Supreme Court

New South Wales

Case Name:	Flanagan v Bernasconi
Medium Neutral Citation:	[2022] NSWSC 381
Hearing Date(s):	14 – 22 March 2022
Date of Orders:	04 April 2022
Decision Date:	4 April 2022
Jurisdiction:	Common Law
Before:	Schmidt AJ
Decision:	1. Judgment entered for the defendants. 2. The parties are directed to confer and approach in the event that they wish to be heard on costs within 14 days. 3. The parties are to file final orders within 14 days, which will then be made.
Catchwords:	INSURANCE — Property insurance — Home and contents — Exclusions — events involving swimming pools excluded from coverage — swimming pool lifted causing damage to pool and pool enclosure — plaintiff not aware of lack of coverage under policy — failure to give necessary advice. NEGLIGENCE — duty of care — insurance broker — whether insurance broker failed to advise of exclusion regarding events involving swimming pools — whether insurance broker breached common law duty and statutory duty under the Corporations Act 2001 (Cth) — breach established. EVIDENCE — tendency evidence — affidavit evidence from former clients regarding service insurance broker provided — admissibility objection — whether the evidence had “significant probative value” — Evidence Act 1995 (NSW), s 97(1)(b) — admitted. EVIDENCE — credibility and reliability – authenticity of documents. CAUSATION — onus — liability — whether defect existed — whether reasonable precautions taken by insured. DAMAGES — assessment— whether too remote — actions of plaintiff — expert evidence.
Legislation Cited:	Civil Liability Act 2002 (NSW), ss 5B, 5D(1), 5D(3), 5E Corporations Act 2001 (Cth), ss 766A, 766B, 944A, 945A, 946A, 947C Evidence Act 1995 (NSW), ss 97, 128 Motor Accidents Act 1988 (NSW) Trade Practices Act 1974 (Cth), s 52
Cases Cited:	CGU Insurance v Porthouse (2008) 235 CLR 103; [2008] HCA 30 Chappel v Hart (1998) 195 CLR 232; [1998] HCA 55 Fraser v BN Furman (Productions) Ltd [1967] 1 WLR 898 Hancock v East Coast Timber Products Pty Ltd (2011) 80 NSWLR 43; [2011] NSWCA 11 Horsell International Pty Ltd v Divetwo Pty Ltd [2013] NSWCA 368; 18 ANZ Insurance Cases 61-991 Hughes v The Queen (2017) 263 CLR 338; [2017] HCA 20 Hutchison Construction Services Pty Ltd v Fogg; Fogg v Les Quatre Musketeers Pty Ltd (t/as Plastamasta South Coast) [2016] NSWCA 135 IMM v The Queen (2016) 257 CLR 300; [2016] HCA 14 Legal & General Insurance Australia Ltd v Eather (1986) 6 NSWLR 390 Malec v JC Hutton Pty Ltd (1990) 169 CLR 638; [1990] HCA 20 McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579; [2000] HCA 65 Murray v Sheldon Commercial Interiors Pty Ltd [2016] NSWCA 77

	Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd (2003) 77 ALJR 768; [2003] HCA 10 Prasad v Minister for Immigration, Local Government and Ethnic Affairs (1991) 101 ALR 109; (1991) 23 ALD 183 Sellars v Adelaide Petroleum NL; Poseidon Ltd v Adelaide Petroleum NL (1994) 179 CLR 332; [1994] HCA 4 Thiess Pty Ltd v Zurich Specialties London Ltd [2009] NSWCA 47 TL v R [2020] NSWCCA 265 Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd (1998) 192 CLR 603; [1998] HCA 38 Zurich Australian Insurance Limited v CSR Limited [2001] NSWCA 261 Zurich Specialities London Ltd v Thiess Pty Ltd [2008] NSWSC 1010
Category:	Principal judgment
Parties:	Sue Flanagan (Plaintiff) Robert John Bernasconi (First Defendant) Nadic Insurance Brokers Pty Ltd t/as Nadic (Second Defendant)
Representation:	Counsel: D Priestley SC (Plaintiff) M Elliott SC (First & Second Defendants) Solicitors: Mayweathers (Plaintiff) Hall & Willcox (First & Second Defendants)
File Number(s):	2019/66093

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JUDGMENT

1 In 2013 the 25-metre swimming pool and surrounding pool enclosure at Dr Flanagan's home were damaged when the pool partially lifted out of the ground, damage which her insurance did not cover. She claims that this was the result of the negligence of Mr Bernasconi, who had long been her and her former husband, Dr Oldfield's insurance broker and who was then employed by Nadic Insurance Brokers Pty Ltd.

2 Dr Flanagan claims that in 2012 Mr Bernasconi advised her to take out homeowners' insurance with a new insurer, Vero Insurance Ltd, rather than with her former insurer, CGU Insurance Ltd, which had fully insured her home. But contrary to the duty which he owed her, Mr Bernasconi did not advise her that while under both policies the property was insured for some $3,500,000, the Vero policy had an exclusion in respect of the pool.

3 The result was that when the pool, surrounds and enclosure were later extensively damaged, the claim Mr Bernasconi prepared for accidental damage under the Vero policy was declined, Dr Flanagan having earlier made a claim to the Mine Subsidence Board, which had also failed. Her later application for review of the insurer's decision by the Financial Ombudsman Service, which she pursued on legal advice, was also rejected.

4 Dr Flanagan had the pool and structure demolished in 2014, given the requirements of her financier and not then having the means to rebuild. She considered that in their damaged condition they posed risks to health and safety, creating a potential for release of fibreglass debris into the surrounding soil and air, and also adversely affecting the value of the property.

5 On the pleadings what was in issue included the circumstances in which Dr Flanagan came to take out the Vero policy; her instructions to Mr Bernasconi; the nature of the advice and services he offered and provided her; breach; causation; contributory negligence; whether Dr Flanagan had failed to mitigate any loss which she suffered; and whether she had a basis for claiming that she had lost a business opportunity.

6 Before the hearing the parties agreed what remained in issue between them. At the hearing they identified various other matters which were also in issue.

7 Dr Flanagan did not finally pursue her lost opportunity claim and while there was no issue about the nature of the duty she was owed, it was only after Mr Bernasconi was cross-examined that it was conceded that it had been breached. Despite this, her claims were still defended, although the contributory negligence and mitigation claims were also not finally pursued, other than in the former case on the basis of Dr Flanagan's failure to read the Vero policy, which it was accepted was unlikely to amount to contributory negligence. On the evidence I will explain, I consider that it did not.

8 Much turned on the credibility and reliability of the evidence which Dr Flanagan and Mr Bernasconi each gave.

Conclusion

9 For reasons which follow I have concluded that despite the admitted breach, there must be judgment for the defendants.

The agreed facts

10 The parties agreed that:

> "1. In 2012, the Plaintiff was the registered owner of the property Lot 6 DP xxxxxx situated at xxxxxxxxx in NSW South Wales (Property), jointly with her former husband Geoffrey Oldfield (Oldfield), until 30 June 2013 and then solely.
>
> 2. In addition to a large two-story house, garage, tennis court and standalone shed, erected on the Property were:
>
> (a) A concrete and fibreglass inground swimming pool measuring 25 meters long and wide enough for 5 painted lanes (the Pool); and
>
> (b) A building surrounding and enclosing the Pool measuring 32 meters by 12.5 meters (the Pool Building).
>
> 3. The First Defendant commenced providing insurance broking services to the Plaintiff and Oldfield for the first time in or around 1984.
>
> 4. The First Defendant provided the Plaintiff and Oldfield with Insurance Broking Services in respect to a suite of insurance products for both personal and various medical services business for almost 30 years.
>
> 5. The Plaintiff has been at all material times a medical practitioner.
>
> 6. On 20 December 2000, the First Defendant commenced employment with the Second Defendant as an insurance broker and continued to provide the Insurance Broking Services to the Plaintiff under an agreement between the Plaintiff and the Second Defendant.
>
> 7. In 2003, the First Defendant recommended that the Plaintiff and Oldfield take out a Homeowner's Insurance policy with CGU Insurance Limited (CGU). The Plaintiff accepted this advice and incepted the Homeowner's Insurance policy with CGU to provide coverage of the buildings and contents on the Property. This was renewed each year until 2012 (the CGU Policy).
>
> 8. On 5 December 2011, the CGU Policy was amended to name the Plaintiff as the sole insured, following the marital separation of the Plaintiff and Oldfield.
>
> 9. The CGU Policy was not renewed in 2012.
>
> 10. The Plaintiff took out a Homeowner's Insurance Policy with Vero [titled "Secure Home Elite Insurance" bearing the policy number HAHA015730948] on or about 16 March 2012 (the Vero Policy).
>
> 11. On or about 28 March 2012, the Second Defendant issued the Plaintiff with a Tax Invoice bearing the same date for the sum of $8,562.16, which related to the inception of the Vero Policy and which was paid through premium finance funding taken out by the Plaintiff [as had been her usual funding course].
>
> 12. As a result of action taken by the Plaintiff, the Pool was empty in 2013.
>
> 13. In each of the months of January and March 2013, there were days of heavy rain at and around the Property.
>
> 14. On or around 2 March 2013, the Pool partially lifted out of the ground, causing extensive damage to the Pool itself, to the surrounding concrete and tile surface, to equipment connected to the Pool and a collapse of the 30-meter eastern brick wall of the Pool Building (the Pool Damage).
>
> 15. On 9 July 2013, the Plaintiff made a claim on the Vero Policy with respect to the Pool Damage by submitting a claim form (the Claim).
>
> 16. The Claim was declined by Vero on 8 October 2013 (declinature). The Claim was expressly declined on the basis of exclusion 12 in the Vero Policy, which excluded events involving swimming pools, including pool lifting or any area around the pool lifting (the Pool Exclusion Clause).
>
> 17. The Plaintiff challenged the Vero's declinature of the Claim with the Financial Ombudsman Service on or about 18 May 2014 (the FOS Application). The FOS Application was rejected by the Financial Ombudsman Service on 6 January 2015.
>
> 18. In about December 2014, the Plaintiff demolished the damaged Pool Building and caused the damaged Pool to be filled in with the surrounding rubble."

11 It emerged at the hearing that it was common ground that the CGU policies had insured accidental damage to the pool and pool building; that the Vero policy had an exclusion which the CGU policy did not; that Mr Bernasconi did not tell Dr Flanagan about the existence and effect of the Vero exclusion; that other insurers also offered cover for damage to

the pool and building, but he also did not tell Dr Flanagan about them, or that advice as to their premiums, some less than CGU required, had been obtained by Nadic staff.

Issues

12 Before the hearing the parties identified facts in dispute to be:

> "1. The usual practice of the First Defendant in providing Insurance Broking Services to the Plaintiff, in particular in providing documentation and explanation of policies at or before the time of renewal.
>
> 2. Whether the Plaintiff and the First Defendant met and discussed Homeowners insurance on 28 February 2012.
>
> 3. Whether the Plaintiff said any words to the First Defendant to the effect that she was not prepared to pay a high premium for Homeowners insurance for the 2012 – 2013 year.
>
> 4. The terms of the conversations between the Plaintiff and the First Defendant in relation to Homeowners insurance in 2012."

13 At the hearing other facts in issue were identified to include:

(1) What instructions and advice were given at the 15 March 2012 meeting between Dr Flanagan and Mr Bernasconi;

(2) Whether there was another meeting on 28 March 2012;

(3) Whether Dr Flanagan and Mr Bernasconi had discussed insurance cover for the pool in 2005;

(4) How Mr Bernasconi came to learn about the damage to the pool; and

(5) Whether the pool was empty in 2010.

14 The matters in issue the parties identified before hearing were:

> "Duty & Breach
>
> 1. What meetings and conversations occurred between the Plaintiff and the First Defendant in about February and March 2012?
>
> 2. What advice and other broking services did the Defendants provide to the Plaintiff in relation to Homeowners insurance, and in particular the matters in dispute, in 2012?
>
> 3. What instructions did the Plaintiff give the First Defendant in relation to Homeowners insurance in 2012?
>
> 4. Should the Defendants have provided different advice or broking services as alleged by the Plaintiff such as to breach their duty to exercise due care and skill?
>
> 5. Was the Second Defendant in breach of the pleaded provisions of the *Corporations Act* in not providing the Plaintiff with a Statement of Advice in relation to Homeowners insurance in 2012?
>
> Causation
>
> 6. If the Defendants breached their duty, what insurance cover would the Plaintiff have had as at March 2013 if such advice and services had been provided?
>
> 7. If the Second Defendant was in breach of the pleaded provisions of the *Corporations Act,* what insurance cover would the Plaintiff have had as at March 2013 if such breaches had not occurred?
>
> 8. Having regard to the Plaintiff's conduct after the inception of the Vero policy in 2012, in particular in emptying the pool, and leaving it empty for a period of time, would a notional policy taken out have covered the claim for damage which was made?
>
> 9. Was there any existing defect in the pool or pool building and if any, would it have affected cover under a notional policy for the claim that was made, and if so, in what manner?
>
> Damages
>
> 10. Did the Plaintiff sustain the loss and damage claimed as a result of the alleged breaches, and if so, what is the quantum of damages?
>
> 11. Should the damages be reduced by reason of any conduct of the Plaintiff as pleaded in the Defence?"

15 As well as the credibility and reliability issues pursued, the authenticity of documents exhibited to Mr Bernasconi's affidavit also arose.

16 It was after Mr Bernasconi was cross-examined that the defence announced that it was agreed that the duty owed to Dr Flanagan had been breached. His evidence also resulted in parts of the report of the defence liability expert, Mr Gribbin not being read, as well as aspects of the experts' joint report. It did not, however, resolve the credibility and reliability issues.

17 In final submissions issues also emerged between the parties about the nature of the case advanced on the pleadings, who bore the onus in respect of some issues and whether there were relevant evidentiary gaps in Dr Flanagan's case.

The disputed evidence led in Mr Bernasconi's case

18 Mr Bernasconi led affidavit evidence from other of his clients, the admissibility of which was in issue. They were not required for cross-examination and the resolution of the objection was deferred until judgment.

19 The objection was that the evidence was inadmissible under s 97 of the *Evidence Act 1995* (NSW), which does not permit evidence of conduct, with which the affidavits were concerned, to be admitted unless "the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value": s 97(1)(b).

20 That was in issue, the argument advanced for Dr Flanagan being that the evidence said nothing about the course which Mr Bernasconi had pursued in her case, he having elected to call evidence from only a handful of clients from the hundreds he had advised over the years and where differences between them, their needs, and the reasons why those practices had developed, could only be speculated upon.

21 "Probative value" is defined in the dictionary to the *Evidence Act* to mean "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue". It need not have significant probative value with respect to all facts in issue: *TL v R* [2020] NSWCCA 265. It must be assessed on the assumption that the evidence is credible and reliable: *IMM v The Queen* (2016) 257 CLR 300; [2016] HCA 14 at [48]. But it must be of importance in establishing facts in issue: at [46].

22 Further, what the tendering party seeks to establish must be identified with some precision and the strength of the inference and the extent to which the tendency increases the likelihood that a fact in issue did or did not occur must all be considered: *Hughes v The Que*en (2017) 263 CLR 338; [2017] HCA 20 at [153], [213], [216].

23 The affidavits each dealt with matters such as what Mr Bernasconi did when providing his services. Mr Emerton, for example, said that at each of their meetings held shortly before insurance renewal "Mr Bernasconi would sit down with me and go through the insurance documents (including schedules and policy wordings) for the policies that Swansea RSL was buying that year. He would explain what was and was not covered under each policy. He would also bring to my attention any changes to policies from one year to the next."

24 Mr Kentish said that Mr Bernasconi would go through each insurance policy "in detail so that we understood the extent of the cover we were buying and what our responsibilities were to the insurers. He would bring to our attention any exclusions in the policies as part of that process."

25 Ms Borrelli, Mr Richards and Mr Bolth gave like evidence.

26 The affidavits, I am satisfied, established relevant similarities between the type of services Mr Bernasconi provided to Dr Flanagan and these clients and how he went about providing them to other clients. This evidence was led in order to establish that Mr Bernasconi had a tendency to act in the way these witnesses explained, when providing his services to his clients, in order to infer that he had behaved in conformity with that tendency when he provided his services to Dr Flanagan in 2012 when she took out her home and contents insurance.

27 I am thus satisfied that the evidence was admissible, having significant probative value, given what was in issue.

28 But as I will explain, even taking that evidence into account, all of the evidence which has to be considered does not establish that Mr Bernasconi did what he claimed in relation to the CGU and Vero policies. Indeed, the evidence supports the conclusion that he did not then act in conformity with his usual practices, but departed from them in the ways Dr Flanagan described.

29 This conclusion rests in part on conclusions which I reached about the credibility and reliability of the evidence of both Dr Flanagan and Mr Bernasconi, as well as on concessions which he made in cross-examination.

Credibility and reliability

30 Dr Flanagan and Mr Bernasconi's credibility and the reliability of their evidence turn on disputed conversations and actions and what various documents, the authenticity of some of which were in issue, do and do not establish. Dr Flanagan and Mr Bernasconi each gave affidavit evidence, aspects of which were not in dispute, and they were cross-examined about matters which were.

31 Dr Flanagan's case was that Mr Bernasconi's evidence had been proven to be incorrect about numerous matters and could not be preferred over hers. The defence case that there were aspects of Mr Bernasconi's evidence, including about what Dr Flanagan told him on 28 February 2012 about her insurance needs, that were more plausible than her evidence.

32 I am unable to accept that submission.

33 Given the real conflict in their evidence about many matters, it is necessary to "engage with, or grapple or wrestle with the cases presented by each party" on these issues: *Murray v Sheldon Commercial Interiors Pty Ltd* [2016] NSWCA 77 at [60]. Such conflicts must be resolved by "reasoning so far as possible on the basis of contemporaneous materials, objectively established facts and the apparent logic of events", as well as upon the assessment of a witness' reliability*: Hutchison Construction Services Pty Ltd v Fogg; Fogg v Les Quatre Musketeers Pty Ltd (t/as Plastamasta South Coast)* [2016] NSWCA 135 at [60].

34 Having undertaken that exercise I have concluded that Dr Flanagan did not give deliberately false evidence, nor can it be concluded that she was not a credible or reliable witness. I have not been able to reach the same conclusion about Mr Bernasconi.

35 In her case Dr Flanagan called affidavit evidence from Mr Murray, a business adviser, who corroborated her evidence that it was in 2011 that he first began giving her advice about the possibility of the property being used for various commercial purposes. During the course of the hearing she also led affidavit evidence, without objection, from her daughter, who corroborated Dr Flanagan's evidence about the pool not being empty in 2010, as was Mr Bernasconi's evidence. Only Mr Murray was cross-examined. Their evidence and contemporaneous documents, including those which evidenced the ongoing regular pool maintenance, supported Dr Flanagan's evidence about various issues.

36 As well as the disputed evidence called from his clients, during the course of the hearing Mr Bernasconi also called evidence, without objection, from the CEO of Nadic, Mr Dallas James, after Mr Bernasconi was cross-examined about the authenticity of documents he claimed he had given to Dr Flanagan. Mr James' evidence established that aspects of Mr Bernasconi's evidence were inaccurate, including in relation to such documents.

37 I thus came to the conclusion that what appeared to be contemporaneous documents supporting aspects of Mr Bernasconi's evidence, had not been given to Dr Flanagan and further, that his evidence about critical matters was not reliable.

38 Finally, that in the event of conflict Dr Flanagan's evidence had to be preferred, was supported by an analysis of their disagreements and the concessions which they each made, including in Mr Bernasconi's case, ones which led to breach of duty being accepted. Despite this, I was still unable to prefer his evidence.

39 Consideration had to be given to the passage of time, not only since the events in question, but in his case, since Mr Bernasconi's retirement in 2013. That, I accepted could explain some of his difficulties in recollecting matters put to him, but not other difficulties with his evidence.

40 Despite the nature of the regard which Mr Bernasconi repeatedly said in cross-examination he had for Dr Flanagan; I came to have reservations about his evidence about various matters. This included the extent of his business contact with her, rather than with her staff; what he did in 2012, before the Vero policy was taken out; and finally, his general credibility and the reliability of his evidence when it conflicted with that of Dr Flanagan. In the end I had to conclude that some of his evidence was simply not plausible and finally, that his evidence could not be preferred over hers.

41 In explaining these conclusions it is convenient to resolve various of the factual issues lying between the parties.

The relationship

42 Dr Flanagan is a medical practitioner and Mr Bernasconi a retired insurance broker who had almost 50 years' experience when he retired in 2013, although on his evidence he was never licensed. They had a professional relationship over some 29 years beforehand, during which they had regular contact about the complex business and personal insurance needs which Dr Flanagan and Dr Oldfield had, other than in relation to life insurance. Before their divorce Dr Flanagan, Dr Oldfield and various of their companies were involved in the operation of businesses which included a private hospital and cardiac testing business. Dr Oldfield also had a cardiology practice.

43 Dr Flanagan's role in the businesses included medical work, such as filling in for other doctors who provided their services, as well as an administrative and financial role, essentially that of a chief financial officer. She was assisted by both administrative and accounting staff and was responsible for overseeing insurance. Both she and other staff dealt with Mr Bernasconi about insurance matters over the course of each year, although not to the extent that he claimed.

44 In cross-examination Dr Flanagan acknowledged that before she left the business in 2011 she was very busy, as was Mr Bernasconi's experience, she also having the care of five children and the home, which is situated on a three-acre

property. She also had various staff to assist her there.

45 Dr Flanagan denied, however, that her interactions with Mr Bernasconi were as he described them, visiting the office two or three times a week, but dealing mainly with her staff, because she was too busy to see him.

46 It was common ground that Dr Flanagan and Mr Bernasconi had a longstanding friendship, which he described in cross-examination. Her evidence was that it was she who usually dealt with Mr Bernasconi, which he disputed. In cross-examination she said that while she could not always see him when he called in, usually she could make time.

47 After Dr Flanagan's separation from Dr Oldfield, Mr Bernasconi continued to provide her with broking services for her professional and personal needs, about which she also took the advice of her accountant. He also continued to provide his services to Dr Oldfield.

48 Dr Flanagan, Dr Oldfield and Mr Bernasconi had considerable personal contact, although Dr Flanagan and Mr Bernasconi also disagreed about how frequently he visited the home. He had swum in the pool with Dr Oldfield on at least one occasion and on Dr Flanagan's evidence, even had an access code to enter the property. On his evidence, when he met with Dr Flanagan at her home, it was usually early in the morning.

49 Theirs was undoubtedly a relationship of considerable trust, Mr Bernasconi taking their business with him whenever he changed employers.

50 Dr Flanagan's evidence was that because of the pattern of brokerage services Mr Bernasconi had provided over the years, during which he worked for various brokers, she did not closely review documents which he provided and he did not advise her to review them, nor to satisfy herself that they were satisfactory. She relied on him that the wording was appropriate.

51 From February 2003 the property was insured with CGU, he having recommended it to be the best policy in the market for her. Mr Bernasconi corroborated this. He considered that policy provided the best cover for the property even in 2012 when the Vero policy was taken out, although he did not tell Dr Flanagan this.

52 The CGU policy was index linked, providing for automatic yearly increases to the amount of cover according to inflation. Several substantial claims had also been made under the policy and his view was that it was more prudent to take a long-term view and establish a good relationship based on loyalty between the client and underwriters. In his experience chasing the cheapest premium could be counterproductive. In any event he considered that the CGU policy was a high-end policy and that the difference in other policies and premiums would have been negligible.

53 Dr Flanagan also deposed that in or around November each year, Mr Bernasconi would tell or remind her that he was going to review the existing policies, compare them against the available policies in the marketplace and recommend the best one. They invariably followed his recommendations, and he would organise an insurance premium funding loan for the premiums, arrange for the policies to be taken out and send an invoice, indicating that payment had been made. Mr Bernasconi disputed some of this.

54 Dr Flanagan also said that they usually met in person in or around February of each year at her workplace and from around 2001 at her home, when he provided his advice and/or recommendation on the best policies and she signed the premium funding document. He would later send her the tax invoice that included premiums and the brokerage services fees.

55 Despite the evidence led from his other clients, Mr Bernasconi did not agree. On his account he dealt more often with her employees than with Dr Flanagan, who often had no time to speak to him and he did not contact Dr Flanagan each November. While he agreed that he reviewed the insurance cover on the property each year, there was no reason for him to contact her each November; he did not regularly seek alternative quotes for insurance; and it was his practice to provide a folder containing the relevant documents which he left for her with her staff, not Dr Flanagan. She disagreed.

56 Mr Bernasconi also said that he always provided copies of policy documents and product disclosure statements when writing new business and at renewal. He did so every year for Dr Flanagan, presented in a folder, as was her evidence, but he disagreed as to the time at which it was presented and to whom. He also disagreed with Dr Flanagan that he did not advise her to review the policy documents or satisfy herself that they were satisfactory for her need. But he insisted that he did not usually provide them to her, but rather to her staff, Ms Nichols and Mr Tickle, advising them "Here are the renewal documents. I'm happy to go through them with you, but if there are any questions feel free to call me at any time".

57 On his next visit Mr Bernasconi would ask them whether Dr Flanagan had any questions, and he would also have a brief conversation with her to the effect:

> "Dr Flanagan: Is there anything we need to do?
>
> Me: Not really Sue. Your sums insured have been indexed linked to keep pace with inflation. The premium might have increased slightly from last year. I'd only be too happy to run through the schedule and the policy wording at a time to suit you.
>
> Dr Flanagan: No I'm happy with that. I'll have to leave you."

58 On Mr Bernasconi's evidence he rarely spoke to Dr Flanagan directly otherwise. This was also disputed by Dr Flanagan, who also explained why he could not have spoken to Ms Nichols, and later Mr Tickle as he claimed. On her evidence whilst she had many business, professional and personal obligations and at times was busy when Mr Bernasconi called in, he was a friend for whom she always tried to make time and they spoke regularly.

59 When challenged both Dr Flanagan and Mr Bernasconi insisted that their evidence as to their interactions was correct, although Dr Flanagan accepted that she did not articulate each year the requirement that he compare the existing policy against the available policies in the marketplace and recommend the best one to her. That, however, was her expectation, given the considerable broking services he was providing.

60 I am satisfied that her evidence must be preferred.

Problems with Dr Flanagan's recollection

61 What the cross-examination did establish was that while Dr Flanagan had a good memory of events dealt with in her evidence, supported as much of it was by contemporaneous records, the reliability of which were not in issue, as well as by the evidence of other witnesses, including Mr Bernasconi, her memory about some matters was mistaken.

62 For example, she told the engineer engaged by Vero to investigate her claim that the pool had been emptied in December 2012, which was reflected in his 2013 report. On her evidence when she received it, she realised her error, having emptied the pool at the end of winter.

63 It was the defence case that this was a part of Dr Flanagan's deliberate attempt to mislead Vero, which she denied. This was also said to be evidenced by her failure to inform the investigating engineer about problems with the hydrostatic valves. On her evidence there were problems when the pool was first built, after which it was emptied three times and one of the valves replaced, before the dispute over the problems was resolved in 2001, when she made payment.

64 Dr Flanagan explained that she did not mention this to the engineer in 2012, who did not ask her about the valves. She did not then consider the initial problems with the pool to have been relevant to the investigation of what had caused the pool to lift, they having been repaired at the pool builder's cost before the final payment was made for the pool in 2001. There had not been further problems afterwards, apart from a leaking light which was repaired without the pool needing to be emptied, until it was identified in 2012 as the likely source of a leak which she had become aware of in late 2011 from an increased water bill.

65 This accorded with Dr Flanagan's daughter's evidence that she had lived in the home since 1999 and had regularly used the pool as a child and until her late teenage years, and also with the pool maintenance records. It was in February 2012 that she saw the pool had started turning green and her mother told her that it had been turned off to investigate a leak. The pool was not emptied until winter, after Dr Flanagan had been advised that it was designed to be emptied. That accorded with the expert evidence.

66 I am satisfied that neither this nor any other evidence established that Dr Flanagan had set out to mislead Vero or the Court, let alone that she gave false or generally unreliable evidence.

67 On documents which she wrote at the time, after the pool was emptied Dr Flanagan was not prepared to spend money on the pool which she considered might only prove be to the bank's benefit if it sold the property, as was being threatened. That proved to be a costly decision, given what eventuated, and there being no suggestion that what may have been involved in the investigation and repair of the cause of the leak after the pool was emptied would have been expensive or something which Dr Flanagan did not have the finances to deal with.

68 The property was not sold, but the empty pool lifted, and the Vero policy proved not to have covered the resulting damage.

69 When cross-examined about her finances and sources available to her to pay her commitments, Dr Flanagan also referred to money held in her solicitor's trust account, which she thought was available in 2012 to meet expenses she was incurring. They showed, however, that those amounts had been expended by December 2011, rather than February 2012, as had been her recollection.

70 I am satisfied that this mistake also does not permit the conclusion that Dr Flanagan's evidence was generally not credible or otherwise unreliable. Everyone has lapses in memory. The evidence establishes that this was a particularly challenging and difficult time for Dr Flanagan. That she made mistakes then and when giving her evidence about events that occurred at that time, which were evidenced by documents, did not lead me to conclude that her evidence was falsely given, or otherwise unreliable.

71 I did not reach the same conclusion in relation to Mr Bernasconi.

The disputed 2005 conversation

72 That Dr Flanagan's evidence was generally reliable was established by other evidence. It is convenient to begin with the conversation Dr Flanagan deposed having in February 2005, while Mr Bernasconi was at her home.

73 Between 1997 and 1999 Dr Flanagan and Dr Oldfield had built a new house, the 25-metre pool and pool building of commercial sized proportions on their property. There were problems and they obtained written advice about the adequacy of the pool and pool building and in mid-1997, on her evidence, she instructed Mr Bernasconi to take out insurance cover, including for the pool and pool building, because of the size of their investment.

74 There was an issue about this, but not that in 1998, problems with the pool leaking were investigated. Ongoing issues with the pool after it was filled were pursued and, Dr Flanagan believed, resolved by the pool builder by 2001. On her evidence they required the pool being emptied a number of times and the replacement of a faulty hydrostatic valve. From that time the pool was cleaned and maintained monthly or fortnightly depending on the season, until it was emptied in mid-2012.

75 On Dr Flanagan's affidavit evidence in 2005 she discussed with Mr Bernasconi at her home:

> "Me: Rob, is the pool fully insured, I mean for everything the equipment, the building and all?
>
> Bernasconi: No.
>
> Me: What about the tennis court and the shed?
>
> Bernasconi: No Sue. They are not included in the policy.
>
> Me: Why not? They need to be included. Please make sure they are all insured.
>
> Bernasconi: Okay, no problem Sue. I will need you to give me a figure for the cost of each item to re-build.
>
> Me: I can give you some round figures, the pool was approximately, $250,000 and the building enclosure was approximately $127,000. The tennis court and shed were approximately $75,000. I cannot remember the exact dollar amounts, but those figures would be close to the mark.
>
> Bernasconi: Ok, I will arrange it for you."

76 Mr Bernasconi had no recollection of this conversation and also denied that Dr Flanagan had ever discussed with him her requirement that the pool be fully insured. Dr Flanagan was adamant that both had occurred.

77 But Dr Flanagan did make some pertinent concessions. For example, her affidavit evidence was that she had a regular pattern of communication with Mr Bernasconi in around November of each year, from 1984 to 2013, in which her instructions were to "make sure I am fully insured and that I have the right insurance to cover me". In cross-examination she accepted that she had not expressly articulated this each year.

78 By way of contrast, in cross-examination Mr Bernasconi insisted not only that full insurance had not been discussed, but he said that it was not available in the insurance industry, because exclusions always apply. When pressed, while finally agreeing that some of his clients did use that expression when he dealt with them, he insisted that Dr Flanagan had not.

79 Despite Mr Bernasconi's reluctance to accept the concept, the expression "full insurance" is not an unusual one. It was used, for example, in *Horsell International Pty Ltd v Divetwo Pty Ltd* [2013] NSWCA 368; 18 ANZ Insurance Cases 61-991, where it was observed that "the evidence as to Mr Todd's determination to have full insurance cover" amply supported the conclusion that had the client "been properly advised about the limits on the cover available under the Policy, he would have taken out the full insurance Horsell otherwise could have arranged: s 5D(3), *Civil Liability Act"*: at [242].

80 On Mr Bernasconi's evidence the pool and pool house had always been included in the definition of "buildings" in the CGU policy, which covered all the buildings on the property and their replacement value had been taken into account in determining the sums insured. That reflected a valuation undertaken at his suggestion in 1998 by a Mr Hemmings of Rushtons. Colloquially, on his evidence, the CGU policy thus always offered "full insurance".

81 In evidence, however, were documents which showed that the insurance cover had been increased in September 2004 from $1,715,000 to $2,500,000. That was consistent with a conversation to the effect that Dr Flanagan described, albeit at a time somewhat earlier than she remembered and she then having a concern about being fully insured, which the increase in the CGU cover seemingly achieved.

82 There is no issue that the Vero policy did not provide such cover

83 Having considered this and other conflicts in their evidence, I am satisfied that Mr Bernasconi's evidence cannot be preferred on these matters. I consider that it must be accepted that had Mr Bernasconi drawn the difference in the policies to Dr Flanagan's attention, that the Vero policy did not provide the full insurance which the CGU policy did, would have been of concern to her.

The pool was not empty in 2010

84 Dr Flanagan, in the extensive attack in cross-examination on many aspects of her evidence, insisted that she had a good memory of conversations dealt with in her affidavits, even those held long ago. She was also certain that some events Mr Bernasconi gave evidence about had not occurred, such as Mr Bernasconi speaking to her in 2010 when he saw the pool empty.

85 In his affidavit Mr Bernasconi described the occasion in February 2010 when he went to the home to retrieve his swim fins and saw that the pool was empty. On his account he then spoke to Dr Flanagan about the risk of the pool lifting out, which he explained in cross-examination he was aware of, because of his general knowledge. She then told him that they had been having problems with the pool since it was built; that it was leaking; and that she was pursuing the matter with the builder, Bel-Air Pools.

86 Dr Flanagan denied this in her affidavit. None of the contemporaneous documents support Mr Bernasconi's account, and it was contradicted by some of them, as well as by the evidence which Dr Flanagan's daughter gave.

87 Mr Bernasconi also said in his affidavit that he told Dr Oldfield in 2010 that the pool was empty and that he was very angry. But there was no suggestion that Dr Oldfield did anything as a result, unlike in 2012 when he sent Dr Flanagan an email, at a time when there is no issue that the pool had been emptied.

88 In cross-examination Mr Bernasconi denied that he could have been confused about the timing. He also volunteered that he knew that Dr Oldfield had spoken to Dr Flanagan about the pool being empty in 2010, because he was present when Dr Oldfield telephoned her "and told her in no uncertain terms to refill the pool".

89 This had not been put to Dr Flanagan, whose cross-examination had been:

> "Q. In February 2010 Mr Bernasconi came to the property and when he did, he was with you and noticed that the pool was empty. Correct?
>
> A. No. The pool was full. I don't believe he came over but I'm telling you in 2010 the pool was full.
>
> Q. You don't believe he came over in February 2010. Is that what you say?
>
> A. I did not see Mr Bernasconi in 2010 with an empty pool. I - I need to explain this differently perhaps. The pool was full in 2010.
>
> Q. Do you accept that Mr Bernasconi may have come to your property in February 2010?
>
> A. He may have come.
>
> Q. He may have come to ask for his pool fins back. Correct?
>
> A. He could have got them without asking.
>
> Q. You had a conversation with him about the pool being empty?
>
> A. No.
>
> Q. You told him you'd let the water out because the pool had been leaking?
>
> A. No.
>
> Q. The pool at that stage was in a untidy condition, wasn't it?
>
> A. No.
>
> Q. The whole pool area was littered, wasn't it?

A. No.

Q. You said to Mr Bernasconi that you never really wanted the pool, didn't you?

A. Not - at different times I may have said it.

Q. You said that it was Geoff's folly, didn't you?

A. Yes. I have called it Geoff's folly before.

Q. Is that's the first time you've admitted that in this proceeding?

A. I've never denied it.

Q. It's not addressed in your second affidavit, is it?

A. It's a passing comment of no importance.

Q. You told Mr Bernasconi during this conversation that you'd had problems with the pool since it had been built.

A. That's not true.

Q. He told you you'd better be careful because by leaving the pool empty, there was a risk that it could pop up. Correct?

A. No, he did not. No conversation occurred.

Q. It doesn't suit you now to admit there was a conversation of that kind, does it?

A. No conversation occurred."

90 It was not put to Dr Flanagan that in 2010 Dr Oldfield spoke to her about the pool being empty. That was consistent with her daughter's evidence, who was not required for cross-examination and with pool maintenance records. Her daughter's evidence was that while still at high school in 2009 to 2011 she swam in the pool up to three times a week.

91 In his cross-examination it was put to Mr Bernasconi that he had invented events both in his affidavit and oral evidence, which suited his case, which he denied. I came to the conclusion, however, that Mr Bernasconi did give some evidence which did not truly reflect his recollection, or what had occurred. On all of the evidence he was mistaken about the pool being empty in 2010.

Dr Flanagan's financial position

92 Dr Oldfield and Dr Flanagan separated in 2010 and in November 2011 they reached a heads of agreement about how they were going to separate their personal and professional affairs, which on her account Dr Flanagan later showed Mr Bernasconi. On his evidence he was then aware of the separation and its impact on Dr Flanagan's financial position.

93 The 2011 agreement included the home being transferred into Dr Flanagan's sole name unencumbered, which depended on Dr Oldfield refinancing and thus what was agreed was noted as being subject to the NAB's and other approval. The NAB then had a mortgage over the property to secure business debts, in which Dr Flanagan was no longer to have any interest.

94 On her evidence in cross-examination Dr Flanagan was relieved when the agreement was reached and for a time not much concerned about her financial position, but this changed in 2012. She was not privy to the steps Dr Oldfield was pursuing to refinance, necessary to obtain the bank's approval, which proved not to be readily forthcoming, and she came to be concerned about the financial viability of Dr Oldfield's practices, given his failure to refinance.

95 In her first affidavit Dr Flanagan explained that despite what she had agreed with Dr Oldfield, she was thus under some stress. She was time poor due to a combination of factors, including the divorce; Dr Oldfield's inability to refinance; the NAB threatening foreclosure, which would have left her and her five children with no home; having to work and take care of her patients; and supporting her children. Details of her considerable problems as the result of what was no doubt a difficult divorce process emerged in cross-examination.

96 Dr Flanagan had the advice of her accountant, as well as legal advice, but eventually came to fear that what was to be her sole asset, the unencumbered home, would be repossessed by the bank and that both she and Dr Oldfield would end up being bankrupted. On 8 March 2012 she wrote that she could not live at the financial whim of the bank and Dr Oldfield for another 18 months and was then prepared to go into receivership, having repeatedly faced losing the house and bankruptcy. In April she discussed a possible fire sale of the house, being bankrupt and having no super. But this did not transpire.

97 Amongst the many things Dr Flanagan was cross-examined about was her decision to reduce insurance for the contents of the home in 2012 from over $1million to $500,000, it was common ground, in consultation with Mr Bernasconi. On her evidence this reflected property Dr Oldfield had taken with him in 2010 and other property it was agreed in 2011 he would then take.

98 Her evidence was plausible.

99 Dr Flanagan denied that the insurance for the contents was reduced because she could not afford the considerably increased premium CGU required in 2012 for the home and contents insurance, which on her evidence Mr Bernasconi did not tell her about. Her evidence was that she had to have the property insured, that being a requirement under the loan and that she had the means to pay the CGU premium, given what she was earning, but Mr Bernasconi never told her about that premium.

100 She also insisted that her decision to reduce the contents insurance reflected the reduction in the value of the contents. In cross-examination Mr Bernasconi agreed that he had discussed what was a reasonable figure with her, but he considered that it was up to her to finally determine the sum to be insured.

101 It was not Mr Bernasconi's evidence that as a result of the decrease in contents insurance Dr Flanagan was underinsured. Nor was there any evidence as to what Dr Oldfield insured the contents he had taken for. While Dr Flanagan agreed that most of the contents remained in the house, she explained that what Dr Oldfield took was valuable including, for example, 350 dozen bottles of wine, which had been stored in the large cellar, which she described.

102 There was also no issue that when Dr Flanagan instructed Mr Bernasconi to reduce the contents cover when she accepted the Vero proposal in March 2012, it was expected that this would result in a reduction in the premium, even though this did not eventuate. The premium initially indicated on the invoice for the Vero policy Mr Bernasconi provided was $8,204.18. It was later increased to $8,562.16. Why is not apparent, Mr Bernasconi's explanation being that he assumed that it reflected information provided and the reduction in the cover.

103 But he did not advise Dr Flanagan that the decrease in the contents insurance would have also decreased the CGU premium.

104 Dr Flanagan had also consulted with her accountant about various life insurance covers, which she believed was no longer required, about which she was also cross-examined. She said that was because under the agreement she no longer had any responsibility for Dr Oldfield's business debts. She denied that she could also no longer afford those premiums, pointing out that she was not the insured and thus not responsible for paying any of them, nor was she the beneficiary.

105 This was also entirely plausible.

106 Dr Flanagan was also cross-examined about arrangements which had to be made to pay considerable outstanding company taxes, the ATO having issued a garnishee notice to the bank. She explained that it had come to light that a former accountant had failed to finalise certain tax returns, she not having noticed at the time that they had not been provided for signature, with the result that repayment plans were negotiated. That may have been part of the reason why Dr Oldfield had problems with refinancing, but the evidence did not suggest that Dr Flanagan was responsible for making any of the negotiated payments.

107 On Dr Flanagan's account, after she left the business in which she had worked with Dr Oldfield, she had an income stream on which she could live, as well as adequate cashflow to have permitted her to pay the increased CGU home insurance. She said that while initially she had only two days' work a week in late 2011 after the heads of agreement were arrived at, this increased to five by early 2012 and her cash flow improved, as payments came in.

108 Dr Flanagan was also cross-examined about what her bank statements revealed, as well as the circumstances in which she had not paid her accountant in 2012 and did not have the pool repaired.

109 Her bank accounts showed that her income was certainly tight, especially immediately after the heads of agreement were arrived at and she left the business. That in 2012 she could not meet her outgoings, including the CGU insurance if it had been taken out, was not established, even though her credit card records, which could have shed further light on what she was spending her income on, were not produced. Over that year her financial position, more difficult than it had been before the separation, certainly improved.

110 In 2012 Dr Flanagan paid her insurance premiums, including the Vero policy, as had occurred in the past, under a funding arrangement provided by a subsidiary of Nadic. There was no suggestion that there was any difficulty in Dr Flanagan making payments due under that agreement at any time. The evidence simply does not permit the

conclusion that if the CGU premium had also been funded under that arrangement in 2012, Dr Flanagan could not have paid for it, even though that would have attracted interest.

111 Dr Flanagan also explained that she came to have a dispute with her accountant in 2012 when she discovered that unbeknownst to her, he had not only performed work for Dr Oldfield which she considered involved a conflict, but that she had been charged for that work, which she had refused to pay. But she had paid some of that account.

112 That also did not establish that she could not have paid the CGU premium, or would not have been prepared to, if properly advised.

113 In the result I am not able to conclude that Dr Flanagan's evidence about her ability to finance the CGU premium was not credible, despite the case advanced as to the insubstantial safety net Dr Flanagan then had for her personal expenses and the concerns which she undoubtedly then had about her ongoing financial situation.

114 Nor does the evidence about her financial position help establish that she had limited interest in the pool, as the defence also submitted. To the contrary, it helps explain why commercial use of the property was something which she began to consider with Mr Murray's assistance.

115 Dr Flanagan's evidence on all these matters must be accepted.

The planned commercial use of the property

116 Dr Flanagan said she had first begun exploring plans in 2011 for alternate income producing uses for the property, including the pool and pool structure, which she had then also mentioned to Mr Bernasconi, but which she had not actively pursued until more recently.

117 Mr Bernasconi also denied this, but it is entirely possible that it was something which he had simply forgotten. Given the early stage of her investigation in 2011, it seems quite unlikely that Mr Bernasconi would then have investigated and advised Dr Flanagan about her insurance needs, as was his evidence, given the early stages of her consideration of this possibility.

118 It was put to Dr Flanagan in cross-examination that even though she no longer pursued a pleaded claim for lost opportunity, she had no plan in 2011 to pursue such opportunities and had never intended to put the pool, which she had never wanted and was content to get rid of, to such use, having always considered it to be Dr Oldfield's "folly", as she had described it in the past. She accepted that she had used this description, but denied having not considered using the pool, or having no interest in it.

119 It was also argued that Dr Flanagan, who borrowed $400,000 in late 2013 and refinanced in 2014, resulted in her having an extra $290,000 available to spend, but not then having constructed a new pool and enclosure, also showed that she had no real interest in the pool. A document written by Dr Flanagan's son in 2017 in response to a question asked by an insurance expert about the construction of the pool structure, which made no reference to the pool, was also relied on by the defence to establish this.

120 That Dr Flanagan had the pool and structure demolished and grassed over, rather than rebuilt, having unsuccessfully pursued a claim with the Mine Subsidence Board, Vero and the FOS and eventually later brought these proceedings, is all inconsistent with any lack of interest in the pool. Her evidence in cross-examination, that even though she had considered the pool to be a folly, she also considered it to be a valuable asset which she could make commercial use of, was supported by Mr Murray's evidence, which is not undermined by the 2017 document.

121 Mr Murray's affidavit evidence corroborated Dr Flanagan's evidence, although he agreed he could not now remember details of conversations which he had with her in 2011. He was cross-examined, but his evidence did not detract from this conclusion.

122 Dr Flanagan had first engaged Mr Murray in 2011 to advise her on commercial uses to which the property and its assets, including the pool, could be put. He had discussed them further with her in following years, even though it was not until 2017 that Dr Flanagan actively began pursuing the development of a business plan for commercial use of the property. On his affidavit evidence the uses which he advised about were:

(1) Turning the property into a bed and breakfast;

(2) Operating an educational facility using the pool and pool house;

(3) Turning the property into a private health facility, using the pool, tennis court and the grounds; and

(4) Using the property as a private function venue, by covering the swimming pool with a temporary floor.

123 The business plan more recently prepared concentrated on educational opportunities, high teas, and a wedding venue utilising the pool building. It also made reference to the pool and a floor which could be placed over it when the pool building was used.

124 It must thus be accepted that Dr Flanagan has been considering making commercial use of the property since 2011, although it is only recently that she has begun pursuing such opportunities and that the pool and pool structure were assets which she had considered using in such ventures. They were, after all, valuable assets, as she said.

125 Dr Flanagan's evidence that pursuit of these opportunities was adversely affected by various matters, including the damage and demolition of the pool and pool structure and the pursuit of the insurance claim, must also be accepted.

Other evidence Mr Bernasconi volunteered

126 While Mr Bernasconi was not able to answer some questions because he could no longer remember the events he was being asked about, not only was he adamant that his detailed memory of some things was accurate, he also volunteered other additional information which he had not included in his affidavit, and which had not been put to Dr Flanagan in cross-examination.

127 Some of his evidence also became contradictory.

128 No evidence was led by any of the Nadic staff who Mr Bernasconi said in cross-examination had prepared various documents he had provided Dr Flanagan, by use of its computerised system. Some documents were issued under his name, he said in accordance with Nadic's usual practices, but others were not. He could not explain why some documents he claimed he had given Dr Flanagan were issued in the name of Mr Dallas James, Nadic's CEO, or his son Mr Mitchell James, who also worked for Nadic, when their authenticity was raised with Mr Bernasconi in cross-examination. On his evidence they should have born his name, it being he, not they, who provided her with broking services.

129 It has been observed that "[e]xperience of the world shows that the files and other records of even the best run organisations, government and private, large and small, can usually not be treated as infallible": *Prasad v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 101 ALR 109; (1991) 23 ALD 183 at [122]. The evidence finally led in this case established that Nadic kept no reliable record of what documents Dr Flanagan was given. Also, that Mr Bernasconi's evidence that he gave exhibited documents to Dr Flanagan, relying as he did on documents created in the way Mr Dallas James explained, established that his evidence was not correct.

130 The result of the challenge to the authenticity of the documents was that without objection, evidence was called from Mr Dallas James which confirmed that documents bearing his name and that of his son had not been given to Dr Flanagan. That Mr Bernasconi gave her any such documents was not established by his evidence.

131 Mr James explained how the exhibited documents had been created by printing them from the Nadic system on current letterhead and forms not in use when Mr Bernasconi was providing broking services to Dr Flanagan. He also explained why what was so retrieved from the system did not refer to Mr Bernasconi. This evidence confirmed that the exhibited documents had not been given to Dr Flanagan.

132 Understandably, Mr Bernasconi had been assisted with the preparation of his affidavit by solicitors. He said that he had had to look at very many documents, some of them discovered, with the result that it had taken over 40 hours to complete his affidavit. Still, as the result of that process, instead of accepting that documents exhibited to Dr Flanagan's affidavit were ones he had given her, he swore that documents exhibited to his affidavit were copies of those documents. They were not.

133 In cross-examination Mr Bernasconi also finally said that the product disclosure statement for the Vero policy exhibited to his affidavit was not that which he had given to Dr Flanagan in 2012, on his account, on three different occasions. Mr Dallas James' evidence shed no light on this.

134 Mr Bernasconi also volunteered that while the Vero statement exhibited to Dr Flanagan's affidavit was in the form he had given her, he insisted that it was also not the statement he had provided her. He then remembered that the Vero statement contained an exclusion in different terms to that contained in the statements in evidence. He also volunteered that before he met Dr Flanagan he had marked that exclusion in pen, intending to discuss it with her. That had also not been put to Dr Flanagan in cross-examination.

135 That document was called for but not produced by the defence. Nor was the defence case, finally, that the Vero statement given to Dr Flanagan contained an exclusion in different terms to that in evidence, as had been Mr Bernasconi's evidence.

136 In the result, it can only be concluded that his evidence about the terms of the Vero statement was a recent invention. This and other evidence made it increasingly difficult to accept Mr Bernasconi's evidence about other matters, particularly the crucial conversation he claims he had in February 2012 about the CGU policy.

The 28 February meeting did not occur

137 On Dr Flanagan's evidence, the Vero policy was taken out as the result of Mr Bernasconi's recommendation on 15 March 2012 and on his evidence, it was because she was not prepared to pay CGU's considerably increased policy, which he advised her of on 28 February.

138 In Dr Flanagan's affidavit evidence she said that on 15 March Mr Bernasconi did not provide her with any Vero documents, but that she signed the insurance premium funding loan form which she gave back to him. In April she received an amended version of that document. Mr Bernasconi did not then advise her about any of the terms of the Vero policy, other than saying that he would increase the sums insured by 5% as he had in previous years and decrease the contents cover, to reflect changes resulting from the dissolution of her marriage. He did not discuss any alternative options and she believed that she continued to have full coverage for the pool and all buildings on the property. Mr Bernasconi also did not tell her that the policy did not cover the pool or pool building or that she should read the terms and conditions of the policy or do anything else to satisfy herself that they satisfied her needs.

139 Mr Bernasconi's denied this in his affidavit where he said that he met with Dr Flanagan on 28 February 2012, the date the CGU policy fell due for renewal, at about 7.30 am and gave her a folder containing an invoice, product disclosure document and Statement of Advice, which Dr Flanagan denied receiving in her second affidavit. Mr Bernasconi exhibited a Nadic invoice dated that day, as well as a disclosure document, but no Statement of Advice. Instead, there was a General Advice Warning exhibited. That these documents were ever provided was not established.

140 On Mr Bernasconi's evidence on 28 February they discussed:

> "Me: Sue I am afraid he renewal premium has increased substantially this year.
>
> Dr Flanagan: Why
>
> Me: I think it's to do with the bush fire risk. We're having some trouble getting alternatives, but the girls in the office are working on it already and we're in the process of seeing what other quotes are available.
>
> Dr Flanagan: Good, because I can't afford it. I won't pay it Rob. You'll just have to find a better premium.
>
> Me: The other thing with the CGU renewal is that they want you to carry out some improvements that were recommended by the insurance surveyor who came round to inspect the property.
>
> Dr Flanagan: Well, I can't afford those either.
>
> Me: Ok, we'll do our best, but bear in mind there are bush fires raging in this area and insurers won't quote in high bush fire risk areas, particularly when there is fire activity. The CGU policy offers good cover and I'm just not sure we'll be able to find you a better alternative. I'm happy to go through the CGU policy with you if you think it would help.
>
> Dr Flanagan: Look, I could just about afford last year's premium, but that's it. I can't afford to pay what they're asking for."

141 On his account, the 28 February meeting left Mr Bernasconi understanding:

> "a. Dr Flanagan did not wish to proceed with the CGU Policy because of the cost of the premium;
>
> b. her main concern in relation to any alternative policy was price; and
>
> c. the maximum price she was prepared to pay would be around the amount of the CGU Policy premium from the previous year (which I later checked to see was $8,440.00)."

142 But it was not his evidence that this also conveyed to him that Dr Flanagan no longer wanted the full insurance which the CGU policy provided, or that she was prepared to reduce or remove the insurance cover which it provided for the pool and pool enclosure. But without further discussion with her that is the basis on which, on the defence case, he proceeded.

143 Dr Flanagan denied such a meeting or conversation in her second affidavit, where she also denied Mr Bernasconi having left her with a folder of CGU documents.

144 I am satisfied that her evidence about these matters must also be preferred.

145 It seems unlikely that a meeting of the kind Mr Bernasconi described could have occurred at 7.30am on 28 February at Dr Flanagan's home, given his explanation of how the invoice would have been computer generated earlier that day by

Nadic office staff, that not being a part of his role and the system not permitting the date to be changed. This document referred to an Authority which was not then in existence and was printed on letterhead not then in use and it was one of those which referred to Mr Dallas James, rather than to Mr Bernasconi, as it ought to have, given Nadic's usual practices.

146 Amongst other things, Mr Bernasconi said that hard copies of documents were not kept unless notes were recorded on them and what he had given Dr Flanagan could have been later reprinted from the computer system, which Mr Dallas James confirmed. But that could not account for the documents not referring to Mr Bernasconi as they normally would.

147 The invoice also did not refer to Dr Flanagan, the client, but rather to a company which was not the insured, as did the General Advice Warning document. That was unexplained.

148 Mr Dallas James described the process undertaken to create the documents Mr Bernasconi had said he had provided Dr Flanagan. His explanation was that they did not refer to Mr Bernasconi because in the system clients had been allocated to another broker, in circumstances when a broker retired or left having to be dealt with. That did not explain why the document referred to Mr Dallas James the CEO, rather than the broker who advised Dr Flanagan after Mr Bernasconi retired, or why it did not refer to Dr Flanagan, the insured.

149 The result was that the evidence established that the documents Mr Bernasconi relied on were not copies of documents he had provided to Dr Flanagan and were incapable of establishing that the meeting, which Dr Flanagan denied having, occurred on 28 February.

150 The documents exhibited did not include the Statement of Advice which, on his affidavit evidence, Mr Bernasconi gave Dr Flanagan at that meeting. In cross-examination he initially said that the General Advice Warning exhibited was a statement of advice, but as he finally accepted, that was a different standard document which Nadic had in use and which he had given Dr Flanagan on other occasions, reflecting what he had then advised her.

151 The General Advice warning provided:

> "This advice has been prepared without taking into account your objectives, financial situation or needs. You must therefore assess whether it is appropriate, in the light of your own individual circumstances, to act upon this advice.
>
> If this advice contains information about a particular financial product, you should ensure you obtain a Product Disclosure Statement in respect of that product prior to making any decision to acquire that product."

152 By way of comparison earlier Statements of Advice he had given Dr Flanagan in 2011 not only gave a recommendation, but provided reasons.

153 Understandably, Mr Bernasconi finally accepted that in Dr Flanagan's situation in 2012 she should also have received such a Statement, but could not explain why she did not. The experts were divided about this, Mr Gribbin considering that such statutory advice was not required in the circumstances, given that it was home insurance and for a premium below the threshold amount, but Mr Le Plastrier took a different view, given the change in insurer and increase in premium. He said that under the legislative scheme there was a grey area and providing a statement was a matter for Mr Bernasconi.

154 Whatever might be resolved about this, it was accepted that Mr Bernasconi had then breached the duty of care which he owed Dr Flanagan.

155 While initially resisting the notion that he made recommendations to her about her insurance needs, Mr Bernasconi finally said:

> "Q. Why were you giving her, in February 2012, a general advice warning, telling her that some advice had been prepared without taking into account her objectives, financial situation, or needs?
>
> A. Well, it shouldn't have been. There should have been a standard statement of advice there.
>
> Q. Because you say you were providing her with now a tax invoice
>
> A. Yes.
>
> Q. for an existing policy renewal
>
> A. That's correct.
>
> Q. at a significantly increased premium.
>
> A. Correct.
>
> Q. And you were giving it to her for her approval. Is that right?
>
> A. Yes, that's correct.

Q. You were recommending that she renew that policy

A. Yes, yes.

Q. on those terms.

A. Yes.

Q. That was your advice.

A. That was my advice, yeah.

Q. And that was Nadic's advice.

A. Yes."

156 Mr Bernasconi also deposed that it was not his practice to suggest a change to a different underwriter unless there was a compelling reason, in which case he would offer the proposed alternative and provide any explanation required, but ultimately the decision to switch remained with the client. In cross-examination Mr Bernasconi said that even though he did not consider the Vero policy to be appropriate for Dr Flanagan, he did not tell her. Nor did he tell her that it did not provide the cover which the CGU policy provided, or that other insurers would offer similar cover, at a premium less than CGU required, which he believed offered the best cover.

157 This was thus also a departure from the usual practice which he described and about which his other clients gave evidence. The "compelling reason" for suggesting the Vero policy, on his account, can only have been his understanding that Dr Flanagan was not prepared to pay the CGU premium, the one and only time in his experience that she was not prepared to pay a premium, he having not advised her that Vero did not offer the full insurance that CGU did.

158 Supporting, as the evidence of his other clients did Mr Bernasconi's account of how he usually provided his broking services, it has to be concluded that not only recommending the Vero policy, as he did in March, but even how he claims he acted at the disputed February meeting, involved an unexplained departure from his usual practice. That supports Dr Flanagan's evidence that they did not meet on 28 February and that Mr Bernasconi did not then give her documents about the CGU renewal or advise her to renew it. Had he done so, she is likely to have accepted his advice.

159 In her second affidavit Dr Flanagan also explained that they could not have met on 28 February, which was a memorable day because she had left home at about 6 am to drive her daughter to Sydney, where she was starting university. She left Sydney at noon, having patient appointments which could not be moved, from 3 to 5pm. She then had to return to Sydney to be with her daughter and did not return to Newcastle until late in the night and so could not have met with Mr Bernasconi that day.

160 There is no reason for not accepting this evidence. Both Dr Flanagan and Mr Bernasconi kept diaries, but only she referred to extracts in her affidavit, which supported her account. He was not certain that he had produced his 2012 diary, explaining that it might have been destroyed, but it was not in evidence.

161 In the result I am satisfied that Mr Bernasconi's evidence that he met with Dr Flanagan on 28 February when he advised her about the CGU premium, cannot be accepted.

162 Other evidence supported this conclusion.

The altered funding document and the March meetings

163 Dr Flanagan's case was that Mr Bernasconi recommended the Vero policy at their meeting on 15 March 2012 as a replacement for the CGU policy, but he gave her no advice about its terms or the differences in the cover and exclusions offered by the two policies. Nor did he enquire as to whether she wished to reconsider insuring for damage to the pool and pool building, given the reduced contents cover. He also gave her no advice about other available insurance apart from Vero, comparative scope of cover or premium cost, and did not provide policy wording documentation or a product disclosure statement or a statement of advice under s 946A of the *Corporations Act 2001* (Cth) .

164 Pertinent to the resolution of this is Mr Bernasconi's explanation of the premium Vero charged for the insurance Dr Flanagan took out and the premium funding loan then provided by the Nadic subsidiary, which it is common ground was entered on 15 March. The loan was dealt with by a form which Mr Bernasconi had had prepared and he completed by hand, which Dr Flanagan signed in his presence that day.

165 On Mr Bernasconi's evidence in cross-examination, unbeknownst to Dr Flanagan, two later changes were made to the signed document afterwards.

166 Mr Bernasconi said initially that he had left blank the amount of the premium for the Vero policy on the loan form. Then, that he had written a figure in before it was signed and finally, that he had later increased the amount, without Dr Flanagan's knowledge or consent, after she had signed it. A certificate under s 128 of the *Evidence Act* was issued to Mr Bernasconi in relation to this evidence. He also said that someone else at Nadic had later altered the date from which the Vero insurance was provided on the signed form.

167 This evidence made implausible other evidence which Mr Bernasconi had given in his affidavit, which Dr Flanagan had also denied. Including that after the 15 March meeting when she had signed the funding agreement containing the Vero premium, which was considerably lower than the CGU premium, that he had met again with Dr Flanagan around the end of March, when she expressed her happiness with the higher Vero premium he then told her about.

168 Dr Flanagan denial of this was consistent with her expectation, which Mr Bernasconi shared, that the premium would be considerably reduced by the decrease in the contents cover.

169 Mr Bernasconi's evidence was not that he ever told Dr Flanagan about the increase in the Vero premium of over $300. That makes it most unlikely that after she had signed the funding agreement for a lower amount on 15 March, she expressed the happiness with the premium on 28 March, which he claimed. He claims she then said:

> "Me: As you know we had good news for you about the home insurance. We found an alternative quote with Vero within the premium range you requested.
>
> Dr Flanagan: Good. Rob thanks very much for doing that. I really appreciate your effort. [I handed Dr Flanagan the 3-ring binder at this point]
>
> Me: Don't thank me. Thank the girls in the office who did all the work.
>
> Dr Flanagan: I'd be pleased if you passed on my thanks to them.
>
> Me: I will do. I used to work with Vero, which was the old Royal Australia.
>
> Dr Flanagan: How much is the premium?
>
> Me: $8,562.16
>
> Dr Flanagan: That's more like it
>
> Me: I'm happy to sit down and go through the policy with you.
>
> Dr Flanagan: No, I don't have time, sorry. I have to be at work. I'll have a look at it and get back to you about it if need be."

170 I am satisfied that Dr Flanagan's denial of this must be preferred, as must her evidence about the disputed meetings, given all of the evidence finally led.

171 Other evidence also supported this conclusion.

How the Vero policy came to be taken out on 15 March

172 Dr Flanagan said in her affidavit that she had been concerned about the renewal of the insurance in early February when she contacted Mr Bernasconi, who assured her that her cover would continue and advised her that CGU required an inspection. He denied this, even though there is also no issue that in 2012 CGU had required an assessor to inspect the property and that the cover was extended. The CGU renewal schedule Mr Bernasconi exhibited was dated 2 March, noting the policy expired on 28 February.

173 The policy was then in Dr Flanagan's name. The inspection occurred in February, when Dr Flanagan was present. The assessor provided a 20 February report to CGU, but when it was provided to Nadic is not clear. CGU wrote to Nadic on 2 March about its resulting requirements, however, advising that identified fire protection equipment needed to be serviced and requiring advice of the result of discussions with Dr Flanagan by 4 May. Contrary to the defence submission this was not expressed to be "a condition precedent to the grant of cover" which, Mr Bernasconi claimed, he had already advised her to take out on 28 February.

174 The 2011 CGU premium had been $8,440.59 and Mr Bernasconi said he learned from a Nadic employee, Ms Daniels, only in late February 2012 that CGU was prepared to offer a renewal at $15,414.94. The Nadic invoice in evidence was dated 28 February in that amount, referred to Mr Dallas James and identified the insured to be Cardiac Assessment Centre Pty Ltd, not Dr Flanagan. As I have explained, that document plainly was not provided to Dr Flanagan.

175 Mr Bernasconi said he then expected that Dr Flanagan would be unhappy about the increase and so asked Ms Daniels to go to market to look for alternative quotes, which she was already doing.

176 Mr Bernasconi also said in his affidavit that he was then aware that insurers were changing their assessment of the risk of insuring homes in the vicinity because of increased bushfire risk and that this applied to the property, which was close to a State Conservation area and Dudley Bluff, where there was a bushfire at the time. He also said he was then concerned that there would not be an alternative insurance policy which met Dr Flanagan's requirements as to premium cost because of the bushfire risk and so he arranged for continuing bound cover on 90-day credit terms with CGU, while that search was made. Mr Bernasconi exhibited a message from Ms Cockburn, a Nadic staff member, of 14 March advising that:

> "Specialist U/W's
>
> Mansions - declined due to risk
>
> Chubb - declined due to risk
>
> Summit - declined due to risk
>
> General Insurers
>
> Lumley - $14,867 gross premium. Referral required due to sums insured & security
>
> Vero - $8204.18 gross premium. Referred to u/w for consideration
>
> QBE - $25,049!! Referral Generated
>
> Allianz - $12822 Referred to u/w for consideration. Basic excess $750
>
> Rob, tried quoting with NRMA (to see if any direct insurers would do this). Maximum sum insured on building with NRMA is 1.1million."

177 That Mr Bernasconi did not inform Dr Flanagan about the other insurers and their positions when they met on 15 March, having received this advice, is consistent with him also not having advised her about the CGU premium. There is no issue that he also did not then advise her about what cover the Vero policy or the others available, offered.

178 On Dr Flanagan's evidence when they first met on 15 March, they discussed:

> "Me: I have spoken to Michael Murry and Robert Houghton and I'm looking into plans to use the house, pool and pool enclosure as a business. I had a huge water bill in December. I have had the plumber out and he thinks it may be related to the pool and suggested I empty the pool and check for leaks. I will do this before I start the business in the pool area. It is early days, but this is what I'll be doing now. We can talk about the relevant insurances I need when I am ready to start the business.
>
> Bernasconi: Okay. I have looked around and I think the Vero home insurance policy is a better policy for you than CGU. You should go with Vero for home insurance this year. [Mr Bernasconi handed me an insurance premium funding loan document].
>
> Me: Okay.
>
> Bernasconi: If you sign this today, I can process it tomorrow when I return to the office. I have increased the building and contents sum insured by 5% as per usual to make sure there is enough cover for everything.
>
> [I inspected the premium funding loan form]
>
> Me: Thanks Rob. I think we need to decrease the contents. The value of my contents is not $1,340,100 anymore. A lot of the expensive items were removed when Geoff moved out and I don't think such a high amount of contents is necessary. We should change this to match my contents I now have.
>
> Bernasconi: Okay, what do you think the relevant figure should be?
>
> Me: Approximately, I think $500,000 is appropriate. I really haven't made any significant purchases.
>
> Bernasconi: Okay, I can amend that accordingly. Sign the funding and I will fix it for you in the office. Your other policies are fine. I recommend that you renew those existing policies. I will arrange it all for you."

179 Mr Bernasconi denied this, although he did agree the funding document for the Vero policy was signed that day. On his evidence the meeting was short, no longer than 5 minutes and that all they discussed was:

> "Dr Flanagan: What can I do for you?
>
> Me: I've got a couple of commercial policies to renew and a funding agreement.
>
> Dr Flanagan: I believe you've got something better on the home and contents policy too? By the way, now Geoff has moved out and taken some of the contents with him, I think I should reduce the amount of contents cover, I think the current contents are worth about $500,000.
>
> Me: Yes, ok we can organise that. We've had an indicative quote from Vero. Here's the policy booklet. The CGU policy is still in force. Do you want the Vero quote included in this premium funding arrangement, because I've made provision for it?
>
> Dr Flanagan: Yes where do I sign?

> Me: Here. We'll deal with the reduction in the contents sum insured and any change in the final premium. I'll then adjust the figures in the funding form as necessary. I'll come back to you with the invoice as soon as it's ready.
>
> Dr Flanagan: Ok, I'll have to leave you now."

180 It was only later that he delivered the Vero policy documents to Dr Flanagan, most likely he thought on 29 March, given the dates of various documents.

181 There is thus no question that when she agreed to accept the Vero policy Dr Flanagan did not understand that, as a result, she would no longer have the full insurance cover CGU provided, or the nature of the Vero exclusion. This explains the concession in relation to breach, which was properly made.

182 Mr Bernasconi also deposed that it was his habit to offer to take clients through their policy documents at inception and renewal and had Dr Flanagan accepted his later offer to go through the Vero policy wording, he would have pointed out the limitations and exclusions, but she was in too much of a rush and so he never had the opportunity to do so.

183 This is also implausible and cannot be accepted, given what he claims he told Dr Flanagan at the 28 February meeting and their expectation that the premium would decrease.

184 It was put to Mr Bernasconi that he had not even realised that the Vero policy did not cover the damage which occurred to the pool in 2013, which he denied. There is also a dispute about how he came to learn of the damage, disputing Dr Flanagan's account of her conversation with him, despite phone records reflecting that they had a 3-minute conversation on his home phone, at a time when he claimed that while the line was still connected, he no longer had a receiver.

185 That is also implausible, but there is no issue that someone at the office then mistakenly sent Dr Flanagan a CGU claim form, which Mr Bernasconi altered when they met by striking out CGU and writing in Vero. He then completed the form. Still, he did not tell her about the Vero exclusion, which he had never drawn to her attention or explained.

186 It must be accepted, despite Mr Bernasconi's denial, that this was consistent with him not then having an understanding of this difference between the Vero and CGU policies.

187 In the result I am well satisfied that Mr Bernasconi's evidence of how the Vero policy came to be taken out cannot be preferred over that of Dr Flanagan.

188 This evidence well established the breach of duty on which Dr Flanagan's case rests.

How the pool came to be emptied

189 In her affidavit Dr Flanagan said that in December 2011 she had noticed a large increase in her water bill. Between January and May 2012 the possible causes, of which there were a number, were investigated by her plumber, Mr Houghton, whom she told:

> "I am still waiting for Geoff to refinance and so I can't get to it right now. I will monitor my water bills for the next couple of months and we can revaluate? That way we can fix any issue as soon as I have the funds come in, and we are sure it is being caused by the pool."

190 Mr Houghton advised in late May 2012 that he thought it was a leak coming from the pool, having excluded other causes. It was decided to turn off the equipment, which automatically refilled the pool and to then monitor the water bill further.

191 The next bill reduced, confirming that there appeared to be a leak in the pool to be repaired. Dr Flanagan asked Mr Houghton whether the pool could be emptied. He advised that it could be, being a "commercial" type pool designed to be emptied. She also knew that the pool had been emptied before and had also seen the council empty pools every year and so at the end of winter asked Mr Houghton to empty it. But she did not have the cause of the leak investigated or repaired, the pool was just left empty.

192 In January 2013 Dr Flanagan received an email from Dr Oldfield in which he said that there was a danger of the pool cracking and popping out as the clay underneath dried out and that he would hold her responsible for any damage if it was not at least half filled, because of the reduced potential sale value. There was at that stage still a possibility that the bank would decide to sell the property.

193 Dr Flanagan advised her barrister of the email, instructing that she had received a $2,000 water bill and a plumber had identified the leak to be in the pool, as the result of a process of elimination. She said that she did not have the financial scope to refill it, pay for the chemicals and run the cleaning system, which also required a new commercial

quality cleaner which cost $5,000 and that she had been advised that the pool would not be popped out. While Dr Flanagan there instructed that the pool held 160,000 litres, in her evidence she corrected this to 300,000.

194 Dr Flanagan also told her counsel that she did not want the pool fixed because it could make the option of selling the house more attractive to the bank. She also asked for advice on various issues in the divorce proceedings and her arrangements with Dr Oldfield.

195 In cross-examination Dr Flanagan said that she had not initially paid to have the pool repaired, because she had to wait to see if it was the cause of the water leak, which she expected to be established after the water was turned off and she received her next water bill. She also said that she was not then interested in spending money which would only end up being for the bank's benefit, but understood that there was no risk, the pool having been designed to be left empty.

196 As it transpired it was not the result of clay drying out under the pool which led to it being damaged. It lifted after two periods of heavy rain which followed.

197 When Vero later investigated the claim, its engineer advised that the cause of the leak was likely to have been a hydrostatic valve. The experts could not examine the pool or valve because it had been filled in, but in their concurrent evidence agreed that it was likely that a faulty valve allowed the pool to lift.

198 None of the evidence established that Dr Flanagan gave false evidence about how the pool came to be left empty or that she believed there to be a risk in doing so and simply acted recklessly. To the contrary, she acted deliberately, for reasons which seemed good to her. That, in all of the circumstances she should have understood that in doing so she was running a considerable risk which would have affected her rights, had she been fully insured as she undoubtedly thought she was, was also in issue, to which I will return.

How the Vero claim and other steps were pursued

199 The pool was still empty in 2013 when there were two very heavy downpours, in January to March. On 2 March Dr Flanagan discovered that the pool had lifted out of the ground and the entire 30-metre eastern wall of the pool enclosure had collapsed. When she then spoke to Mr Bernasconi, he advised:

> "Me: Rob, the Pool has come out of the ground and the wall of the Swimming Pool has completely fallen down and is on the ground. I'm really concerned, the wall has also collapsed.
>
> Bernasconi: Don't worry Sue, you are covered by the Vero insurance policy.
>
> Me: What do I need to do? I am in the middle of preparing for Dominic's 21st birthday.
>
> Bernasconi: It's fine, you are going to need to get Mine Subsidence out there as soon as possible to make sure it is not related to the mine. Then we can take it from there.
>
> Me: Okay."

200 Mr Bernasconi denied so assuring Dr Flanagan about how Vero would respond to a claim. But she did make a Mine Subsidence claim, the rejection of which, he was aware of. Despite on his evidence Mr Bernasconi having seen the pool empty in 2010 and then telling her about the risk of lifting, he did not tell Dr Flanagan that this could have any impact on her insurance claim. Nor had he told her in 2012 about the Vero exclusion. Instead, he prepared the claim, which raised the likely problem with the hydrostatic valve, on his evidence in accordance with Dr Flanagan's instructions.

201 This was also in issue. But Dr Flanagan's evidence was that she later discussed the renewal of the Vero policy with Mr Bernasconi on 13 March 2013, when he advised:

> "I think that is a good idea Sue, given that you will be required to lodge an insurance claim, you should stay with Vero to facilitate the claim for the pool damage."

202 This was also denied, but the policy was then renewed.

203 Dr Flanagan had engaged a structural engineer, Mr Kidd, to assess the damage. His report was provided to Vero, which also engaged an engineer, with the eventual result that Vero denied the claim in October, when on her evidence Mr Bernasconi advised:

> "Bernasconi: Sue, I have some bad news. Vero has rejected the claim. There is an exclusion under the policy, but I think it will be okay. I think the pool damage will still be covered because there is a consequential damages clause.
>
> Me: Okay, what does that mean?
>
> Bernasconi: There are circumstances where there is accidental damage clauses that can cover accidental damage to your property. For example, assume you have a fire in your home on the first floor and the fireman damages the carpet on

> the ground floor with water when he is putting out the fire, the subsequent damage to the carpet may be covered under the accidental damage clause in a home insurance policy. I have had some success with other policies claiming under accidental damage when the claim was initially denied. One time with your boat claim and another with a different home insurance policy. I think the hydrostatic pressure release valves didn't work and therefore the pool lifted secondarily to this, it is a secondary event or accidental damage and is therefore covered under the accidental damage clause in you Vero Policy.
>
> Me: Okay, well what do we need to do?
>
> Bernasconi: I need to look at the Insurance Contracts Act and I will let you know what you should do.
>
> Me: Okay. Thanks Rob. I will speak to my solicitor tonight."

204 Mr Bernasconi also denied this conversation, although he recollected making a reference to the *Act*. Nothing finally turns on this.

205 As the property was located in a bushfire risk area Dr Flanagan became concerned about fire protection requirements, the pool water no longer being available. In November 2013 she obtained a quote for installation of a new fire protection system and instructed its installation at a cost of $50,000. She also installed a new 110,000 water tank at a cost of $22,621.26. In December 2013 with Mr Bernasconi's assistance, Dr Flanagan took out new home insurance.

206 In March 2014 Dr Flanagan took out new insurance with Allianz at a cost of $14,914.10. In August 2014 she engaged new brokers, having come to understand that she was uninsured for the damage to the swimming facility, on her evidence, despite Mr Bernasconi continually advising her that she was covered by the policy, up until the refusal of her application to the FOS.

207 The building was later levelled, and the pool filled in, Dr Flanagan understanding the risk posed by exposure to fibreglass with which the pool was lined and not having the resources to rebuild.

208 I am satisfied that Dr Flanagan's evidence about these matters must also be accepted.

Other factual issues

How the pool and enclosure were built

209 There were various photographs of the pool and the enclosure in evidence.

210 The experts, Mr Clemmett and Mr Dockrill, examined contemporaneous records evidencing how the pool had been constructed, including advice from the builder Bel-Air Pools in 1998 when concerns were raised about water entering the pool through a drain at the deep end, it would seem, before it was filled.

211 The pool shell was built of reinforced concrete and the pool house constructed of braced structural steel framing supporting a metal sheet roof and masonry walls, built on reinforced concrete footing beams, supported at points by bored piers. The documentation did not indicate that the pool had been designed to withstand hydrostatic groundwater pressure. That would usually be referred to in design drawings, which would have regard to relevant Australian standards.

212 But Bel-Air's 1998 advice was that there were three hydrostatic relief valves in the pool structure which were spring loaded and designed to relieve build-up of water pressure under the pool and that if they were not present, a build-up of pressure could result in the pool popping out of the ground.

213 Mr Clemmett's view was that this was a typical method of construction in use at the time, the valves allowing for pressure to be relieved by groundwater entering the pool shell until equilibrium is achieved. In his report Mr Dockrill observed that the pool "may or may not have been built with hydrostatic relief valves". The 2013 report provided by Mountford Prider Engineers and Technical Advisers Pty Ltd had noted that such valves had not been observed, but that they could exist in the pipework supply to the floor of the shell.

214 In 1998 a problem with water loss had also been investigated by Bel-Air Pools. It then advised it was likely to be from the hydrostatic relief valves in the pool and a water make-up chamber. In 1999, Craig's Building Advisory Services Pty Ltd referred to Bel-Air Pools replacing the valves in the floor of the pool, the shallow end valve having showed leaking through the mechanism. In 2000, Bel-Air Pools also advised that both an expansion joint problem and the water loss from the valve had been repaired.

215 In the result, as the experts agreed in their concurrent evidence, it must be accepted that the evidence establishes that the pool was designed and built to withstand hydrostatic groundwater pressure when empty and so long as the valves were functioning correctly, it could be left empty without the pool being at risk of lifting out of the ground.

216 On the expert evidence, the masonry walls of the pool house had not been constructed as designed and they were thus not sufficiently robust, having been built of a single skin of bricks tied to the steel frame, not a two-skin cavity wall. On investigation, the capacity of the wall was not compliant with the relevant Australian standard for strength, given its reduced capacity to resist lateral wind load.

How the pool came to be left empty

217 That Dr Flanagan did not consider in 2012 and 2013 that leaving the pool empty involved an insurance risk may be accepted. She was not aware of the Vero exclusion. Even though on Mr Bernasconi's evidence that he saw the pool empty in 2010, he did not tell her about the CGU policy requirement to take reasonable precautions, even though he considered that gave rise to a risk of the pool lifting.

218 Before Dr Oldfield advised her of his concern about the pool lifting in 2013, she had taken advice about emptying the pool, at a time when she did not want to make the property more attractive to the bank, which was threatening to sell it. She did not then believe that there was a risk which needed to be addressed by partially filling the pool.

219 That there was then such a risk was established by the expert evidence.

220 While the valves were designed to prevent the pool lifting because of hydrostatic pressure, them again not functioning could have caused the leak. When the pool was emptied Dr Flanagan was undoubtedly aware of the leak and the need to empty the pool to deal with it. On her evidence the advice she obtained from Mr Houghton in late May 2012 was:

> "Houghton: I have spoken to Kev's Pools and we can empty it. It is a 'commercial' type pool. They are designed to be emptied, serviced and refilled on regular basis.
>
> Me: Okay Robin, I know it was emptied before and I have seen the Council empty swimming pools every year. I just don't have time to deal with this at the moment, given everything I am dealing with. Can we empty the pool?"

221 Despite what Dr Oldfield raised with her in 2013 about the risk of the pool lifting, Dr Flanagan took no further advice, even though she had not emptied, serviced and refilled the pool, but had instead left it empty, by then for over 6 months, without investigating the cause of the leak.

222 On the expert evidence the pool, built as it was with three hydrostatic valves, was capable of being safely left empty for such a time, but only if the valves were functioning correctly. There then being an un-investigated risk that the cause of the leak was a defective hydrostatic valve, it could not safely be left empty. What was then required to ensure that it did not lift, was half filling the pool.

Breach

Breach of duty

223 There was no written agreement between the parties, but there was no issue about the nature of the duty which the defendants owed Dr Flanagan as her insurance brokers. It is of the kind explained in *Horsell International*.

224 An insurance broker has a duty both in contract and tort to exercise all reasonable care and skill, both in advising the client and in obtaining appropriate insurance cover: at [237]. That duty requires the broker to use reasonable skill and care not only to ascertain the customer's needs by instructions or otherwise, but to procure the cover that the customer has asked for, either expressly or by implication. If what is required cannot be obtained, the broker must report in what respects it has failed and must also seek the customer's alternative instructions: at [235].

225 Further, the client should not be exposed to an unnecessary risk of legal disputes with the insurer. The broker thus also owes the client a duty to draw to their attention any onerous or unusual terms or conditions and should also explain their nature and effect: at [236].

226 If ambiguous instructions are given by the client in circumstances where, if they had the meaning put upon them by the broker, they left the client substantially under insured, the broker's duty is to clarify the instructions and draw to the client's attention the consequences of giving effect to them, if they had that meaning. While the broker's duty does not include expounding the law, it does extend to pointing out legal pitfalls: at [238].

227 Mr Bernasconi knew that the Vero policy included an exclusion relevant to damage to the pool while the CGU policy did not. The expert evidence confirmed that as well as the CGU policy, in 2012 there were other policies available in the market which offered cover for loss arising from accidental damage to the pool and pool enclosure which the Vero policy excluded, as did information Nadic staff had gathered.

228 Mr Bernasconi also knew the pool was a valuable asset. Because of the location of the property near the bush and its size, it was also a source of water for firefighting. At that time he also knew that CGU and other insurers were concerned about heighted bushfire risks.

229 Despite this Mr Bernasconi did not draw the Vero exclusion to Dr Flanagan's attention, although she accepted in cross-examination that had she read the Vero policy, she would have understood it. But she did not read it, relying as she did on Mr Bernasconi.

230 Given the nature of their longstanding relationship and the broking services he had provided for very many years, it was not unreasonable for her to have done so. But he failed to give her the advice about the policy which she needed, in order to determine whether she would take the risk involved in no longer having the full insurance cover which CGU and other insurers offered.

231 Mr Bernasconi's evidence was that he drew to Dr Flanagan's attention the risk of the pool lifting if left empty in 2010 when she told him that she was pursuing the pool builders about ongoing problems with the pool. I have not accepted that evidence, but despite the CGU insurance then being in place, on his own evidence he did not tell either Dr Flanagan or Dr Oldfield when he spoke to him in 2010, about the obligation which then fell on both of them as the insured, to take reasonable precautions in relation to the risk of the pool lifting.

232 This was a legal pitfall because, on his evidence, Mr Bernasconi understood that leaving the pool empty gave rise to a risk of the pool lifting out of the ground. Being aware of that pitfall, he should have drawn it to his client's attention, at least in 2011 when the CGU policy was renewed, given his evidence in cross-examination that as far as he knew, the pool then remained empty.

233 I have not accepted, however, that the pool was empty in 2010.

234 The pool was only emptied in about June 2012, after the CGU policy had been replaced by the Vero policy, after the automatic water replacement system and other pool equipment had been switched off for some months, while the source of the water leak was investigated. Had that occurred in 2010, it would no doubt also have been reflected in water bills, but this was not put to Dr Flanagan.

235 By 2012 only Dr Flanagan was the insured. It is possible that was the time that Mr Bernasconi saw the pool empty. But if he did, he also did not draw the Vero exclusion to Dr Flanagan's attention, despite understanding that leaving the pool empty gave rise to a risk of it lifting out of the ground, a risk which Vero did not cover.

236 Despite there being no issue that Mr Bernasconi did not tell Dr Flanagan about the existence and effect of the Vero exclusion in relation to the pool or the availability of other policies which did not contain such an exclusion, whether the broker's duty was breached remained in issue until after Mr Bernasconi was cross-examined. Then he made pertinent concessions about the advice which he should have given, which the defence accepted established the breach.

237 The concession was properly made. What was announced was that it was accepted that "a reasonably competent broker who held Mr Bernasconi's view as to the significance of the pool exclusion would have drawn that to exclusion to the attention of the plaintiff".

238 The duty required Mr Bernasconi to exercise reasonable skill and care not only to ascertain Dr Flanagan's needs, by instructions or otherwise, but to procure the cover that she had asked for, either expressly or by implication. On his own account of what she said, what she wanted was continued insurance at the price CGU had charged the previous year. They never discussed insurance covering anything less than what CGU had insured.

239 On the evidence such a policy was not available in the market. It followed that even accepting Mr Bernasconi's evidence, the duty would have included advising Dr Flanagan that such cover was not available and seeking her alternative instructions about what was. It also included advising her that the Vero policy did not provide the full insurance CGU provided, while other available policies did.

240 Mr Bernasconi did not give Dr Flanagan such advice nor seek her instructions about her available options. Giving her the Vero policy document and offering to discuss it with her, if she had any questions, could not satisfy the duty she was owed.

241 Section 5B of the of the *Civil Liability Act 2002* (NSW) applies. It provides:

> 5B General principles
>
> (1) A person is not negligent in failing to take precautions against a risk of harm unless—

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm.

242 There was no issue that it would have been reasonable for Mr Bernasconi to have given the advice which Dr Flanagan required, which he said he intended to give her and which he could easily have provided, either orally or in writing, so that she could make an informed decision about whether she was prepared to risk no longer having her home fully insured, as she understood it was under the CGU policy, given what that would have cost.

243 The result was that Dr Flanagan was misled and took out a policy which, unbeknownst to her, did not insure the damage which the pool and the enclosure later sustained.

244 This was a significant and foreseeable risk which arose in circumstances where a reasonable broker in Mr Bernasconi's position would have given Dr Flanagan the information she needed to make an informed decision about continuing or discontinuing the full insurance which she had previously taken out. The seriousness of the harm which she was likely to be caused if she was not given the advice she required; the pool and pool structure no longer being fully insured; and the little it would have taken for Mr Bernasconi to advise her, given the information which Nadic had obtained; all lead to the conclusion that a reasonable person in Mr Bernasconi's position would have given advice about the Vero exclusion and Dr Flanagan's alternative insurance options.

Breach of the Corporations Act

245 The alleged breach of the *Corporations Act* obligations was also established, given its requirements in relation to the giving of financial product advice and the provision of financial services and personal advice: ss 766A and 776B. Although this can be dealt with shortly, not much finally turning on this, as the defence accepted in final submissions.

246 Instead of a Statement of Advice, of the kind which Mr Bernasconi had previously given Dr Flanagan and which he accepted he should on this occasion also have given her, the General Advice Warning he exhibited to his affidavit was given to her which advised that:

> "This advice has been prepared without taking into account your objectives, financial situation or needs. You must therefore assess whether it is appropriate, in the light of your own individual circumstances, to act upon this advice.
>
> If this advice contains information about a particular financial product, you should ensure you obtain a Product Disclosure Statement in respect of that product prior to making any decision to acquire that product."

247 On Mr Bernasconi's evidence that was inaccurate. She was a retail client: s 944A. He did consider Dr Flanagan's situation and was of the view that the CGU policy was preferable to the Vero policy, but did not tell her that or explain why, or mention the Vero exclusion, or that other insurers offered cover of the kind that CGU offered. In the circumstances he had to ensure the advice given was appropriate in Dr Flanagan's circumstances: s 945A. He also had to give her the statement of advice s 946A required, including in relation to premium costs and likely consequences of taking out the policy, given the exclusion.

248 His explanation in cross-examination was that he had no opportunity to tell Dr Flanagan about these things in any of the three meetings he claimed he had with her, the last in late March for 15 minutes, when he gave her yet another folder containing the Vero documents, which she also denied. He also said it did not occur to him then to say anything to her about the Vero policy because he was still hoping to arrange a meeting with her for an hour at her home and reserved telling her about the Vero policy for then. But there is no evidence that he ever attempted to arrange such a meeting, or raised the need to have one with Dr Flanagan, as he easily could have done.

249 Mr Bernasconi's evidence in cross-examination thus established not only the alleged negligence, but also the alleged breach of the requirements of the *Corporations Act*. He accepted in cross-examination that he should have provided Dr Flanagan with a Statement of Advice, as he had on past occasions, rather than the General Advice Warning in evidence. The experts had disagreed about this in their reports and the joint report, but agreed in their concurrent evidence that in general, for a householder's policy, a general insurance broker would not normally issue a statement of advice.

250 Mr Le Plastrier considered that in this case, the change of insurer and significant increase in premium in an area that is very difficult for lay people to understand, might have required a statutory statement of advice to have been given, although he was not certain.

251 Mr Gribbin explained the difference between giving general advice, which required a general advice warning, which highlights to the client that their individual risk appetite and financial circumstances have not been taken into account in arriving at the policy recommendation. If personal advice was provided, at the time it had to be accompanied by a statement of advice prepared in a formal manner and maintained on file for seven years, with a resulting significant administrative burden. While brokers invariably give advice, which may be about premium, factual issues around the extent of coverage, deductibles or excesses that are pertinent, for the most part they are straightforward factual matters, not in their nature judgmental which in Mr Gribbin's view would not constitute personal advice.

252 While Mr Le Plastrier agreed generally and had considered Mr Bernasconi's evidence that he should have provided a statement of advice, he considered that the issue was difficult. Mr Gribbin disagreed, given his experience, that the vast majority of brokers do not provide personal advice, taking into account the person's unique circumstances, which required a statement of advice to be given.

253 The experts agreed that it was the statutory scheme not defining the term "personal advice" which gave rise to the grey area Mr Le Plastrier had referred to. They agreed, however, that despite this a failure to give advice might amount to a breach of a broker's duty to the client.

254 On all of the evidence I have discussed, including what was contained in previous Statements of Advice, Mr Bernasconi's knowledge of Dr Flanagan's altered circumstances and what they gave rise to, including in relation to the alteration of her home insurance cover, that he was giving her personal advice which necessitated a statutory statement of advice being again given, must be accepted.

Causation

What must Dr Flanagan prove?

255 It was the defence case that Dr Flanagan's pleaded claim was an all or nothing case which required proof not only that she would have taken out another policy, but that her claim would have been accepted by that insurer. That was because she did not pursue the loss of an opportunity which may or may not have come to pass, with its value having to be assessed having regard to possibilities of the kind dealt with in *Sellars v Adelaide Petroleum NL; Poseidon Ltd v Adelaide Petroleum NL* (1994) 179 CLR 332; [1994] HCA 4

256 It followed that Dr Flanagan "must prove that, more likely than not, she would have taken out a different policy, the terms of that different policy, and the insurer under that policy (whoever it was) would have accepted the claim."

257 But Dr Flanagan had led no evidence that she would have stayed with CGU if made aware of the Vero exclusion, or that she would have taken out cover with any other insurer. Had she done so, consideration of all of the terms of the policy and other matters such as that insurer's attitude to claims, whether they had an interest in promoting or removing themselves from the market and whether they had a local presence, would all have been relevant. But only the terms of the then current CGU policy were in evidence and an Allianz policy taken out by Dr Flanagan in 2014. There were thus various evidentiary gaps in Dr Flanagan's case, preventing her case on causation being made out.

258 This was also disputed.

259 For Dr Flanagan it was argued that on her pleaded claim she bore the onus of proving that she would have successfully taken out homeowner's cover for the risk which the Vero policy did not cover, but not that she would have taken out a particular policy. Further, that whether or not a notional policy would have covered her notional claim for the risk and loss which materialised had to be determined on the balance of probabilities, or an assessment of the possibilities and probabilities, in a *Sellars* manner.

260 There was evidence that there were policies available which would have covered Dr Flanagan's claim and that she was uninsured because of the Vero exclusion. She did not have to prove all of the conditions and terms of such other policies. To establish causation, she had to call sufficient evidence of what would have occurred if the negligence had not happened, as well as the link between the breach and her loss, which had to be considered objectively, having regard to matters which included the nature of the pool and the enclosure, what the Vero policy excluded and the cost of policies which did not, as well as Dr Flanagan's circumstances.

261 But the onus fell on the defendants to establish that other available policies would not have covered her loss, on the pleaded defence, given the two particular features relied on. They were contained both in the CGU policy and that taken out with Allianz in 2014, which it could be inferred was also contained in its policy in 2012. It was not for Dr Flanagan, however, to give evidence as to the policy she would have taken out, even though technically that might be admissible in respect of the *Corporations Act* claim.

262 Accordingly, unless 100% satisfied that Dr Flanagan's claim would have been not only refused by a notional insurer, but even in a contest over that in court, involving matters of interpretation of an insurance policy, she would certainly have failed either on the defect point or the reasonable precautions point on which the defence relied, then Dr Flanagan's case had to succeed. That was not established on the evidence.

The pleadings

263 What Dr Flanagan pleaded was that:

- she had taken out the Vero policy in reliance on Mr Bernasconi's recommendation: Statement of Claim: at [15];
- she suffered economic loss and consequential harm as the result of the breach of the duty of care which the defendants owed her: at [26]-[30];
- the defendants had also provided her with financial services and personal advice under the *Corporations Act*: at [31]-[34];
- they were obliged in the circumstances to provide her with a Statement of Advice in accordance with s 947C and other specified provisions of the *Act*: at [36]-[39]; and
- the defendants thus also breached their statutory obligations: at [40].

264 This has to be understood in the context of the exclusion clause in the Vero policy for risk which the CGU and other available policies did not exclude, namely:

> "12. Events involving swimming pools, including
>
> the pool lifting or any area around the pool lifting."

265 Causation was pleaded at [43] of the Statement of Claim by reference to the alleged breaches:

> "(a) but for the breaches the Plaintiff would have sought Homeowner's Insurance cover which covered damage to the Pool and the Pool Enclosure, including the Pool Damage;
>
> (b) had the Plaintiff sought insurance as described in (a) above she would have successfully taken out such insurance cover, and on terms sufficient to cover the total cost of repair or replacement of the Pool Damage;
>
> (c) the Pool Damage would have been covered by the Homeowner's Insurance which the Plaintiff would have taken out, subject only to the deduction of an excess;
>
> (d) the Plaintiff would have claimed on her Homeowner's Insurance policy and the claim in relation to the Pool Damage would have been accepted;
>
> (e) the Pool Damage would have been either repaired by the relevant Homeowner's Insurance or that insurer would have paid the Plaintiff a sum of money sufficient to enable her to fully repair the Pool Damage;
>
> (f) in either of the events as set out in (e) above, the Pool Damage would have been repaired at no cost to the Plaintiff, (other than an excess), by no later than twelve months after the Pool Damage occurred;
>
> (g) the denial of the Claim by Vero caused the Plaintiff to make the FOS application, and incur legal costs in doing so;
>
> (h) as a result of the unavailability of insurance cover to the Plaintiff with respect to the Pool Damage, the Pool Damage has not been repaired other than as described in paragraph 22 above;
>
> (i) removal of the rubble present from the Pool and the Pool Enclosure, which is contaminated with fibreglass, will require specialist waste removal services, which will cost up to $1,800,000 plus GST, (according to a quotation for this work obtained by the Plaintiff in January 2019);
>
> (j) to repair and rebuild the Pool and Pool Enclosure to a state comparable to that existing before the Pool Damage occurred will cost in the order of $820,610 inclusive of GST, (according to quotations for this work obtained by the Plaintiff in April 2016);
>
> (k) the Plaintiff has not had sufficient funds available to her to remove rubble, repair or rebuild the Pool or the Pool Enclosure, and the costs of doing so have increased since the time by which the Pool and Pool Enclosure would have been repaired had the Plaintiff been insured for this damage;
>
> (l) as a consequence of having not yet repaired or rebuilt the Pool or the Pool Enclosure, additional related works would now be required to obtain Local Government certification of any new Pool or Pool Enclosure, including:
>
> (i) upgrading driveways;
>
> (ii) removing trees and grinding out tree stumps; and
>
> (iii) upgrading the garage;
>
> (m) as a further consequence of having not yet repaired or rebuilt the Pool or the Pool Enclosure, the Plaintiff was required to construct an alternative fire- fighting water source in the form of the installation of a 110,000-litre water tank;

(n) as a further consequence of having not yet repaired or rebuilt the Pool or the Pool Enclosure, the Plaintiff has been unable to pursue a prospective business opportunity, which involved her operating a business utilising the Property, and the Pool and the Pool Enclosure, as an environmental education centre or health retreat, (the business)."

266 The loss Dr Flanagan claimed she suffered was specified at [44]. It included repair and rebuilding costs; specialist removal of rubble; cost of additional works required to obtain Local Government certification of a new pool and enclosure and to replace the firefighting source formerly provided by the pool; legal costs and loss of capacity to conduct a business.

The onus

267 In *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603; [1998] HCA 38 it was explained that whether "one event caused or resulted from another is determined in legal proceedings by applying common sense criteria and not philosophical or scientific theories of causation": at [22].

268 While *Sellars* was concerned with a claim for damages for breach of s 52 of the *Trade Practices Act 1974* (Cth) for misleading and deceptive conduct claimed to have resulted in a lost opportunity, it was there explained that "the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence the applicant must prove on the balance of probabilities that he or she has sustained some loss or damage": at 355.

269 The *Civil Liability Act* now applies to Dr Flanagan's negligence claim. In order to succeed on causation she must establish that the admitted negligence was a necessary condition of the occurrence of the harm which she suffered and that it is appropriate for the scope of the defendants' liability to extend to the harm so caused: s 5D(1). Further, Dr Flanagan bears "the onus of proving on the balance of probabilities, any fact relevant to the issue of causation": s 5E.

270 The evidence established that Dr Flanagan suffered harm as a result of Mr Bernasconi's failures. No longer having the full insurance cover which she previously had, the claim which she made under the Vero policy was rejected because of the result of the operation of the exclusion, of which she was not aware and which the CGU and like policies did not contain.

271 On all of the evidence I have discussed I am satisfied, on the balance of probabilities, that but for Mr Bernasconi's negligence, she would not have taken out the Vero policy, but would have accepted his views about the cover CGU offered.

The available insurance cover

272 The experts Mr Le Plastrier and Mr Gribbin agreed that while most home policies include cover for pools, associated buildings, and equipment, they do not necessarily cover the risk of a pool lifting under accidental damage cover which applies to both direct and consequential damage. They also confirmed Mr Bernasconi's evidence that when the Vero policy was taken out, other insurers, Allianz, Lumley and QBE, as well as CGU, did not exclude the lifting claims which the Vero policy excluded.

273 In the concurrent evidence they agreed that no insurer would have offered cover for the risk of the pool lifting for the Vero premium, $8,600. A quote was obtained from Allianz for such cover at a cost of $12,822, less than the cost of the CGU renewal of $15,415. All the possible premiums available in the market for such cover could not, however, be calculated, that being the role of underwriters and the role of brokers being to source quotations. Further, the terms on which that cover was provided depended on the particular policy.

274 Dr Flanagan was not advised about the availability of insurance other than Vero, or that the Vero policy did not provide cover for the pool lifting. Initially Mr Le Plastrier and Mr Gribbin did not agree that Mr Bernasconi should have informed Dr Flanagan about this. That altered after Mr Bernasconi's evidence in cross-examination. The result was that parts of Mr Gribben's report and the joint report were not read.

275 Dr Flanagan never instructed Mr Bernasconi that she was prepared to take out insurance which did not provide either the full insurance the CGU policy provided, or one which did not insure damage to the pool and pool structure, understandably given as the mortgage required the property to be insured.

276 Mr Gribbin agreed that a competent broker would have obtained quotes from alternative insurers which provided cover equivalent to that provided by the expiring policy. Nadic staff did that, obtaining quotes from Allianz, Lumley and QBE, which offered such cover at premiums $4,000 to $16,000 more than CGU had previously charged, as well as obtaining a quote from CGU. Other insurers were not prepared to offer cover.

277 Still Mr Bernasconi did not inform Dr Flanagan about any of those quotes, so that she could make an informed decision about whether to insure with Vero, the only quote with which she was provided, but whose policy, unbeknownst to her, did not provide cover for the damage which the pool and building later sustained.

278 In Mr Gribbin's view in the joint report, advice about what a policy offered in relation to the pool "would have to be accompanied by a warning regarding the effect of the condition precedent i.e., that leaving a pool empty for an extended period would undoubtedly constitute a breach of that policy condition and result in the cover being illusory". Mr Le Plastrier considered that matters about whether a condition was a condition precedent and when an insured had acted reasonably were not matters on which a broker was qualified to provide an opinion.

279 Mr Gribbin disagreed, considering that brokers were very properly placed by virtue of their experience and possibly qualification to provide such opinions and whether conditions were conditions precedent or subsequent were relatively straightforward matters within their competence of an experienced broker.

280 Like Mr Gribben Mr Bernasconi was also aware of the risk of a pool lifting

281 The CGU premium was high, almost double both that paid the previous year and the Vero premium and on Nadic's investigations, also higher than that for other insurance which offered similar cover. But on Mr Bernasconi's evidence he expected that the premium would reduce significantly when the insured contents were reduced from over $1million to $500,000. By how much was not established, but he continued to consider that the policy CGU offered provided the best cover.

282 Nadic was continuing, through its subsidiary, to provide Dr Flanagan with premium funding for her insurance needs and she had the resources to pay the CGU premium, or other lesser premiums available for such cover, under that arrangement.

283 When this is considered together with the value of the pool and the enclosure; the requirement under the mortgage to insure; the ongoing water resource which the pool provided for firefighting purposes, which Dr Flanagan had to replace at considerable expense; and the consideration which Dr Flanagan had begun to give to commercial uses to which the property, including the pool and pool enclosure, could be put, she no longer obtaining income from the businesses; I am satisfied that on the balance of probabilities, she would have taken out insurance cover which did not contain an exclusion of the kind which the Vero policy contained, likely accepting Mr Bernasconi's view about CGU, had he told her about it and his reasons for preferring it.

284 That in 2014 Dr Flanagan took out insurance with Allianz, reinforces that conclusion.

285 Dr Flanagan's evidence was that she was willing to pay whatever premium was required to have the home and other buildings fully insured for non-intentional damage. That has to be understood in the context of the evidence as to what such insurance was known to cost at the time, but can be given limited weight.

286 While not objected to, it is settled that a plaintiff's evidence of the course that he or she would have taken in a hypothetical situation is of limited value: *Chappel v Hart* (1998) 195 CLR 232; [1998] HCA 55 at 246 fn 64. Under the *Civil Liability Act* such evidence is not admissible and the matter must be determined subjectively in the light of all relevant circumstances: s 5D(3). They support the conclusions I have reached.

287 On Mr Bernasconi's own evidence, he had no basis for understanding that Dr Flanagan wanted or would be prepared to enter into home insurance which did not cover the pool and pool structure. While he arranged to extend the CGU cover while other insurance was investigated, being concerned that Dr Flanagan would not be happy with the increased premium, he failed to advise her of the available options which Nadic's research had identified. Instead of telling her that the Vero policy, available at a cost he believed she was prepared to pay, contained an exclusion which provided less cover for the pool and pool structure than the CGU policy, or that he considered that Vero policy was not appropriate, that the CGU policy was and that other insurers provided similar cover to the CGU policy, he recommended that she take out the Vero policy.

288 Had he adhered to his duty and what on his case was his usual practice, given the nature of their longstanding relationship, it is unlikely that Dr Flanagan would have taken out the Vero policy. On all of the evidence, given Mr Bernasconi's view that CGU then offered the best cover, had he given her that advice, as he should have, it is likely that she would have accepted it and would then have funded it under the premium funding arrangement Nadic made available to her through its subsidiary.

289 The evidence I have discussed thus also established that the admitted negligence was a necessary condition of the occurrence of the harm Dr Flanagan suffered and that it is appropriate for the scope of the defendants' liability to extend to that harm, so caused. When pressed Mr Bernasconi simply could not give any sensible explanation for not giving her the information or advice about the home and contents insurance which she required.

290 Also raised by the defence was whether Dr Flanagan would also have incurred the cost of servicing the fire safety equipment and system raised in CGU's advice. That was also not shown to have been beyond her means and in fact, she did spend considerable funds on fire safety when she had to deal with the loss of the pool. The evidence is simply not consistent with her funds and financial situation being so strained in 2012 that she could not have met that expense, or would not have done so if she took out the CGU or a like policy, notwithstanding her then reluctance to spend money which might ultimately only be for the benefit of the bank.

291 Not only was the negligence causally connected with the breach of duty established, but it resulted in a loss of the kind in the contemplation of a reasonable person in Mr Bernasconi's position: *Rocco Pezzano* at [24].

292 But also necessary to consider is the question of whether Dr Flanagan could have established her claim, had she had full cover under a policy such as that which CGU offered, given what is in issue in relation to the defect and reasonable precautions provisions.

Was there a defect?

293 The experts agreed that other policies which provided the cover the CGU policy offered would also have contained similar provisions in relation to defects and reasonable precautions.

294 Dr Flanagan's case was that the defence had not met the onus falling upon it, given the advice which she had received before emptying the pool, which had left her with an understanding that there was no problem with leaving the pool empty as she did, given that it was designed to be left empty. Both the defect and reasonable precautions points would have, in the circumstances, been hopeless for an insurer to take in the case of the defect provision because there was not sufficient evidence to establish any defect, especially given that the valve could not be inspected.

295 Given what she understood, Dr Flanagan's actions in emptying the pool and leaving it empty, on the defence case, showed that she would not have acted differently if damage to the pool had been insured under the CGU policy. Further, that there was an evidentiary gap, because she had not led expert evidence to establish that in the circumstances, it was likely that her claim would have been accepted had she been insured under such a policy.

296 While I do not accept that the existence of a defect in the valve could not be established unless it was inspected, the question of whether another policy would have insured the damage for which Dr Flanagan made her claim under the Vero policy, does not depend on the opinions of experts such as Mr Gribben, who considered that liability for such a claim would be declined, in his experience the most common cause of a pool lifting being well known to be emptying a pool and leaving it empty, or even upon the view of an insurer.

297 As was contended for Dr Flanagan, whether a policy provides cover in particular circumstances does not depend on expert evidence that an insurer would have accepted the claim, or the Court guessing or forming its own view about how the insurer would behave. It depends on the proper construction of the policy and its operation in those circumstances.

298 What constitutes a "defect", the CGU policy and other policies which did not contain the Vero exclusion excluding damage or loss caused by a defect, thus arises to be considered. The word is not there defined and so must be construed in the context in which it appears, namely in an exclusion of damage or loss caused by "a defect in an item, faulty workmanship, structural defects or faulty design". On the expert evidence other policies of the kind CGU offered, also contained such a term.

299 Clearly in the CGU policy the word means something other than what is conveyed by the terms which follow it. Under the heading "What is insured" the CGU policy also said that:

> "We will not cover your buildings and contents for any accidental damage or accidental loss caused by: … water entering the buildings because of a structural defect, faulty design or faulty workmanship when the buildings were constructed" [or] "a defect in an item, faulty workmanship, structural defects or faulty design."

300 It was not in issue that the valve was an item, but that it suffered a defect was. I am satisfied, on the balance of probabilities, that it did.

301 The meaning of the word has often arisen for consideration. In *Zurich Australian Insurance Limited v CSR Limited* [2001] NSWCA 261, for example, in the context of the *Motor Accidents Act 1988* (NSW). There the term “defect in the vehicle” arose for consideration. It was concluded that the defect must be “in” the vehicle, which is not “defective” only because of its operation: at [67]-[68]. There it was observed that while the word “may, in specific contexts, be given a wide meaning to encompass any form of shortcoming”, it may “be given a more restrictive meaning depending on the context”: at [43].

302 Given the way in which the word is used in the CGU policy, I consider that it includes a mechanism such as a valve, which does not suffer from faulty workmanship or design, has no structural defect and has not been operated incorrectly, but which has stopped functioning as it was designed to do. In the case of a hydrostatic valve, the question of operation does not arise, given how it is designed to function in a pool.

303 I am satisfied, on the balance of probabilities, that the valve did not function as it was designed to do, because it had developed a defect, with the result the lifting of the pool, because hydrostatic pressure could not be relieved.

304 Until late 2011 there was no problem with the pool leaking as had been the case when the valve had to be replaced before 2001. It follows that the valve, during all that time, had no defect and was operating as it was designed: one way, to allow water to enter the pool. In 2011 the pool developed a leak, which was identified in 2012, but its cause was not investigated, after the pool was emptied.

305 The report of the engineer Dr Flanagan engaged after the pool lifted advised that the lifting was the result of hydrostatic pressures, which the valve was designed to relieve. Vero’s engineer later advised that the source of the water which caused the pool to float was rainfall; that had not caused earth movement; and that if the pool had been constructed with a pressure relief valve, “and it failed the owner would have been unaware that this was the case”.

306 The evidence established, however, that Dr Flanagan was aware not only that the pool had been constructed with pressure relief valves, but that one of them had failed before.

307 In the concurrent evidence, the experts Mr Dockrill and Mr Clemmett agreed that while the available structural and architectural drawings did not show the drainage or hydrostatic value systems designed to withstand hydrostatic pressure, contemporaneous documents made it reasonable to assume that they existed, given that the pool could no longer be inspected. Further, that was a suitable system to use to deal with any hydrostatic pressures when and if the pool was empty.

308 The documents in evidence supported their assumption, as did Dr Flanagan’s evidence that the pool had to be emptied, she remembered, three times after it was built and that one of the hydrostatic valves had to be replaced before it was finally handed over and paid for in 2001.

309 The expert evidence confirmed that if the pool had not been left empty as it was, it was unlikely to have lifted out of the ground as it did, the hydrostatic pressure below the shell being resisted by both the weight of the pool structure and the water. Further, had the valves been functioning correctly, after the pool was emptied, increased groundwater pressure would have opened the valve and allowed water to enter and relieve the pressure, preventing the pool from lifting out of the ground.

310 In their joint report the experts thus agreed that it is probable that at the time of the pool failure, the valves were defective and did not perform as expected. That is consistent with the pool having lifted as it did after heavy rainfall. They advanced no other possible explanation for how the pool then lifted.

311 The evidence thus established that so long as the valves, which were designed to operate one way, were functioning the pool could be safely left empty and it would not lift out of the ground. There was then no time limit on it being left empty, because the valves would allow water to flow in if there was heavy rain, increased ground water and resulting pressure, until equilibrium was reached.

312 The evidence also established that if the hydrostatic relief valve did not function correctly, the pool could not safely be left empty. The experts agreed that it would then need to be kept about half full to prevent it from moving, if the hydrostatic pressure increased.

313 I am thus satisfied that the result of the pool having been left empty as it was, was that when the hydrostatic pressure under the pool increased because of the heavy rain in 2013, the defect in the valve prevented it from operating to allow water to flow into the pool, to equalise the pressure, with the result that the pool lifted.

314 Instead of operating one way to allow water into the pool to equalise that pressure, the valve was allowing water to leak out. The result of the defect eventually permitted the pool to lift, with resulting damage to the pool and pool structure.

315 Had the valve not then had that defect, this pool could not have lifted as it did and the pool and pool structure would not have been damaged as they were. It follows that Dr Flanagan's case, that the CGU or like policy did not exclude that damage, cannot be accepted and there must be judgment for the defendants.

Was there a failure to take reasonable precautions?

316 In the circumstances the evidence also establishes, on the balance of probabilities, that Dr Flanagan failed to take the reasonable precautions which the CGU policy and those which offered like cover, on the expert evidence, also required. That also leads to judgment for the defendants.

317 The policy provided under the heading "What you are required to do for us", that "You must take reasonable precautions to prevent anything which could result in a claim under this policy".

318 The experts did not agree, in the concurrent evidence, whether a broker in Mr Bernasconi's circumstances should also have drawn attention to this. Irrespective of this, or whether in 2012 Dr Flanagan remembered that there had in 2001 been a problem caused by a defective valve which was replaced, which on her evidence it seems she did, when she left the pool empty she would have been contractually bound to take reasonable precautions to prevent anything which could result in a claim in relation to the pool.

319 What they were, were established by the evidence.

320 The leak had been identified in late 2011 by Dr Flanagan and the pool its likely cause in 2012, by Mr Houghton. It was emptied mid-year and left empty until it was damaged in 2013, without the cause of the leak being investigated or repaired, Mr Houghton having advised only that it could be emptied, serviced and refilled. Dr Flanagan chose not to take the latter two steps.

321 In Mr Dockrill's opinion, in the circumstances it would have been prudent for Dr Flanagan to have taken advice from a pool contractor about leaving the pool empty for a long period. If he had been consulted in 2012, Mr Clemmett said that he would have advised that the pool should only be emptied for maintenance and left empty, after confirmation that all three hydrostatic valves had been maintained in working order.

322 As Bergin J, as she then was, explained in *Zurich Specialities London Ltd v Thiess Pty Ltd* [2008] NSWSC 1010, by reference to *Fraser v BN Furman (Productions) Ltd* [1967] 1 WLR 898, the purpose of such a requirement to take reasonable precautions is to "ensure that the insured will not refrain from taking precautions which he knows ought to be taken because he is covered against loss by the policy": at [14].

323 Further, an insurance policy "is a commercial contract and should be given a businesslike interpretation. Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure": *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579; [2000] HCA 65 at [22], affirmed in *CGU Insurance v Porthouse* (2008) 235 CLR 103; [2008] HCA 30 at [43].

324 In a home and contents policy there is no reason to think that an obligation to take reasonable precautions could not extend to investigating the cause of a leak in a swimming pool. In *Thiess Pty Ltd v Zurich Specialties London Ltd* [2009] NSWCA 47 it was concluded that it could extend to the performance of construction work designed to protect the insurer by limiting the obligation to indemnify the insured: at [15]. Further, that the requirement to take such precautions is "a condition of the insurer's obligation to indemnify, not a promise or undertaking by the insured to take those steps": at [17].

325 It follows that if the condition to take reasonable precautions is not satisfied by an insured, the insurer's obligation is not engaged.

326 Determining the scope of such obligations requires consideration to be given to the purpose of the particular policy and whether a risk has been courted by recklessness. The more valuable the property, the greater the obligation to take precautions. The greater the foreseeable risk of loss, the greater the obligation to take precautions. The greater the possibility of taking them, the more readily will it be inferred that they ought to have been taken*: Legal & General Insurance Australia Ltd v Eather* (1986) 6 NSWLR 390 at [395]-[398].

327 Here what arises for consideration is an unusually large pool and pool enclosure for a home, built at considerable cost and used on this property as a resource for firefighting, which Dr Flanagan was also contemplating using for commercial purposes. What was reasonable to be done by way of precaution when the pool was left empty for an extended period, arises to be considered in circumstances where:

(1) after it was built and before Dr Flanagan and Dr Oldfield were prepared to pay for it, the pool had to be repeatedly emptied and a faulty valve involved in a leak had to be replaced;

(2) in 2012 the investigations Dr Flanagan had pursued established that there was another leak in the pool, the cause of which had to be identified;

(3) Dr Flanagan was given advice that the pool had been designed to be emptied, serviced and refilled;

(4) without taking further advice, Dr Flanagan decided not to have the leak identified, repaired and the pool refilled, but to leave the pool empty; and

(5) she then did not want to spend money which might only prove to be for the benefit of the bank and encourage it to sell the property, albeit contrary to the defence case, that did not establish that she was paying no regard to the interests of the bank or the obligations which she owed it.

328 It may be accepted that Dr Flanagan believed that there was no problem with leaving the pool empty as she did. But her case that on the expert evidence this understanding was correct, may not be accepted. Nor was that what Mr Houghton had advised her.

329 It must be accepted that in all the circumstances, having decided not to have the cause of the leak identified and repaired or the pool refilled, it would have been reasonable for Dr Flanagan to have taken the precaution of obtaining advice about whether the pool could still safely be left empty for an extended period.

330 On the expert evidence, if she had done so, she would have been advised either to establish the cause of the leak and have the valve repaired if it had a defect, as the pool later lifting established it did, or to half fill the pool, given the risk of lifting which existed if the valve was not functioning properly to deal with increased hydrostatic pressure while it was empty.

331 On the evidence that precaution would have been simple to take. Mr Houghton had already given Dr Flanagan advice about emptying the pool, after consulting with a pool company. His advice was that it had been designed to be emptied, serviced and refilled on a regular basis. There is no suggestion that taking further advice about leaving the pool empty for an extended period, without establishing the cause of the leak, would have been difficult or costly.

332 The evidence also does not suggest or establish that inspecting the pool and repairing or replacing the valve when the pool was empty, was expensive or beyond Dr Flanagan's means. On the evidence, half filling the pool would have cost some $312, but in the email Dr Flanagan sent her counsel after receiving Dr Oldfield's email asking her to half fill the pool, she explained why she did not then want to bear the all the cost of operating the pool, given the expense and that it might be incurred only for the benefit of the bank.

333 Having the cause of the leak identified and dealt with would undoubtedly have been for her benefit. Given the risk of the pool lifting, which Dr Flanagan would have been advised the valve could pose, given the considerable leak revealed by her increased water bill, had she taken the precaution of seeking advice about leaving the pool empty for an extended period, on the evidence it must be accepted that Dr Flanagan would have met that expense, as well as that involved in its repair.

334 In those circumstances I am satisfied, on the balance of probabilities, that had Dr Flanagan had cover under the CGU policy or another policy which contained a term requiring the taking of reasonable precautions, that it could not have been established that she did take such precautions in order to prevent the risk of the pool lifting while it was empty from materialising.

335 In the result, the obligation falling on the insurer under the policy in respect of the damage to the pool and pool structure would not have been engaged.

Damages

336 Whether Dr Flanagan had established the damages which she claimed should also be determined, in case I am wrong about the conclusions I have reached about the existence of a defect and her failure to take reasonable precautions.

337 Dr Flanagan pursues total damages of $2,083,061.75, much of it for demolition costs. Dr Flanagan's claim was that her entitlement arose primarily from being uninsured for the damage to the pool and pool building, for which she would have been covered under a notional policy such as that of CGU, which covered her for reinstatement of the damage

and certain consequential losses. But the parties also disagreed about what would have been recoverable under such a policy.

338 While at one point it appeared that it was finally common ground that damages must be assessed on 2013, rather than 2020 figures in evidence, in respect of damages which are only payable when work is undertaken, such as council fees, for example, it was 2020 figures which were relevant.

339 On the defence case much of what Dr Flanagan pursued had no evidentiary basis and the maximum which could be awarded was:

(1) Demolition - $35,000 plus interest; and

(2) Pool - $231,070.

340 The measure of Dr Flanagan's damages is the difference between the position she was in and that she would have been in, had the complained conduct not occurred, even if that requires consideration of a range of possible hypothetical past events: *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638; [1990] HCA 20 at 643.

341 The burden of proving that Dr Flanagan suffered the claimed damage as the result of the defendants' breaches and the amount of the loss she sustained, "on the balance of probabilities and with as much precision as the subject matter reasonably permitted", fell on Dr Flanagan: *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 77 ALJR 768; [2003] HCA 10 at [37].

342 Further, if precise evidence of what was lost could not be provided, estimation or guesswork may be necessary in assessing the damages to be allowed. In such a case mere difficulty in estimating damages "not relieving the court from the responsibility of estimating them as best it can": at [38].

343 The parties again relied on expert evidence. While there are similarities in some of their calculations, Mr Sturgess and Mr Vasey disagreed about many of the claimed costs, disagreements which remained largely unresolved in their joint report and by their concurrent evidence.

What was covered?

344 The relevant CGU provision was:

> "How we pay a claim for your buildings
>
> When damage or loss occurs to your buildings we will pay the cost of rebuilding your buildings or repairing the damaged portions to the same condition as when they were new.
>
> We will also pay any additional costs required for your buildings to comply with government or local authority bylaws. We will not pay these additional costs if you were required to comply with these bylaws, and had not done so, before the damage or loss occurred.
>
> Rebuilding or repairing your buildings must commence within six months of the damage or loss occurring. If it does not commence within six months, we will do one of the following:
>
> - reinstate or repair the buildings to the condition they were in just before the damage or loss occurred, or
> - pay you the cost of reinstating or repairing the buildings to the condition they were in just before the damage or loss occurred, or
> - pay you the value of the land and buildings just before the damage or loss occurred. We will reduce this payment by the value of your land and buildings after the damage or loss occurred.
>
> We decide which one we will do.
>
> We will pay for the damaged portions of fixed coverings to walls, floors and ceiling only in the room, hall or passage where the damage occurred.
>
> We will try to match any material used to repair the buildings with the original materials. If we cannot, we will use the nearest equivalent available to the original materials. We will not pay any costs for replacing undamaged property.
>
> If the damage was caused by liquid that escaped from a bath, basin, sauna, spa, shower base, or shower wall we will pay the costs to repair the buildings. We will not pay the costs to repair or replace the bath, basin, sauna, spa, shower base or shower wall."

345 I am satisfied, on the balance of probabilities, given this clause and the evidence about the damage caused to the pool enclosure and how it had been built, that the entire cost of rebuilding it would not have been covered by this or a like policy.

346 On the contemporaneous engineering advice it cannot be concluded that the damage to the pool necessitated the demolition of the entire enclosure. To the contrary, the advice that both Dr Flanagan and Vero received was that it could have been repaired, Vero's engineer offering to provide a detailed scope of works for "necessary repairs".

Contrary to Dr Flanagan's case this does not suggest that "maybe everything needed to be demolished and built as new".

347 That the experts did not consider the cost involved in such repair was the result of instructions which they were given, not because anything in evidence established that the building could not have been repaired, as was the 2013 engineering advice of those who had inspected the damaged enclosure.

348 When Dr Flanagan later took out her $700,000 loan, Citibank also does not appear to have required its demolition. The decision was hers. But that does not provide a basis for concluding that the damage caused by the pool lifting required that the structure be entirely demolished, rather than repaired.

349 On the defence case this led to the conclusion that the entire claim for the structure failed, there being a gap in the evidence as to what repairing the old structure would have cost.

350 Dr Flanagan's case was that the Court still had to do its best to arrive at some quantum on the evidence, for the damage which the policy covered. I agree. But I do not accept the result is acceptance of the proposition that repair would have not been less expensive than a complete rebuild. Neither logic nor any evidence leads to that conclusion, given what was damaged.

351 That Dr Flanagan would have been astute to ensure work was begun before the six months expired is also not apparent. That Dr Flanagan would have taken advice from anyone other than Mr Bernasconi about making an insurance claim is not established and on the evidence seems unlikely. The Vero claim was only made four months after the pool lifted in March 2013, after the claim to the Mine Subsidence Board was rejected. Vero then obtained an engineer's report, as any other insurer is likely to have done in the circumstances. It was dated September 2013,

352 On the evidence it is thus unlikely that rebuilding and repair work would have commenced within six months, giving the insurer the three options which arose in that event.

353 What then also arose for the insurer to consider was that the enclosure had not been built in accordance with building specifications and standards, given the obligation to then repair or reinstate to the condition existing just before the damage.

354 In the result, it must be accepted that at most, the insurer would have made a contribution to the cost of repairing the damaged and defective enclosure.

Demolition costs

355 That if the pool lifted there would be damage to the pool and pool enclosure which would require demolition work was foreseeable, as was that Dr Flanagan would herself have to deal with the damage because the Vero policy did not cover the pool lifting. That necessitated demolition work. She considered in 2014 that the pool and pool enclosure could not be left, given the health and safety risks which they posed, the requirements of the bank and not considering herself to be in a financial position then to rebuild.

356 The experts agreed, having considered both documents and photographs, that the rubble from the demolition work which was undertaken in 2014 was used to fill the pool, instead of both the pool and enclosure being demolished and the rubble being removed, as Dr Flanagan had contracted in 2014.

357 That material was then covered with clean fill and grassed over, although some bricks were retained. If the pool and enclosure are to be rebuilt there, this material now has to be removed.

358 The experts also agreed that the clean fill could be removed, but that much of the pool, which was lined with fibreglass, remains in place underground and still has to be demolished in order to be removed, so that the pool can be reinstated. That should have been done as part of the 2014 contracted $32,000 cost, on the quotes in evidence.

359 It follows that if the 2014 demolition contract had been adhered to, there would only now be clean fill to be removed.

360 The experts disagreed about how the rubble from the demolition in 2014 could now be removed and disposed of, apart from the clean fill and what that would cost; whether fibreglass can be separated successfully from other waste; whether any of the materials can be disposed of as general solid waste, Mr Sturgess considering that it all had to be disposed of as special waste, at a very considerably higher cost; as well as about what account should be taken of costs Dr Flanagan has already met.

The cost of the initial demolition

361 Mr Sturgess' costing rests on his assessment of the work necessary in October 2013 when the damage occurred, without regard to the costs Dr Flanagan paid in 2014 to the demolition contractor Novalec. Mr Sturgess calculated additional sums for work appropriate, but not then done at $77,373. Mr Vasey arrived at a figure of $75,039, but he considered that the quoted 2014 sum should fix this aspect of claim, which was included in his figure. Mr Vasey also allowed an additional amount of $5,537 for the grassing over of the site, which could be seen on photographs in Mr Sturgess' report.

362 Also to be considered is a term of the CGU policy which limited what was payable to 10% of the sum insured.

363 No work was undertaken in 2013, Dr Flanagan pursuing the insurance claim Mr Bernasconi prepared and, only after it was rejected in 2014, incurring the cost of the demolition. The value of the property had undoubtedly been adversely affected and work on the pool and structure was then necessary. In the circumstances such work could plainly not await the bringing and resolution of these proceedings.

364 The defence case was that if insured by a policy like the CGU policy, Dr Flanagan would not have had the 2014 demolition work undertaken. Given the views I have reached, such an insurer is also likely to have resisted her claim and so the cost incurred needs to be taken into account.

365 Mr Sturgess explained in the concurrent evidence that he considered the 2014 quote to have been "only a quotation which was inconclusive". Mr Vasey however considered not only that "the scope appeared on that quotation to be reasonable", but its cost known and so he had taken it into account. The quote was to demolish and remove the structures, demolish the pool, backfill with clean fill, level the area for grassing and remove the demolished items from the site.

366 The experts also offered possible explanations for the quote: that the contractor had a place to dump the materials for a competitive price; illegal dumping; mistake; and utilising the materials, or some of them, on another project. But they disagreed about their likelihood, given the size of the site and what had to be disposed of. It is unnecessary to resolve this.

367 The experts agreed that the work performed in 2014 did not accord with what had been quoted. But the evidence established that Dr Flanagan had paid the quoted sum. Accordingly, I accept that this cost must be taken into account in determining damages.

368 Mr Vasey explained his views that the required quoted work included salvaging and selling aluminium doors and windows, pool plant and equipment and bricks and that a competent demolition contractor could have removed the fibreglass lining from the pool, sorting waste by machine and by hand and disposing of it offsite. Mr Vasey also considered that the fibreglass was reasonably confined, and much was not contaminated by it, including recyclable materials.

369 While Mr Sturgess agreed that some material could be recycled, there was still a disagreement about removal and disposal of fibreglass.

370 What Dr Flanagan contracted for in 2014 was demolition of both the pool and structure, removal of the material from the site and filling the hole with clean fill at a cost of $32,000, which she paid. Instead the demolished materials were used to fill in the pool, which was only partly demolished. It was not suggested that Dr Flanagan knew of or agreed to any such variation to the contract.

371 I have thus concluded that damages must have regard to the $32,000 Dr Flanagan paid, as well as the $5,537 for the grassing over of the site.

The waste would not be kept onsite

372 The differences between the experts' costing for removal of the waste on site was $215,790 on Mr Sturgess' approach and $79,253 on that of Mr Vasey, although in the joint report they agreed on a 2020 cost of some $97,153, if the material was taken off site.

373 Mr Vasey considered that the waste could be retained onsite, at even less cost than if disposed of as general waste, either by the pool being built in a different location, or retaining the demolished material elsewhere onsite, for example in a pit or by extending an embankment, although he said in the concurrent evidence that would require engineering advice. He had not inspected the property, while Mr Sturgess, who disagreed, had. Mr Vasey also explained that he had used site diagrams in Mr Sturgess' report, which did not show trees, to arrive at his conclusions.

374 Mr Sturgess disagreed about the cost involved, given the nature of this site, the regulatory approvals required and the unreasonableness of what was proposed.

375 I am satisfied that these possibilities are not a reliable basis for any conclusions in relation to damages and in final oral submissions, understandably, damages calculated on this approach were not urged by the defence.

376 Not only did Dr Flanagan contract for the removal of the demolished materials, onsite retention would obviously require her approval. That it would be forthcoming, or ought reasonably to be given, was not established. Dr Flanagan is not only entitled to rebuild the pool and enclosure where they were, but to have the demolished materials removed. Nor does the evidence establish what onsite retention of these materials would require by way of approval, for example from the relevant Council or EPA, or what that would involve and cost, if available.

377 In the result, I am satisfied that this cannot be contemplated as a basis for assessment of damages.

The cost of disposal of material which remain onsite

378 Photographs taken before the pool was filled in were explained by the experts. They show that much of the fibreglass had delaminated and spread around in material which lay on the bottom of the pool, much of it close to the walls; but some adhered to small pieces of broken concrete lying on the floor of the pool, the pool walls having been partly demolished by a large hammer; and a great deal still adhered to the concrete walls, which still have to be demolished. There are also broken bricks and other materials there to be seen, which were all covered by the clean fill and grass.

379 Mr Sturgess approached costs on the basis that only 80% of that fill could be removed as clean fill and the rest treated as hazardous, given his view that fibreglass would have contaminated the rest, the demolition work having shattered some of that glass into very small pieces which had dispersed throughout the waste and some of the fill. Mr Vasey disagreed.

380 It is common ground that the cost of dumping recycled material is less than either general solid waste, or the most expensive, special waste. That, I accept, encourages demolishers to recycle as much waste as they can and otherwise, if possible, to wrap materials such as fibreglass, so that it may be dumped as general waste in accordance with the applicable EPA guidelines. That will also have an influence on how they might compete for the work and at what price.

381 Mr Sturgess' approach was that most of the material had to be disposed of as special waste and even bricks as general solid waste. In the concurrent evidence he explained that the fibreglass shards in the mix had led him to make an enquiry of the EPA and that his view of the documentation he had considered had led him to conclude that shards of loose fibreglass in the waste would result in it being classified and having to be disposed of as special waste.

382 Mr Vasey disagreed, having had experience of the guidelines in his work. On his approach, a large part of the remaining pool walls could be detached from the fibreglass and the concrete then recycled, for which he made allowance. What could not be, could be dealt with as general solid waste by being appropriately bagged. He also explained why he considered some of the material was still recyclable, including as it did structural steel and bricks which could be separated by methods he explained, using equipment, labour and protective equipment which he had included in his costing. Otherwise, the waste containing fibreglass could still be wrapped as required to prevent dust emissions, permitting disposal as general solid waste.

383 While Mr Sturgess then accepted that the material could be wrapped, he considered it would all have to be, explaining his view that it was not only the cost of disposal which a demolisher had to consider, but also safety considerations. Mr Vasey still disagreed, given the practice he explained, of recovering recycled materials using a machine with a sift bucket and labourer utilising personal protection equipment, which he did not consider to be impractical for the work which still had to be undertaken. Still Mr Sturgess disagreed, even though he agreed that workers could wear protective equipment.

384 Accepting that all the fibreglass could not be separated from other materials, still the evidence does not establish that any of the rubble containing fibreglass could not have been wrapped as required, in order to be disposed of as general solid waste.

385 I am thus satisfied that Mr Vasey's approach must be preferred, given that the applicable guidelines provide for wrapping waste which contains fibreglass for disposal as general solid waste and that I accept that some of the remaining material could be recycled by a competent demolisher.

The cost of further demolition and removal of the remaining material is too remote

386 I am also satisfied, however, that the defence case that the cost of the removal of the material now left in the pool is too remote, must be accepted. That flows from Dr Flanagan's decision to remove the entire enclosure, rather than repairing it as engineers had advised was possible in 2013 and from the work she contracted to have undertaken in 2014, demolition of both the pool and enclosure and removal of all material offsite.

387 It could not have been reasonably contemplated, not only that Dr Flanagan would have had the entire enclosure demolished, rather than repairing it as the engineers advised, but that the contractor she engaged would not complete the contracted work for which it was paid, with the result that the pool was only partly demolished and instead of removing what had been demolished from the site, it was dumped in the pool and so must now be removed in order for the pool to be rebuilt.

388 In the concurrent evidence Mr Sturgess described what had been done as akin to having created a tip on the property, but still Dr Flanagan paid for the contracted work which had not been performed. That was also not foreseeable.

389 It follows that while part of what Dr Flanagan has paid is recoverable as damages, the cost of further demolition required and the removal of that and the materials which were left in the pool, contrary to the demolition contract, is not.

Conclusion

390 In the result, doing the best I can on all of the evidence, I have concluded that these damages must be assessed by reference to what Dr Flanagan agreed to pay for the contracted work, with the result that $20,000 of what was paid is recoverable for the demolition of the pool and part of the enclosure and the removal of those materials.

391 That reflects that the demolition and removal of the pool would have been more difficult and expensive than the cost of demolition and removal of part of the damaged enclosure.

The new pool

392 Mr Sturgess concluded that in 2013 rebuilding the pool and enclosure would have cost $600,566 and Mr Vasey $532,164, with the pool plant room being costed respectively at $13,286 and $8,629, on the basis that it had also been demolished and was to be rebuilt.

393 The experts' costings have had regard to design and council fees. I am satisfied that there were such consequential expenses contemplated in the event that the pool had to be rebuilt. In Mr Sturgess' case he had also taken account of a second set of consultants to design and have the pool building approved.

394 I am satisfied that only the cost of rebuilding the pool and repair of the enclosure could be recovered and even if this were not the case, only the cost of one set of consultants could be recovered.

395 Mr Sturgess assessed the cost of the pool to be $226,366 and Mr Vasey $188,495. Neither figure can be accepted.

396 Mr Sturgess and Mr Vasey each drew on their own experiences, which were plainly different, to arrive at their costings. For example, in Mr Sturgess' case builder's margins could be up to 30% in some cases, 15 to 20% on a custom-built home and 10% on a project home. Mr Sturgess accepted that a builder might be prepared to negotiate the margin, as was Mr Vasey's experience, in order to be competitive in pricing, although he considered 15% to be a fair market price.

397 Mr Vasey agreed that a 15% builders' profit might be reasonable, but Mr Sturgess maintained that 10% was not, given the risks involved in the project. Mr Vasey's experience was of builders who had tendered for less.

398 The experts both had regard to rates provided by the Rawlinson's guide, which had its own index for the regions, which Mr Vasey departed from because of his view that some of those rates were not applicable in the Newcastle area, which was slightly higher than the Sydney rate. They also disagreed about the cost of some preliminary work and the cost of builder's supervision.

399 Mr Sturgess also agreed that the preamble to the Rawlinson's guide referred to the inclusion of a preliminary 5% margin, but unlike Mr Vasey he was not aware of discounting a builder's margin by that amount as a result, which Mr Vasey said was his daily experience and Mr Sturgess said he had never experienced.

400 In the result I am satisfied that the Rawlinson's rates should be used, with a 10% builder's margin, 15% builder's profit and 10% for preliminaries.

401 The experts also disagreed about whether it would be necessary to incur the cost of a gravel base under the pool as well as a sand base, as originally specified, Mr Sturgess considering that might be necessary after removal of the

existing pool and Mr Vasey that sand was likely to be sufficient, given its intended purpose. They also disagreed about whether timber or metal formwork could be left in place after the pool concrete was pursued. Mr Vasey considered that this was an unnecessary expense, given that the materials could be reused and were not designed to be left in place.

402 I have not been convinced that the gravel will be necessary and accordingly this cost cannot be recovered. Leaving formwork in place would appear to depend on pool design and engineering requirements. There is no suggestion that such formwork had been left in place in the existing pool and I am thus not satisfied that this could be included in the damages assessed.

403 The experts also disagreed about excavation costs, Mr Vasey costing on the basis of clay and Mr Sturgess bush loam. Mr Vasey said that he considered that it was likely that there would only be sandy loam on the top 300mm of this site, but expected that if the pool was rebuilt, little excavation would be required in the hole and some in the surrounds and the area of the enclosure.

404 Mr Sturgess agreed that the pool would require little excavation, perhaps for some steel columns; he considered that excavating in bush loam was cheaper and he had seen no clay onsite. But in evidence is correspondence for Dr Oldfield which refers to clay onsite.

405 In those circumstances damages should have regard to excavation in clay.

The cost of repairing the pool enclosure

406 Mr Sturgess assessed the cost of rebuilding the enclosure to be $401,336.10 and Mr Vasey $312,132.86.

407 Dr Flanagan's case was that the defendants not having led evidence to establish the cost of repairing the enclosure, the Court had to do the best it could on the evidence, which did not leave open the conclusion that repairing the structure would have cost less than replacing it. That was in issue and I consider that was for Dr Flanagan to prove, but the evidence did not touch on this.

408 The wall which was damaged is shown in photographs, as is the state of the enclosure after its collapse. What the engineers advised in their reports included that the steel frame had suffered an upward movement centrally on the east side of the building, causing the masonry wall infill, which was fixed to the steel uprights, to rotate and collapse outwards, damaging the eastern wall beyond repair. But this still permitted the uprights adjacent to the wall to be replaced and/or straightened, with the result that a significant proportion of the pool remained salvageable.

409 The cost of those repairs was not separately considered by the experts.

410 Doing the best I can, I have concluded that they would be less than half of the cost of rebuilding the entire structure, a sum which would also be further reduced, because what collapsed had not been built to the standard required, while the experts' cost of rebuilding had had regard to that standard. In the result these damages should be calculated as 42% of the cost of rebuilding the entire enclosure.

411 The experts also included design and council fees in their costings, again for the cost of the replacement of the building. Given that an entire wall of this structure was severely damaged, that its replacement would also have resulted in some design and council fees, must also be accepted.

Additional works

412 The experts also disagreed about the necessity for substantial additional work which Mr Sturgess had assessed would cost some $293,300, on the basis of a scope of work with which he was provided and on Mr Vasey's costing $15,354, he not having considered that scope of work.

413 Mr Sturgess' costings rest on the assumption that such works are required as the result of the November 2019 NSW Rural Fire Service Planning for Bush Fire Protection document. It is a guide for Councils, planners, fire authorities and developers, but has no statutory basis. There is no suggestion that such a publication existed in 2013.

414 In the concurrent evidence Mr Vasey explained that he considered that it was necessary for a fire consultant to be engaged to advise on such a scope of work. His costing reflected his assessment that it was reasonable to accept that a few of the items Mr Sturgess had been instructed to assess would be required, without such expert advice.

415 Mr Sturgess confirmed that his costing was based on the assumption that the works were required to be undertaken, as he was instructed. They were identified in an annexure to his report.

416 Mr Vasey also explained problems which he saw with some of the assumptions, for example that 55 trees would have to be removed, without consideration of their size or location, which would be relevant to determine the cost of their removal. Mr Sturgess explained that his inspection had allowed him to make some assessment of the type of clearing which would be required.

417 The works also included building a long new driveway around the property and removal of the existing driveway. Given the work already undertaken, the existing driveway would clearly also provide necessary access for further work required to rebuild the pool and enclosure.

418 On Dr Flanagan's approach in final submissions, works to comply with bush fire requirements are likely to be extensive and while it was difficult to be confident of the costs which may be involved, Mr Sturgess had estimated a cost, that being the only realistic estimate before the court and so it should be found that they were recoverable.

419 The defence disagreed. It was argued to be relevant that Dr Flanagan was not obliged to rebuild the pool or pool structure, even though on her evidence she wishes to pursue her commercial plans for the property. However, she had not made a development application. Even if the application of the Bushfire Protection document could result in additional cost if such an application was made, she might never incur them.

420 Questions of what that document required were also addressed, all of which it is unnecessary to deal with. It contemplated, for example, a bushfire assessment report which would be included in a development application. What such a report would contain, if an application was made, is unknown, as is what conditions may be imposed as a result. That is not established by the scope of works provided to Mr Sturgess to cost.

421 I am satisfied that while it may be accepted that it could reasonably be expected that other additional works and resulting consequential costs might result if the pool and structure were rebuilt, an evidentiary basis for these claims was not established.

422 As has often been observed, the extent of correspondence between assumed facts and those proved is relevant to the assessment of the weight to be given to an expert's opinion: *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43; [2011] NSWCA 11 at [88].

423 In this case more needs to be established than the existence of the document relied on and Mr Sturgess' costing of a scope of work prepared by someone else, his opinions resting as they do on the assumption that such works would be required, if the pool and structure were now rebuilt. A reliable basis for that assumption has simply not been established on the evidence.

424 Accordingly these claimed damages could not be awarded, other than those which Mr Vasey agreed could be required.

The FOS challenge

425 Damages for the legal costs incurred in the challenge to the Vero refusal of Dr Flanagan's claim were also claimed. I am satisfied that this claim was also too remote.

426 The challenge was pursued by Dr Flanagan as the result of legal advice which she obtained about the terms of the Vero exclusion. Even though it is undoubtedly not a claim which she would have pursued, had she been covered by a policy which did not contain an exclusion of the kind which precluded this challenge succeeding, that the pursuit of this challenge to Vero's refusal of her claim was reasonably foreseeable, given the nature of the exclusion, is not apparent. Nor is it apparent why the challenge was pursued, even at the limited cost incurred before the Ombudsman.

427 Contrary to Dr Flanagan's case, given the terms of that exclusion, a failure to pursue such a challenge could not have resulted in a successful claim that Dr Flanagan had failed to mitigate her loss.

Calculation

428 Had I concluded that judgment should be entered in favour of Dr Flanagan, these conclusions would have required the parties to calculate her award of damages to reflect the conclusions I have reached, as well as interest, about which there was no argument.

429 Given that I have not arrived at such a conclusion, that exercise need not be undertaken.

Orders

430 For these reasons judgment must be entered for the defendants.

431 The usual costs order under the *Civil Procedure Act* 2005 is that costs follow the event. In this case that is an order that Dr Flanagan bear the defendant's costs, as agreed or assessed.

432 The parties are directed to confer and approach in the event that they wish to be heard on costs within 14 days. Otherwise they are to file final orders within that time, which will then be made.

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Amendments

04 April 2022 - 0 placed before 4 in Date of Orders

04 April 2022 - Index added to Judgment