of action had been disclosed and that it "does not, and cannot, know what the case is that it will be required to meet at trial", which, in its submission, was said to give rise to concerns of procedural fairness and prejudice.

572. Berkley's submissions referred to several decisions of this Court and others in outlining the requirements for Commercial List Statements to disclose a reasonable cause of action and the plaintiff's allegations with sufficient particulars: *Ucak v Avante Developments* [2007] NSWSC 367 at [6]-[8] (Hammerschlag J); *Lawrence Edward Stewart v Australia and New Zealand Banking Group Limited* [2020] NSWSC 1787 at [18]-[19] (Hammerschlag J). Those principles are not in dispute.

573. My attention was also drawn to the correspondence, in which Berkley raised its concerns with CIMIC. For example, on 2 May 2022, Berkley's lawyers wrote to CIMIC's lawyers and requested that it identify the evidence it would rely upon in its case against the 2010 Insurers.

> Although this matter has been listed for a three-week trial commencing on 16 May 2021, your client has not yet identified any material facts whatsoever that it proposes to rely upon in support of its alleged alternative and contingent cause of action for a declaration as against our client, notwithstanding the fact that this lacuna has been drawn to your client's attention repeatedly since the commencement of the current proceedings. Despite the fact that your client has now served a Further Amended Commercial List Statement it has not provided any – let alone any adequate – particulars in support of its alleged cause of action for a declaration. Quite the opposite: your client denies that it had the requisite knowledge that would have enabled it to trigger the Notification clause in the 2010 Policy.

574. Berkley similarly complained to AIG's lawyers on 3 May 2022. That correspondence suggested that it would be "oppressive … for our client to have to trawl through 10,000 pages of documents in the substantive proceeding to try to identify an undisclosed and unparticularised cause of action". AIG responded on 5 May 2022, noting:

> Your client is on notice of the cross claim. Your client is on notice of the affidavit evidence that will be adduced at trial. Your client is also on notice of the documents proposed to be tendered at trial. It is not for us to advise you which portions of that evidence you ought to read. As for the size of the Court Book, we received it at about the same time you did.

575. CIMIC responded to Berkley on 6 May 2022, referring to earlier correspondence in which it had explained its alternative case to the 2010 Insurers. CIMIC also specifically addressed Berkley's queries:

> [Paragraphs 187 to 190 of the FACLS] make it plain that the declarations sought against the 2010 Defendants including your client are sought in the alternative in a situation where the Court "finds that the AFP Investigation Costs, the ASIC Investigation Costs, the MCI Class Action Defence Costs, the Inabu Class Action

> Costs, CIMIC's liability to pay the Inabu Settlement Amount and/or the Gregg Prosecution Costs arose from 'circumstances that could and should have been notified under the 2010 Policies and/or that were in fact notified under the Third 2010 Excess Policy.
>
> ...
>
> CIMIC does not intend to adduce evidence against your client which would be inconsistent with CIMIC's pleaded case (although CIMIC will be making submissions to the Court that explain its pleaded alternative case against your client); and [CIMIC] does not accept that Berkley has any grounds to object to the case being brought against it or that this case "has not been properly pleaded and particularised"
> ...

576. The intended effect of Berkley's submissions is not clear, but appears to be an application to, in effect, strike out or ignore CIMIC's pleading against Berkley. On 4 May 2022, I indicated that any application could be made at the pre-trial directions hearing on 9 May 2022, but Berkley made no application in relation to CIMIC's pleading at that time or in fact any other. During the hearing, when asked why no strike out was sought previously, Berkley relied on the Commercial List Practice Note, which provides that, "as a general rule", applications to strike out and for summary judgment will not be entertained: at [62]. I note that there are occasions where the general rule has been departed from and the plaintiff given the opportunity to replead.

577. I am not satisfied that CIMIC's case against Berkley fails to disclose a cognisable cause of action and, accordingly, I am not satisfied that CIMIC's FACLS should be struck out under the Court's inherent jurisdiction: *Lawrence Edward Stewart v Australia and New Zealand Banking Group Limited* [2020] NSWSC 1787 at [20] (Hammerschlag J).

578. When the impugned paragraphs of CIMIC's FACLS are read in context, it is clear that the denial in paragraph 187 is designed to reinforce CIMIC's primary case against the 2011 Insurers. The case advanced against the 2010 Insurers is expressly framed as an alternative to those paragraphs, where there has been a denial, and is based on the possibility of the Court finding the facts as asserted by the 2011 Insurers.

579. Furthermore, I am not persuaded that the FACLS should be read to contain admissions. First, a pleading of denial is not a positive representation of the truth of its contents: see eg *Jamison v The Queen* (1993) 177 CLR 574 at 579 (Deane and Dawson JJ). I was not taken to any authority that pleading a case expressly in the alternative would therefore fail to disclose a cognisable cause of action.

580. The authorities cited by Berkley account for what might be described as severe procedural infelicities, but are not apt here. There cannot have been any real doubt that Berkley was able to understand that CIMIC's case against the 2010 Insurers:

    1. Was only being agitated if the claim against the 2011 Insurers failed; and

2. Required factual findings, as sought by the 2011 Insurers, to the effect that CIMIC had appropriate knowledge of the Iraq File Note matters to notify the 2010 Insurers during the 2010/11 Policy Period pursuant to clause 5.1, as denied by CIMIC in its primary case.

Election, Waiver and Estoppel

581. Both Berkley and Zurich relied upon the various doctrines of election, estoppel, and waiver in support of a submission that CIMIC should be disentitled from seeking declaratory relief against the 2010 Insurers.

582. The doctrine of election is closely tied to the doctrines of estoppel and waiver. They are "cognate concepts: each relates to the sterilisation of a legal right otherwise than by contract": *Commonwealth v Verwayen* (1990) 170 CLR 394 at 421 (Brennan J) (*Verwayen*). However, the doctrines serve different purposes, as Brennan J noted in *Verwayen* at 421 *:*

> The three concepts can be seen to have different informing legal purposes or considerations: election removes inconsistency of contractual or remedial behaviour; estoppel prevents injustice from reliance on a stated position; and waiver recognises unilateral abandonment of rights.

583. I consider the doctrines separately to identify the principles that are engaged in this particular case: *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 239 CLR 570 at 588 (Gummow, Hayne and Kiefel JJ with whom Heydon J agreed) (*Agricultural and Rural Finance*).

Election

584. The doctrine of election is not "without obscurities": *Sargent v ASL Developments* (1974) 131 CLR 634 at 641 (Stephen J) (*Sargent*). The various taxonomic categories of election are summarised by the High Court in *Agricultural and Rural Finance* at 588-589 (Gummow, Hayne and Kiefel JJ with whom Heydon J agreed). Election can also be categorised according to subject matter, as Handley describes in *Estoppel by Conduct and Election* (1st ed, Lawbook Co, 2006) at 229.

1. First, there is an equitable doctrine of election which arises where a party chooses between taking the benefit and accepting the burden of any stipulated conditions, or rejecting the benefit. The doctrine of approbation and reprobation, raised by Zurich, is generally used as a synonym for the equitable doctrine of election: *Verwayen* at 421 (Brennan J); *Agricultural and Rural Finance* at 589 (Gumm ow, Hayne and Kiefel JJ with whom Heydon J agreed); Spencer Bower and Turner, *The Law Relating to Estoppel by Representation* (3rd ed, 1977, Butterworths) at 314; Handley, *Estoppel by Conduct and Election* (2006, Lawbook Co) at 231.

2. Secondly, and distinctly, common law election arises when there are two alternative and inconsistent rights and the satisfaction of one right means that the other right is no longer available: *O'Connor v SP Bray Ltd* (1936) 36 SR (NSW) 248 at 257 (Jordan CJ).

585. It was not suggested that anything turned on the difference between the forms of common law and equitable election in these proceedings.

586. The relevant principles of election are as follows:

1. Election is a question of fact: *Chief Commissioner of State Revenue v Paspaley* [2008] NSWCA 184 at [54] (Basten JA, with whom Giles and Campbell JJA agreed).

2. "A person is said to have a right of election when events occur which enable him to exercise alternative and inconsistent rights, ie when he has the right to determine an estate or terminate a contract for breach of covenant or contract and the alternative right to insist on the continuation of the estate or the performance of the contract. It matters not whether the right to terminate the contract is conferred by the contract or arises at common law for fundamental breach – in each instance the alternative right to insist on performance creates a right of election": *Sargent* at 655 (Mason J).

3. "Where the circumstances reflect alternative rights inconsistent with each other, the law will, if there is knowledge of facts that give rise to the choice, hold the party to its choice": *Kammins Ballroom Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 882H-883D (Lord Diplock); quoted with approval in *Verwayen* at 452 (Dawson J) and 452 (Deane J).

4. "It is of the essence of election that the party electing shall be 'confronted' with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice": *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26 at 41 (Deane, Toohey, Gaudron and McHugh JJ) (*Immer*).

5. "A person confronted with a choice between the exercise of alternative and inconsistent rights is not bound to elect at once. She may keep the question open, so long as she does not affirm the contract or continuance of the estate and so long as the delay does not cause prejudice to the other side. An election takes place when the conduct of the party is such that it would be justifiable only if an election had been made one way or the other. So, words or conduct which do not constitute the exercise of a right conferred by or under a contract and merely involve a recognition of the contract may not amount to an election to affirm the contract": *Sargent* at 656 (Mason J) (citations omitted).

6. Whether detriment is required remains unsettled: *Sargent* at 646-648 (Stephen J with whom McTiernan ACJ agreed). There is authority to suggest that prejudice

is relevant in determining whether an election should be imputed, however, election, unlike estoppel, is concerned with what a party does and not what he causes the other party to do: *Khoury v Government Insurance Office* (1984) 165 CLR 622 at 633 (Mason, Brennan, Deane and Dawson JJ) (*Khoury*).

7. "There must be both an element of knowledge on the part of the elector and words or conduct sufficient to amount to the making of an election as between the two inconsistent rights which he possesses … an elector must at least know of the facts which give rise to those legal rights as between which an election must be made; without that knowledge of the doctrine of election will not be available to make irrevocable his choice of one particular right, although in appropriate circumstances an estoppel may still arise which produces that very consequence: *Sargent* at 642 (Stephen J) citing dicta in *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 326 (Isaacs J) and *United Australia Ltd v Barclays Bank Ltd* [1 941] AC 1 at 30 (Lord Atkin).

8. An act amounting to an election must be in clear and unequivocal terms: *Immer* at 30 (Brennan J), 39 (Deane, Toohey, Gaudron and McHugh JJ).

9. "There need be no expressed intention to elect, nor will an express disclaimer of such an intention be of any avail in preserving one right if in fact there be an exercise of another inconsistent right. For an election there need be no actual, subjective intention to elect, an election is the effect which the law attributes to conduct justifiable only if such an election had been made": *Sargent* at 646 (Stephen J). "[I]n some instances election may take place as a matter of conscious choice with knowledge of the existence of the alternative right and in other cases it may occur when the law attributes the character of an election to the conduct of the party": *Sargent* at 646 (Stephen J with whom McTiernan ACJ agreed) 656 (Mason J); *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41, 55 (Kitto J).

10. Essential to the making of an election is communication to the party affected by words or conduct of the choice made and it is accepted that once an election is made it cannot be retracted: *Sargent* at 655-656 (Mason J); *Khoury* at 633 (Mason, Brennan, Deane and Dawson JJ); *Newbon v City Mutual Life Assurance Society Ltd* (1 935) 52 CLR 723 at 733 (Rich, Dixon and Evatt JJ).

11. The Court will more readily infer a party's abandonment of a particular right where it is met with a choice that is once and for all, rather than a continuing right: *Immer* at 42 (Deane, Toohey, Gaudron and McHugh JJ).

Consideration

587. Zurich put its election case on the basis that CIMIC ought to be held to its conscious and informed choice between two inconsistent courses of action, namely notifying the 2011 Insurers, rather than the 2010 Insurers, at the following times:

    1. In November 2010, when the Iraq File Note was created, CIMIC did not notify the circumstances recorded in it to the 2010 Insurers.

2. The Iraq File Note was notified in the 2011/12 Policy Period to the 2011 Insurers in February 2012 pursuant to cl 5.1 of the 2011 Policies.

3. Indemnity was sought against the 2011 Insurers and insurance money was actually paid by AIG and Chubb in their capacities as 2011 insurers.

4. When proceedings were commenced, the notifications to the 2011 Insurers were advanced from the outset.

5. When CIMIC served its evidence both in chief and in reply, the only factual contention advanced related to the proper notification to the 2011 Insurers.

588. Zurich submitted that CIMIC's election is reinforced by the text of CIMIC's pleadings, including its denial of any entitlement to notify circumstances to the 2010 Insurers, for example, at [171] of CIMIC's FACLS:

> CIMIC denies that the AFP Investigation Costs, the ASIC Investigation Costs, the MCI Class Action Defence Costs and the Inabu Class Action Defence Costs arose from "circumstances that could and should have been notified" under the 2010 Policies or that, in the premises, the Prior Claims and Circumstances Exclusion has any application to the AFP Investigation Costs, the ASIC Investigation Costs, the MCI Class Action Defence Costs or the Inabu Class Action Defence Costs either as asserted by AIG and Chubb (as described in paragraph 168(c) above) or at all.

589. Further, CIMIC submitted that its conduct throughout the hearing and in its correspondence expressly maintained and emphasised its alternative case against the 2010 Insurers. Accordingly, CIMIC submitted it has *not* clearly and unequivocally abandoned its rights to relief against the 2010 Insurers.

590. I do not consider CIMIC has made an election in proceeding against the 2011 Insurers, such that it is disentitled in proceeding against the 2010 Insurers.

591. I accept that Mr Stewart of CIMIC had actual knowledge of the material facts giving rise to the relevant legal rights in this case: *Sargent* at 642 (Stephen J). CIMIC must also be taken to know the terms of the policy, including the notification clause, and the meaning that a court will assign to it when a court is called upon to interpret it: *Sargent* at 645 (Stephen J).

592. However, I am not persuaded that CIMIC's rights against the 2010 and 2011 Insurers are properly characterised as alternative, mutually exclusive and inconsistent with each other, such that CIMIC made a choice between those rights.

593. Rights are inconsistent if the enjoyment of one necessarily entails the extinction of the other and that extinction confers upon the elector the benefit of enjoying the other, a benefit denied

to him so long as both remained in existence: *Sargent* at 641 (Stephen J); approved by the Full Court in *Ciavarella v Balmer* (1983) 153 CLR 438 at 448 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

594. The relevant rights in this case are contractually conferred rights to notify of a "Claim" pursuant to cll 5.1 of two different policies. The exercise of that right enlivens the insurer's correlative duty to provide indemnity under the cover clause (cll 1.1-1.7). This is not an election of the type considered in *Sargent* and *Immer* , where an elector treats a contract as subsisting, and that precludes the exercise of a right to rescind *the very same contract.* While I also recognise that the doctrine of election is not limited to inconsistent rights arising out of a single contract and cases can involve more than one contract: *Ruby Steam Ship Co Ltd v Commercial Union Assurance Co Ltd* (1933) 150 LT 38, I consider it important in this case that the rights are conferred in separate insurance policies. The choice for CIMIC, as the elector, in this case is not simply between affirming or rescinding an agreement, but between notifying and seeking an indemnity under the 2011 Policy and/or the 2010 Policy.

595. The rights to notify the particular facts in the 2010 and 2011 Policies are different to each other. Under the 2010 Policy, the relevant right to notify was a permissive right. Clause 5.1 stated that the Insured "*may*, during the Policy Period or applicable Discovery Period, notify the Insurer of any circumstance reasonably expected to give rise to a Claim" (emphasis added). During that Policy Period, no "Claim" had arisen. In contrast, a Claim had arisen during the 2011/12 Policy Period, following the AFP investigation. In contrast to 2010, the right to notify under the 2011 Policy was effectively mandatory.

596. Thus, the terms of the Policies militate against a conclusion that there has been an election. The existence of continuity coverage in the 2011 Policy points strongly against CIMIC being confronted by the necessity of making an irrevocable choice between the two alternative positions. The continuity clause 5.3 precisely contemplates a scenario in which the 2011 Insurers are found not to be liable because CIMIC's awareness crystallised earlier during the 2010/11 Policy Period, and CIMIC thereafter proceeds against the 2010 Insurers.

597. Therefore, while it does not matter to the outcome, I do not accept CIMIC's submission that this is a case involving an election between remedies. That CIMIC has proceeded against the 2011 Insurers seeking monetary remedies and the 2010 Insurers seeking a declaratory remedy is different to the circumstances in which the law provides inconsistent remedies for one cause of action or claim: Handley, *Estoppel by Conduct and Election* (1st ed, 2006, Lawbook Co) at 229.

598. The rights are not mutually exclusive because CIMIC was not confronted with the real choice of proceeding only against either the 2011 Insurers or the 2010 Insurers. It was not submitted by Berkley or Zurich that CIMIC could not have exercised its right to notify against both the 2011 and 2010 Insurers, had it chosen to take that course. If CIMIC notified both insurers, the 2011 Insurers would probably have defended the case against them on the basis of cl 3.2(i) of the 2011 Policy. However, the existence of that defence does not, logically and of itself, make the rights inconsistent or mutually exclusive. Rather, that simply meant one course of action

was perceived to be more advantageous to CIMIC than the other. The fact that CIMIC could have notified both 2011 and 2010 Insurers also points against the circumstances which underlie common law election. As Handley put it (at 231):

> An election does not involve a choice between two sets of rights which presently co-exist but between an existing set of rights and a new set which does not yet exist.

599. Despite CIMIC's receipt of the 2013/14 Payments from AIG and Chubb, it was not suggested that CIMIC has enjoyed the right under the 2011 Policy in any meaningful degree, without obtaining the indemnity it was seeking in full. I note that CIMIC did not submit that the payments made by AIG and Chubb constituted an election (or some form of representation giving rise to an estoppel) to provide indemnity, notwithstanding non-disclosure, rather than rejecting the claim and avoiding the policy: *Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd* (1994) 8 ANZ Ins Cas 61-235; Derrington and Ashton) at 2685.

600. Even if I am wrong, and CIMIC's rights are inconsistent or mutually exclusive, I am not satisfied that CIMIC's words or conduct can properly be understood as unequivocal for the purposes of an election. As Stephen J said in obiter in *Sargent* at 646 :

> The words or conduct ordinarily required to constitute an election must be unequivocal in the sense that it is consistent only with the exercise of one of the two sets of rights and inconsistent with the exercise of the other (citations omitted) ... however, less equivocal conduct, only providing some evidence of an election, may suffice if coupled with actual knowledge of the right of election.

601. While Zurich emphasised a broad and high-level chronology of events since 2010, unlike *Sarge nt,* I was not taken to any particular correspondence which was said to confront CIMIC with the necessity of making a choice. The fact that CIMIC did not notify the 2010 Insurers earlier does not support there being an election.

    1. First, CIMIC's non-notification at the time of the Iraq File Note's creation does not indicate any election in circumstances where CIMIC also did not notify the 2011 Insurers.

    2. Secondly, the fact that CIMIC subsequently notified the 2011 Insurers in February 2012 does not, in itself, preclude it from proceeding against the 2010 Insurers when there was only silence and inaction, rather than communication by words or conduct to the 2010 Insurers: *Sargent* at 655-656 (Mason J); *Khoury* at 633 (Mason, Brennan, Deane and Dawson JJ). In the circumstances, CIMIC's silence was equivocal: see Derrington and Ashton at 2692.

    3. Thirdly, the 2010 Insurers are sophisticated commercial entities and operate in an industry environment in which s 54 *IC Act* contemplates a possibility that an insured might late notify a claim. The existence of s 54 points against any inference that CIMIC abandoned its right to notify the 2010 Insurers, because s 54

reinforces CIMIC's right to notify the 2010 Insurers as a continuing right, rather than a "once and for all" choice, which CIMIC cannot be taken to have abandoned by its inaction.

602. CIMIC continually advised the 2010 Insurers that possible action would be taken against them. On 27 August 2019, CIMIC wrote to the 2010 Insurers through Marsh to seek confirmation of the 2010 Insurers' position if a late notification was made pursuant to s 54 *IC Act*. Subsequently, on 21 December 2020, CIMIC wrote to the 2010 Insurers in the following terms:

> None of the 2010 Insurers gave the requested confirmation. In those circumstances, it was necessary for CIMIC to not only bring proceedings against the 2011 Insurers but also against the 2010 Insurers.

603. It was clear, that at the trial, CIMIC maintained an alternative case against the 2010 Insurers. For example, at the pre-trial directions hearing, counsel for CIMIC said:

> But the reality is that, one it doesn't take a great deal of imagination to realise that if the 2011 insurers managed to have the greatest day of their life and succeed on all issues, we're not going to stop. That saying, well, there you go, pack up our tent and move on. There will be against the 2010 insurers dealing with these very same quantification issues.

This appears to have been understood by some of the insurers. For example, counsel for Catlin said at the pre-trial directions hearing:

> But as a result of that structure that's been adopted by the plaintiffs, there inevitably is going to be, if the 2011 insurers succeed, a case against the 2010 insurers.

Counsel for Berkley also submitted at the hearing:

> Put in very crass terms, your Honour, the plaintiff has adopted the approach that they don't care who they get the money from. They don't care if it's the 2010 insurers or the 2011 insurers, as long as they get the money.

604. For the above reasons, CIMIC did not make the election suggested by the 2010 Insurers.

Estoppel and Waiver

605. Although Zurich referenced waiver, its submissions were directed to the inconsistency of courses of action available to CIMIC and the abandonment of a right where a person insists on one course of action over another. This "category" of waiver has been described as merely "an example of the doctrine of election": *Verwayen* at 407 (Mason CJ), and "used in the sense of election as where a person decides between two mutually exclusive rights": *Verwayen* at 422 (Brennan J). Although waiver may arise without there being alternative and inconsistent rights (*Verwayen* at 424 per Brennan J), that was not Zurich's submission.

606. Zurich did not plead estoppel, nor identify a relevant representation made by CIMIC upon which it relied, nor what, if any, detriment it suffered as a result. Estoppel "looks chiefly at the situation of the person relying on the estoppel": *Khoury* at 633 (Mason, Brennan, Deane and Dawson JJ); *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 327 (Isaacs J). Only in relation to the criticisms of CIMIC's pleadings did Zurich indicate that it would have conducted its defence differently.

607. I do not consider Zurich can rely on estoppel or that it would be made out.

CIMIC's claim for declaratory relief against the 2010 Insurers

608. CIMIC chose to frame its case against the 2010 Insurers as one for declaratory relief only, rather than seeking substantive remedies in the form of indemnity and damages. At the motion hearing on 4 May 2022, counsel for CIMIC explained this choice:

> ... It's at that point because of the success of the 2011 insurers we are then directing our attention to 2010. They will not be bound by those findings on those other issues. They will be bound on the question of the state of mind, because that will subject matter [sic] of the declaration. But they won't be bound on the other matters. So, we submit that the most sensible course to take is to stop where everyone is bound by the state of mind.

609. That explanation was further developed at trial:

> The purpose of seeking declaratory relief at this stage is to simply ensure that CIMIC does not fall between two stools – that is, to avoid an outcome where in the present proceeding the 2011/2012 insurers succeed in establishing that there was a known notifiable circumstance in 2010/2011, but in subsequent proceedings the 2010/2011 insurers were able to satisfy a differently constituted Court that the matters known by CIMIC in 2010/2011 did not amount to notifiable circumstances. The potential for such inconsistent findings is plainly undesirable.

610. None of the 2010 Insurers suggested that CIMIC lacked standing, that the dispute about a declaration was not justiciable, or that there was no proper contradictor: P W Young, *Declarato ry Orders* (2nd ed, Butterworths, 1984) at 60 [702].

611. In considering making a declaration, I am not to consider issues, such as defences, that might arise between CIMIC and the 2010 Insurers in subsequent proceedings.

612. CIMIC sought two forms of declaration. In its Further Amended Summons, CIMIC sought (First Declaration):

> Declarations that CIMIC remains entitled, in reliance upon section 54(1) of the Insurance Contracts Act and the 'Notification' and 'Deeming' clauses incorporated into each of the following Policies, to notify circumstances, being the existence and contents of a handwritten document (the Iraq File Note) created by a former co-chief operating officer and former CEO of CIMIC, David Stewart (Stewart) appearing (on its face) to be dated 23 November 2010.

613. During the hearing, CIMIC proposed a modified declaration in the event the First Declaration was not granted (Alternative Declaration) and in response to objections by Swiss Re and other 2010 Insurers to the First Declaration and, in particular, its reference to s 54 of the *IC Act*:

> In the alternative, a declaration, as against each of the sixth to tenth defendants, that, in the events which have happened, the plaintiff was, during the period 30 June 2010 to 30 June 2011, aware of circumstances reasonably expected to give rise to a Claim within the meaning of cl 5.1 of the excess policy entered into by that defendant for that period.

614. As CIMIC explained the reasons for the Alternative Declaration:

> It seems to us that the technical objection, if one that the Court is agreeable with, would not preclude a form of declaration that would achieve the objective that we have, so, effectively, the idea that I've got in mind at the moment on the run, so to speak, would be by focusing on whether CIMIC was aware of circumstances that could have been notified to that policy pursuant to cl 5.1 of that policy. That seems to me to be something that would achieve the commercial object that we have, and it would appear, at least on the face of it, to do away with the technical issue that's been raised.

CIMIC's elaborated on its reasons in its closing submissions:

> The Court would recognise that the essential object of seeking the declaration is to accommodate, in a contingent way, the arguments of the 2011 insurers that CIMIC had relevant awareness in 2010/2011. That is plain from the structure of the contents in the FACLS … The existence of that awareness during 2010/2011 is an essential pre-condition to CIMIC late notifying under cl 5.1.

615. Although Zurich complained that CIMIC did not amend its Further Amended Commercial List Statement to reflect the Alternative Declaration, I do not consider any amendment was required where CIMIC's Further Amended Summons included a general prayer for "[s]uch other orders as the Court considers appropriate" and the final form of a declaration is often a variation of what is pleaded. Further, section 63 of the *Supreme Court Act 1970* (NSW) requires the Court to grant all appropriate relief to deal with all matters in dispute.

616. For the reasons which follow, I do not consider the First Declaration can be made where its form interacts with section 54 *IC Act* and the Court has been asked *not* to consider the

operation of section 54. Even if I considered section 54, the form of declaration is not coherent with the operation of section 54, because no notification or claim has in fact been made to the 2010 Insurers.

617. In relation to the Alternative Declaration:

1. I have found that the Iraq File Note circumstances could have been notified under cl 5.1 of the 2010 Policy during the 2010/11 Policy Period.

2. I am prepared to exercise my discretion to grant a form of the Alternative Declaration.

3. I do not consider CIMIC's claim for a declaration out of time.

618. The two declarations differ in substance and effect. The First Declaration assumes an understanding of the legal operation of section 54 *IC Act* and its interaction with CIMIC's contractual right to late notify the 2010 Insurers on the basis that a late notification could not automatically be denied by the 2010 Insurers as an effective notification. The inclusion of section 54 *IC Act* in the First Declaration reflects CIMIC's acceptance, in its submissions, that (emphasis added):

> … it could not now take advantage of the exercise of that [right to notify a circumstance under cl 5.1] and its consequences for the deeming of a Claim during the 2010/2011 period of insurance, **but for the operation of s 54 of the IC Act.**

619. In contrast, the Alternative Declaration declares the factual findings in these proceedings of CIMIC's awareness of the matters in the Iraq File Note, and places those findings in the proper construction of cl 5.1. It would have the effect of ensuring that a notification under cl 5.1 would not be rejected *only* on the basis that the circumstance was *not* "reasonably expected to give rise to a Claim", as submitted by some 2010 Insurers. However, it would leave open, for instance, the possibility that the notification would still not lead to an indemnity for other reasons.

620. The 2010 Insurers identified different problems with each declaration. I have attempted to separate the arguments about each declaration below, even though it was not always clear whether arguments deployed by individual defendants were in relation to one or both declarations.

621. Against the First Declaration, the 2010 Insurers submitted:

1. Their construction of cl 5.1 means that CIMIC could never have notified the relevant circumstances within the insurance period, because Mr Stewart lacked the requisite mental element.

2. Section 54 *IC Act* does not create a right that did not exist; while that section does mean that an insurer cannot absolutely prevent an insured making a claim late,

there must have previously existed the right to make a claim within time. Again, because of their construction of cl 5.1 above, section 54 does not assist CIMIC. The proper application of section 54 need not be considered in circumstances where the Alternative Declaration avoids that issue.

3. CIMIC has not committed itself to making a claim on the 2010 Policy and therefore it cannot be said that the declaration is anything more than hypothetical. The Court should not declare contractual rights between the parties, contingent on CIMIC electing to take a particular course "that it has not done, does not think it could have done, and may not ever do".

622. Against the Alternative Declaration, the 2010 Insurers did not appear to suggest it is hypothetical. Rather:

1. Zurich submitted that the Alternative Declaration seeks to effect an issue estoppel in relation to the findings of awareness so the 2010 Insurers cannot refuse payment under their policies because of s 54 *IC Act* and such a bare declaration ought not be granted, citing *Minister for Immigration v Ozmanian* (1996) 71 FCR 1 and *Trans Realties Pty Ltd v Grbac* (1975) 1 NSWLR 170.

2. Zurich and Swiss Re both submitted that the effect of CIMIC's Alternative Declaration would be to short-circuit the required notification *procedure* in cl 5.1 without CIMIC needing to, for the purpose of the declaration, identify a factual foundation, the notifiable "circumstance" or connection with a particular "Claim". They submitted that without CIMIC setting out the form of notification, the Court cannot determine whether the declaration sought would have utility.

623. Arch and Dual's position was applicable to both forms of the declarations. They submitted that any declaration against them is pointless, because, even if CIMIC could otherwise succeed against the 2010 Insurers, Arch and Dual's exposure will not be reached because they are too high up in the tower. That submission depends on CIMIC failing to demonstrate that all the Costs claimed, including the Gregg Prosecution Costs, fall within the operation of the 2010 Policy. Arch and Dual resist being liable for the Gregg Prosecution Costs that only arose after the conclusion of the 2010/11 Policy period. However, it was accepted that if I found a connection between the Gregg Prosecution Costs and the circumstances surrounding the Iraq File Note, then the Deeming Clause (cl 5.4) would capture those costs.

Principles

624. The issue here is whether, as a matter of largely unfettered (but not unlimited) discretion, declaratory relief should be ordered: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582 (Mason CJ, Dawson, Toohey and Gaudron JJ) (*Ainsworth*); see also *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5 at [32] (Kiefel CJ, Keane and Gordon JJ) (*Hobart International*).

625. No single principle is necessarily determinative for a declaration to be made. As Young JA observed in *Nicholls v Michael Wilson and Partners* [2010] NSWCA 222 at [132] (appeal allowed, but on other grounds):

> It is now clear that the court has very wide jurisdiction to make declaratory orders. It is also clear that the court, in its discretion, may determine that it is inappropriate to make a declaration. … Because the matter is one of the exercise of discretion, special facts in a particular case may mean that the discretion is exercised other than in accordance with "principle".

626. Courts should not grant declarations where the declarations "will produce no foreseeable consequences for the parties": *Ainsworth* at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ) or where the declarations will be divorced from the facts and be theoretical and hypothetical: *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 356-7 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Paymer v Ayres* (2017) 259 CLR 478 at 491 (Kiefel, Keane, Nettle and Gordon JJ).

627. CIMIC submitted that the declaratory relief sought was not hypothetical, because it has a real commercial interest in establishing the existence of a state of affairs, as it will inform its proposed commercial conduct, citing *National Australia Bank Limited v Nautilus Insurance Pte Ltd* (No 2) [2019] FCA 1543 (*NAB v Nautilus*); *Edwards v Santos* (2011) 242 CLR 421 (*Edwards*); *CGU v Blakeley* (2016) 259 CLR 339, 372-373 (Nettle J). In opening, CIMIC submitted that the declaration would quell a justiciable controversy that emerged when CIMIC approached the 2010 Insurers for indemnity, and it was refused, and because the contradictors have been involved, it is appropriate to determine the issue now.

628. Foreseeable consequences (in the sense required by *Ainsworth*) can extend to arming the parties with knowledge of the correct legal position for future negotiations. In *Edwards* at 435-6, Heydon J (French CJ, Gummow, Crennan, Kiefel and Bell JJ agreeing) briefly dealt with the question of foreseeable consequences:

> The questions which the plaintiffs wished to agitate were not hypothetical. The first defendant's letter … had sufficiently indicated the intention of the petroleum defendants to make an application to the Minister … and it had predicted that success would be "automatic". If so, the plaintiffs would be seriously disadvantaged because their negotiating position would be gravely weakened; if not, the plaintiffs would be correspondingly better off. If the plaintiffs obtained the first declaration sought, it would produce foreseeable consequences for the plaintiffs and the petroleum defendants by allowing them to continue the process of negotiating … armed with knowledge of the correct legal position …

Similarly, Nettle J observed in *CGU Insurance v Blakeley* (2016) 259 CLR 339; [2016] HCA 2 at 373 (footnotes omitted):

> ... the issue in this case is not theoretical but, even if it were, the court does not lack jurisdiction to make a declaration concerning a theoretical issue, in the sense of an issue that does not presently exist but which is likely to arise in future, where the issue is productive of a real and pressing dispute, is of real practical importance or is one in which the claimant has a real commercial interest. Thus, for example, it is now well established that, where a claimant intends to take action which would subject him or her to a 'theoretical' possibility of being subjected to legal process, the risk of being so subjected to that process is sufficient to ground standing to claim a declaration that the basis of the process ... is invalid and, co-ordinately, that in such cases there is a matter upon which the court has jurisdiction to adjudicate. Similarly, where a claimant has a real commercial interest in establishing the claimant's legal status or entitlement in relation to proposed commercial conduct and there is a real controversy with some contradictor as to the existence or extent of the claimant's legal status or entitlement, the claimant may have standing to obtain, and the court co-ordinately will have jurisdiction to grant, a declaration as to the existence or extent of the status or entitlement.

629. CIMIC also relied on Allsop CJ's judgment in *NAB v Nautilus,* where at [106], his Honour stated:

> ... foreseeable consequences are to be assessed by the place of the declaration in the controversy that otherwise exists or existed, and the practical and real effect that it may have on the controversy or the consequences of the controversy. In *Ainsworth* it was that there may be amelioration of reputational harm. In *Edwards v Santos* it was establishing a legal certainty in the operation of the legislation which was relevant to the respective bargaining positions of the parties in a wider controversy.

630. His Honour concluded at [110] and [115]:

> [110] It is difficult to see what is advisory or hypothetical about declaring the meaning of a contract in circumstances where there is no dispute about the terms of the contract, where the relevance of any surrounding circumstances can be debated and found, where the parties are in precise and clearly articulated disagreement as to the meaning of or part of the contract, and where the proper construction of that part is clearly a part, indeed an important part, of an overall controversy about one party's asserted and disputed entitlement to be indemnified under the whole of the contract.
>
> [115] ... The question is whether the resolution of a disputed question of construction... has foreseeable consequences, including practical consequences. The answer is not dissimilar to the answer in Edwards v Santos – the parties will have the correct legal foundation for the resolution or negotiation of a settlement of the claim.

While there was evidence in *Edwards* that the defendants had a clear intention to seek that the Minister issue a licence, Allsop CJ considered the resolution of a disputed question of construction to found a declaration if there were "practical consequences".

631. To support the submission that the First Declaration was hypothetical the 2010 Insurers relied upon NSW Court of Appeal authorities, submitting that they demonstrate that a

declaration is not appropriate where a party has not taken a contractual step and seeks a declaration that such a step would be valid. However, I consider that those cases can be read consistently with the authority above, and concern fact-specific treatment of declarations that a party is entitled to terminate a contract, which may be considered hypothetical because of possible surrounding circumstances at the future time of termination that are not before the court. I deal with those authorities below.

632. In *Sanderson Computers Pty Ltd v Urica Library Systems BV* (1998) 44 NSWLR 73 (*Sanderson v Urica*) at 80, Sheller JA (with whom Mason P and Powell JA agreed) stressed that Urica had not purported to terminate the contract and sought a declaration that it was so entitled, and therefore the declaration was hypothetical, because the validity of a termination must be considered in the context of the circumstances at the relevant time. For example, a question of waiver might have arisen in the meantime. Similarly in *Galaxy Communications Pty Ltd v Paramount Films of Australia Inc* (Unreported, NSW Court of Appeal, 24 February 1998) (*Galaxy v Paramount*) the validity of a notice of election to terminate would have depended on Galaxy's solvency at the date when Paramount issued the notice. That made the question hypothetical.

633. In *Brighton Ceiling Pty Ltd v Pocrnja* [2005] NSWCA 175 at [11] , Giles JA (with whom Santow JA and McLellan AJA agreed) commented on hypothetical judgments in the context of an application for leave to appeal:

> ... the purpose of a judicial determination is to quell a controversy, and that if for whatever reason it will not do so - for example because the question under consideration is not a real question or is one which depends upon facts which are as yet unknown - it is not appropriate for the determination to be made. It is recognised ... that it may be declared that conduct which has not yet taken place will not be in breach of a contract or a law, and that such a declaration will not be hypothetical in the sense presently under consideration. But as Sanderson Computers Pty Limited v Urica Library Systems BV (1998) 44 NSWLR 73 shows, there is a difference between declaring the contractual rights of parties and declaring them contingently on one of the parties to the contract electing to take a course which the party has not taken, is not bound to take, and may not take. The same must apply to declarations of a position in law.

634. *Brighton Ceiling* did not involve declaratory relief. It was a case about an employer's claim for indemnity for worker's compensation. I consider that Giles JA's comments about making declarations contingent on a course which an electing party "has not taken, is not bound to take, and may not take" (relied upon by the defendants) are more likely intended to be confined to the principles expressed in *Sanderson Computers* and its fact-specific treatment of declarations that a party is entitled to terminate a contract. See also *Sandersons Eastern Suburbs v Mercedez-Benz Australia/Pacific* [2018] NSWSC 52 at [28] (McDougall J).

Determination - First Declaration

635. I have concluded the First Declaration (or a form of it) containing a reference to s 54(1) *IC Act,* o ught not be made.

636. I am unpersuaded by CIMIC's submissions that the inclusion of section 54 *IC Act* in the First Declaration says nothing about the operation of section 54 and was directed "to the payment obligation of the insurer rather than the entitlement to notify in the first instance". Whilst CIMIC is correct that section 54 deals with the subject matter of prejudice and principle of proportionality, the language of the First Declaration is plainly framed in such a way that "reliance" is placed on section 54(1) as part of CIMIC's entitlement "to notify circumstances".

637. CIMIC has not yet notified and made a claim against the 2010 Insurers and therefore section 54(1) has not been enlivened. Therefore, even if I did consider the operation of section 54 *IC Act* in the context of the First Declaration, the operation of the provision is premised on there already being, in fact, a claim by the insured. As the plurality (McHugh, Gummow and Hayne JJ) found in *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641 at 659 [40] :

> Section 54 directs attention to the effect of the contract of insurance on the claim on the insurer which the insured has *in fact* made. It is not concerned with some other claim which the insured might have made at some other time or in respect of some other event or circumstance. It requires the precise identification of the event or circumstance in respect of which the insured claims payment or indemnity from the insurer.

That there is already a claim in existence is the "starting point": *Antico v Heath Fielding Australia Pty Ltd* (1997) 188 CLR 652 at 669 (Dawson, Toohey, Gaudron and Gummow JJ). Therefore, I decline to make the First Declaration.

Determination - Alternative Declaration

638. The Alternative Declaration (or form of it) is not hypothetical either. It would have the consequence of quelling the justiciable controversy which arose and was maintained by the 2010 Insurers' opposition to CIMIC's case that it had a particular state of mind which could engage the 2010 Policy, based on the proper construction of cl 5.1.

639. Historically a declaration could not be granted without there also being consequential relief, however that position has been modified by statute: see *Supreme Court Act 1970* (NSW) s 75 ; *For ster v Jododex* (1972) 127 CLR 421 at 434 (Gibbs J) and endorsed in *Ainsworth* at 581-582 (Mason CJ, Dawson, Toohey and Gaudron JJ).

640. I am not persuaded by Zurich and Swiss Re's submissions that CIMIC's Alternative Declaration would short-circuit the notification procedure in cl 5.1 and that CIMIC was required to detail how it would have approached framing its notification before it would be entitled to a declaration. That submission comes very close to requiring that CIMIC have a

cause of action, in the sense of a notified claim against the 2010 Insurers, *before* obtaining declaratory relief, contrary to settled principles: *Hobart International* at [32] (Kiefel CJ, Keane and Gordon JJ).

641. Zurich submitted that CIMIC's purpose was to deploy the Alternative Declaration improperly as a vehicle to create an issue estoppel with respect to CIMIC's state of mind for the purposes of the 2010/11 Policy Period, relying on *Minister for Immigration v Ozmanian* (1996) 71 FCR 1 (*Ozmanian*) and *Trans Realties Pty Ltd v Grbac* (1975) 1 NSWLR 170 (*Trans Realties*). However, those cases are quite different to the present.

642. *Ozmanian* involved a declaration that the Minister for Immigration and Multicultural Affairs had breached the rules of natural justice when making a decision under the *Migration Act 1958* (Cth) in relation to the applicant's refugee status. Zurich asserted that CIMIC, like the applicant in *Ozmanian,* was seeking declaratory relief so as to create an issue estoppel that might operate in later proceedings. *Ozmanian* was actually decided on the basis of findings relating to the Court's judicial review jurisdiction: at 27 per Sackville J (with whom Jenkinson J agreed). Those findings made it unnecessary to decide the issue of declaratory relief.

643. However, Kiefel J concluded in obiter in relation to the declaration (Sackville J concurring) at 33:

> [I]t will be a rare case where a bare declaration will be seen to be justified

644. Read in context, her Honour's reference to a "bare declaration" appears to mean a declaration "not declaratory of any present right, and amounting only to an acknowledgement of past infringement of a right to procedural fairness" (at 31). Her Honour's reasoning accepts that the declaratory relief must have practical consequences; the question posed in *Ozmanian* and which Zurich seeks to agitate here is *what* practical consequence is enough.

645. However, the practical consequences flowing from a declaration relating to a past infringement, as in *Ozmanian* , are of an entirely different character to those consequences which follow from a form of the Alternative Declaration in this case. Those consequences are prospective and affect CIMIC's conduct and performance and notification under the 2010 Policies and future negotiation and litigation.

646. In *Trans Realties* , a declaration was sought by a purchaser of land that the vendor's notice of rescission, which relied upon particular grounds, was invalid. Hutley JA considered the claim for such a declaration a "false issue" (at 173), because there were grounds that could justify rescission, other than those in the notice and in relation to which the declaration was sought. Therefore, the declaration would not end the particular controversy between the parties concerning rescission. Glass JA considered that it led to "incomplete adjudication" (at 176). Mahoney JA noted that "where the validity of the rescission of a contract for sale of land is in issue, it is 'generally undesirable' so to structure a proceeding that the Court is not in a position to determine completely and finally all matters in controversy concerning the subject

matter of the proceedings". That situation was quite different to the form of declaration sought here. Here, a declaration as to Leighton's state of mind during a relevant period that engages cl 5.1 is final and causes practical consequences.

647. As Hutley JA (with whom Street CJ agreed) found in *Lohar Corp Pty Ltd v Dibu Pty Ltd* (1975) 1 BPR 9177 at 9179 (a vendor-purchaser case involving declarations that a contract was validly terminated):

> Declarations as to particular situations are appropriate where the declaration is as to an ultimate or decisive fact, upon which the rights of the parties finally depend. They are not appropriate as to subsidiary or collateral facts which, however interesting to the parties, do not decide the controversy between them and cannot do so. There can be no objection to the trial of facts between the parties in segments according to their and the court's convenience, but that is not the same as seeking in the trial the determination of what are subsidiary issues.

648. Here the declaration is as to an ultimate or decisive fact, upon which the rights of the parties, in part, depend. While other matters are still necessary to be determined before it could be found that the 2010 Insurers are liable to indemnify CIMIC, I do not consider the subject matter of the Alternative Declaration a mere "subsidiary issue" in circumstances where the litigation involved debate about the question of awareness and the proper construction of cl 5.1.

649. It is therefore appropriate to make a form of the Alternative Declaration in these proceedings. I will require the parties to agree on an appropriate self-contained form that incorporates the findings in this judgment.

Limitation Defence to Declaration

650. The limitation defence pleaded by Berkley, Arch and Dual fails for the following reasons.

651. Berkley submitted that s 54 *IC Act* cannot, "by a side wind" abrogate the operation of applicable limitation periods in the *Limitation Act* . Against that position, CIMIC submitted that such a view would install an artificial constraint on when parties can commence proceedings and completely overlook the operation of s 54(1). The proper interaction and/or inconsistency between s 54 *IC Act* as a Commonwealth statute and the NSW *Limitation Act* was not developed by the parties and cannot be resolved here: see s 7 *IC Act.*

652. The *Limitation Act* does not fix any express limitation on declaratory relief. Section 23 provides that limitations found in the statute only apply to equitable relief insofar as they can be applied by analogy. In such circumstances, equity will follow the law: *Cohen v Cohen* (1929) 42 CLR 91 at 100 (Dixon J).

653. Section 23 provides:

Equitable relief

Sections 14, 16, 17, 18, 20 and 21 do not apply, except so far as they may be applied by analogy, to a cause of action for specific performance of a contract or for an injunction or for other equitable relief.

654. Section 14(1)(a) provides:

General

An action on any of the following causes of action is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims—

(a) a cause of action founded on contract (including quasi contract) not being a cause of action founded on a deed

655. The application of limitations by analogy is explained in I C F Spry, *The Principles of Equitable Remedies* (9th ed, Lawbook Co, 2014) at 434-435:

> [T]he court may decide that the material equitable right is so similar to legal rights to which a limitation period is applicable that that limitation period should be applied to it also. In this latter case the limitation period is said to be applied by analogy, and the principles that govern cases of this kind are that if there is a sufficiently close similarity between the exclusive equitable right in question and legal rights to which the statutory provision applies a court of equity will ordinarily act upon it by analogy but that it will so act only if there is nothing in the particular circumstances of the case that renders it unjust to do so. What is regarded by courts of equity as a sufficiently close similarity for this purpose involves a question of degree, and reference must be made to the relevant authorities. The basis of these principles is that, in the absence of special circumstances rendering this position unjust, the relevant equitable rules should accord with similar legal rules.

656. Berkley's submissions on limitation are blurred with questions of construction of cl 5.1. Berkley denied CIMIC had a cause of action at the outset, because of its preferred construction of cl 5.1 and factual findings. However, Berkley's alternative submission, should CIMIC have a cause of action based on the proper construction of cl 5.1, was (as far as I can discern) that CIMIC was seeking a declaration as to a right to notify pursuant to a contract and such right accrued on the last day that CIMIC could have notified a circumstance under the 2010/2011 Policy Period, which would have been 29 August 2011 (this is without reliance upon s 54 *IC Act*). Alternatively, Berkley placed the accrual date as of the first day that CIMIC incurred, paid and/or accepted liability for sums it now seeks to be indemnified. Berkley suggested the date would have been "December 2011" or by the time of the notification to the 2011 Insurers in February 2012. Berkley submitted that on any view the limitation period of 6 years would have expired *before* CIMIC commenced these proceedings on 8 June 2020.

657. Arch and Dual adopted AIG's position on the limitation period, specifically that the insurer's obligation to indemnify arose "promptly after sufficiently detailed invoices for those costs are received by the Insurer" (cl 5.8). Accordingly, it was submitted that where costs were incurred and invoices provided to AIG prior to 8 June 2014, those amounts were said to be not recoverable. I understand this submission to be premised on the date of accrual being the date on which it was unreasonable for the 2010 Insurers to refuse indemnity.

658. CIMIC submitted:

1. The limitation period began to run from the date of the "justiciable controversy" which is sought to be quelled by the declaration, which was when CIMIC sought confirmation from the 2010 Insurers of their position on 27 August 2019 and did not receive any response. Alternatively, the limitations defence cannot apply where "the relief sought is a declaration".

2. Even if the accrual date was before 8 June 2014, CIMIC would only be statute-barred in respect of the relatively insubstantial sum of costs incurred before 8 June 2014. Nothing turns on this and the similar submission made by Arch and Dual regarding amounts captured by the declarations, because no monetary relief is sought by CIMIC against the 2010 Insurers.

659. I consider the limitation defences fail because the insurers failed to discharge their burden of proof: *Pullen v Gutteridge Haskins & Davey Pty Ltd* (1993) 1 VR 27 at 71-76 (Brooking, Tadgell and Hayne JJ); Peter Handford, *Limitation of Actions* (2nd ed, Lawbook Co, 2007) at 295-297. None of Berkley, Arch and Dual actually submitted that CIMIC's declaratory relief constituted "other equitable relief" within the meaning of s 23 . I was not taken to any authorities which suggest that declaratory relief is "other equitable relief". Further, beyond the assertion that s 14 should apply as the relevant limitation period, none of Berkley, Arch and Dual actually drew an analogy between the Alternative Declaration and a claim founded on contract for s 14.

660. I am not satisfied that CIMIC's Alternative Declaration is sufficiently analogous to a common law action founded on contract and it is not out of time.

Abuse of Process Defence

661. Berkley and Zurich submitted CIMIC's claim was an abuse of process.

662. It appears that Zurich's position on abuse of process is reserved as against CIMIC in any later proceedings.

663. Berkley's position was based on its submissions that CIMIC adopted a factual position on knowledge (namely that it had the requisite awareness in the 2010/2011 Policy Period), which it affirmatively denied in its primary claim against the 2011 Insurers, as the basis for the declaratory relief sought against the 2010 Insurers. Berkley submitted that to allow CIMIC to

adopt that position would amount to an abuse of process "of the kind that was addressed by the High Court in *UBS AG v Tyne* (2018) 265 CLR 77" (*UBS v Tyne*).

664. *UBS v Tyne* concerned proceedings against UBS in respect of alleged negligent advice. The original trustee of a family trust (ACN), an investment company (Telesto) and Scott Tyne commenced proceedings in this Court. Tyne was the controlling mind of both ACN and Telesto. Those proceedings were subsequently discontinued and permanently stayed on the basis of issue estoppel and res judicata in light of the determination of other proceedings in the High Court of Singapore. Two years later, Tyne, in his capacity as the new trustee of the family trust, commenced proceedings in the Federal Court making essentially the same claims as those in the proceedings in this Court. The plurality (Kiefel CJ, Bell, Gageler and Keane JJ) found the proceedings should be permanently stayed for abuse of process. Placing particular emphasis on the "timely, cost effective and efficient conduct of modern civil litigation", the plurality concluded (at 100 [59]):

> For the Federal Court to lend its procedures to the staged conduct of what is factually the one dispute prosecuted by related parties under common control with the attendant duplication of court resources, delay, expense and vexation … is likely to give rise to the perception that the administration of justice is inefficient, careless of costs and profligate in its application of public moneys.

665. A superior court can stay proceedings to prevent a misuse of its procedure: *Walton v Gardiner* (1993) 177 CLR 378 at 392-393 (Mason CJ, Deane and Dawson JJ).

666. However, Berkley did not seek any permanent stay of *these* proceedings. Further, it is not clear how a permanent stay of these proceedings would assist Berkley. Berkley's concern is more likely in relation to CIMIC's future case against the 2010 Insurers (as for Zurich), but I was not taken to any authority suggesting the principles from *UBS v Tyne* could be relied upon to permanently stay proceedings that had not yet commenced.

667. It was also not clear from any of Berkley's submissions what the impugned conduct of CIMIC had been to justify a stay. These proceedings will necessarily share a similar factual substratum with any subsequent proceedings against the 2010 Insurers, because the question concerning CIMIC's awareness will necessarily revolve around the Iraq File Note of November 2010. However, CIMIC's claim against the 2010 Insurers in these proceedings was confined to declaratory relief. Re-litigation alone does not conclusively establish any abuse of process.

668. I do not consider CIMIC's case against the 2010 Insurers to be "staged conduct" of the type described by the High Court in *UBS v Tyne* . CIMIC's case against the two towers of insurers is not factually one dispute. Failing in its claim against the 2011 Insurers can lead *consecutively* to CIMIC fully notifying and claiming against the 2010 Insurers. Although that is part of the same broad controversy (namely who will indemnify CIMIC for its losses arising from the Iraq File Note), it cannot be said that these proceedings have resolved, in a final way, a claim against the 2010 Insurers, which has not yet been made.

669. I do not consider CIMIC has abused the Court's processes, such that these proceedings should be stayed or dismissed. The 2010 Insurers could agitate abuse of process in future litigation, should it be appropriate in the circumstances.

Orders

670. I make the following orders:

1. The parties are to confer and provide agreed short minutes of order to give effect to these reasons and appropriate costs orders within 7 days of the publication of this judgment.

2. Should the parties not be able to agree, the parties are to provide their competing short minutes together with submissions of no more than 10 pages, and any necessary evidence, within 10 days of the publication of this judgment.

3. Liberty to apply on 24 hours' notice.

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APPENDIX - Clauses from the 2011 Policy

Company Securities Cover

671. Clause 1.2 provided that "the Insurer will pay the Loss of each Company arising from a Securities Claim".

672. Clause 4.15 defined "Insured" to mean "Any Company and any Insured Person". Clause 4.6 defined "Company" as "The Policyholder or any Subsidiary". There was no dispute that CIMIC and its subsidiaries were the relevant policyholders of the 2011 Primary Policy.

673. Clause 4.16 relevantly defined "Insured Person" to mean "any natural person who was, is or during the Policy Period becomes … a director or officer … [and/or] an employee of a Company … in connection with an Investigation … but only when and to the extent that such Insured Person is acting in such Insured Person capacity".

674. Clause 4.21 defined 'Loss' in the following terms:

> any amount which an Insured is legally liable to pay resulting from a Claim, Defence Costs, and any other awards of damages (including any court order to pay compensation for damage resulting from a contravention of any statute or legislative provision and punitive and exemplary damages), awards of costs or settlements (including claimant's legal costs and expenses). pre- and post judgment interest on a

covered judgment or award, fines and pecuniary penalties and the multiplied portion of multiple damages.

"Loss" in the case of an Insured Person, shall also include Investigation Costs, Asset and Liberty Expenses, Bail Bond and Civil Bond Premium, Prosecution Costs and Extradition Costs.

"Loss" shalt not include, taxes other than an amount of GST for which an Insured is not entitled to an input tax credit, remuneration or employment-related benefits, any sum payable pursuant to a financial support direction or contribution notice issued in respect of any pension scheme, fines and pecuniary penalties for a deliberate or intentional act, nor amounts which the Insurer is prohibited from paying by law.

675. Clause 2 of Endorsement No. 6 defined "Loss" to include "Defence Costs … settlements (including claimant's legal costs and expenses) … [and] Investigation Costs".

676. Clause 4.10 defined "Defence Costs" to include:

(i) reasonable fees, costs and expenses incurred with the Insurer's prior written consent, by or on behalf of an Insured after a Claim is made in the investigation, defence, settlement or appeal of such Claim".

(ii) reasonable fees, costs and expenses incurred with the Insurer's prior written consent, by or on behalf of an Insured of accredited experts, retained through defence counsel to prepare an evaluation, report, assessment, diagnosis or rebuttal of evidence in connection with the defence of a covered Claim

677. Clause 4.5 defined "Claim" to include:

(i) …

(b) a criminal proceeding;

(c) any Securities Claim;

Made or brought against an Insured alleging a Wrongful Act;

(ii) an Investigation

678. Clause 4.32 defined "Securities Claim" to include "any written demand or civil, criminal or arbitration proceedings … alleging a violation of any laws (statutory or common), rules or regulations regulating Securities, the purchase or sale or offer or solicitation of an offer to purchase or sell Securities or any registration relating to such Securities".

679. Clause 4.31 defined "Securities" to mean "any security representing debt of or equity interests in a Company".

680. Clause 4.37 defined "Wrongful Act" to mean:

> (i) With respect to any Insured Person: any actual or alleged, act, error or omission, breach of duty, breach of trust, misstatement, misleading statement or breach of warranty of authority by an Insured Person in any of the capacities listed in Definition 4.15 ("Insured Person"); or any matter claimed against an Insured Person solely because of such listed capacity; and an Employment Practices Breach; and
>
> (ii) With respect to any Company: any actual or alleged act, error or omission by the Company, but solely with respect to Securities.

Investigation Costs Cover

681. Clause 1.3 provided that "the Insurer will pay the Investigation Costs of each Insured Person arising from an Investigation".

682. Clause 4.19(i) defined "Investigation Costs" to include "reasonable fees, costs and expenses, incurred with the Insurer's prior written consent, by or on behalf of an Insured Person of any legal advisor retained in such events".

683. Defence Costs and Investigation Costs are to be advanced "promptly" by the Insurer after sufficiently detailed invoices for these costs are received by the Insurer: Endorsement No. 6 clause 3. The parties referred to this clause as the "Advance Payment Clause".

684. Clause 4.18 defined "Investigation" to include:

1. Any formal written notification to an Official Body of a suspected material breach of an Insured Person's legal or regulatory duty: cl 4.18(iii);

2. Any hearing, examination, investigation or inquiry by an Official Body into the affairs of a Company … or an Insured Person of such Company, once an Insured Person is required to attend or produce documents to, or answer questions or attend interviews with that Official Body; or is identified in writing by an investigating Official Body as a target of the hearing, examination or inquiry: cl 4.18(iv)

685. "Official Body" means "any regulator, government body, government agency, official trade body, or any other person or body having legal authority to conduct an Investigation": cl 4.22.

General Clauses

686. The starting point for any claim is the "Notification Clause" found in clause 5.1. That clause sets out the temporal limit to Claims made in the following terms:

Notification of Claims and Circumstances

The Covers provided under this policy are granted solely with respect to Claims first made against or by an Insured during the Policy Period, or applicable Discovery Period, or accepted as such in accordance with Section 5.4 ("Related Claims or Circumstances"), only if such Claims have been notified to the Insurer as soon as practicable, after the Policyholder's Risk Manager or General Counsel (or equivalent position) first becomes aware of such Claim, but in all events no later than either:

(i) during the Policy Period or applicable Discovery Period; or

(ii) within 60 days after the end of the Policy Period or the applicable Discovery Period, as long as notice is given to the Insurer within 60 days after such Claim was first made against an Insured.

Any Insured may, during the Policy Period or applicable Discovery Period, notify the Insurer of any circumstance reasonably expected to give rise to a Claim. The notice must include the reasons for anticipating that Claim, and full relevant particulars with respect to dates, the Wrongful Act (if applicable) and the potential Insured and claimant concerned.

The details of any other insurance policy which may apply to any Loss covered under this policy shall be reported to the Insurer within a reasonable time of any Claim notification.

All notifications relating to Claims or circumstances must be in writing or sent by facsimile to the address in Item 13 of the Schedule.

687. Clause 5.4 of the 2011 Primary Policy includes a "2011 Deeming Clause" and "Aggregation Clause" which had the effect of deeming related claims as being made at the time of the Claim and aggregating them as part of a single claim, being the Claim first made. It provides:

> If a Claim or circumstance is notified under this policy, then any subsequent Claim, alleging, arising out of, based upon or attributable to the facts or Wrongful Act alleged in that Claim, or described in that circumstance, shall be deemed to have first been made at the same time as that Claim was first made or that circumstance notified, and notified to the Insurer on the date the notices were first provided.
>
> Any Claim arising out of, based upon or attributable to (i) the same or similar originating cause or Wrongful Act, (ii) a single Wrongful Act, (iii) one matter or transaction, or a number of matters or transactions involving the same or similar underlying source, (iv) a series of continuous, repeated, related or connected Wrongful Acts, or (v) the same or similar originating causes or Wrongful Acts involving a number of matters or transactions; whether or not committed by more than one Insured Person and whether directed to or affecting one or more person or entity; shall be considered a single Claim for the purposes of this policy.

688. Clause 3.2(i) is a "Prior Claims and Circumstances Exclusion" which provides:

> The Insurer shall not be liable under any Cover or Extension for any Loss ... subject to section 5.3 ("Continuity"), arising out of, based upon or attributable to: facts alleged or the same or related Wrongful Act(s) alleged or contained in any Claim which has been or could have been reported or in any circumstances of which notice has been or could have been given under any policy of which this policy is a renewal or replacement or which it may succeed in time

689. An exception to ameliorate the harsh consequences of cl 3.2(i) is found in the cl 5.3 "Continuity Clause" which provided that cover shall still be provided subject to two provisos in the following terms:

> Notwithstanding Exclusion 3.2 ("Prior Claims and Circumstances"), cover is provided under this policy for any Claim, or circumstance, which could or should have been notified under any earlier policy, provided always:
>
> > (i) the Claim, or circumstance, could and should have been notified after the Continuity Date; and
> >
> > (ii) the Claim shall be dealt with in accordance with all the terms, conditions, exclusions and limitations of the policy under which the Claim, or circumstance, could and should have been notified.

690. The Continuity Date was defined as 30 June 2005: cl 4.7 and Item 10 of the Schedule.

691. Clause 7.1 ("Non-Rescindability") provides:

> This policy is not avoidable or rescindable in whole or in part and the Insurer shall have no other remedy with respect to any pre-inception misrepresentation or pre-inception non-disclosure by any Insured in connection with this policy, except with respect to Insurance Cover 1.2 ('Company Securities').
>
> If the Insurer has a right to reduce its liability under Section 28(3) of the *Insurance Contracts Act 1984* (Commonwealth) for any fraudulent misrepresentation or fraudulent non-disclosure of a matter or fact established by final adjudication of a judicial or arbitral tribunal, or any formal written admission by or on behalf of any Insured, the Insurer will only exercise such right against that Insured.

692. Clause 7.3 operates to impute knowledge of "only" a defined list of individuals to that of CIMIC itself:

> This policy covers each Insured for its own individual interest.
>
> No statements made by or on behalf of an Insured or breach of any term of this policy, or any information or knowledge possessed by an Insured, shall be imputed to any Insured for the purpose of determining whether any individual Insured is covered under this policy.

With respect to Cover 1.2 ('Company Securities'), only the statements and knowledge of any Chief Executive Officer, Chief Operating Officer, Chief Financial Officer or Chief Legal Officer/General Counsel (or equivalent positions) of a Company will be imputed to that Company, and the knowledge of the same officeholders of the Policyholder will be imputed to all Companies.

693. Endorsement No. 6 provides that the Insurer will "pay the Investigation Costs of each Insured Person arising from an Investigation except to the extent that the Insured Person has been indemnified by the Company for the Investigation Costs" and "reimburse the Company for any Investigation Costs" for which it has indemnified an Insured Person".

694. Endorsement No. 7 provides that AIG and Chubb would each be liable as the Insurer, including to pay "Loss" or reimburse "Investigation Costs", severally and not jointly in the proportions of 50% each.

695. The 2011 Primary Policy contained a liability limit of $30 million and the insurers' liability was only in respect of loss in excess of the Retention sum of $100,000 per claim and $1,000,000 per securities claim.

Decision last updated: 27 July 2022