

**Insurance Australia trading as CGU Insurance v MOS Beverages - [2021] FCAFC  
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## FEDERAL COURT OF AUSTRALIA

### Insurance Australia Ltd trading as CGU Insurance v MOS Beverages Pty Ltd [2021] FCAFC 165

Appeal from:

*MOS Beverages Pty Ltd v Insurance Australia Ltd trading as CGU Insurance* [2020] FCA 1716 and

*MOS Beverages Pty Ltd v Insurance Australia Ltd trading as CGU Insurance (No 2)* [2020] FCA 1820

File number:

NSD 1375 of 2020

Judgment of:

**BESANKO, MCKERRACHER AND DERRINGTON JJ**

Date of judgment:

17 September 2021

Catchwords:

**INSURANCE** — appeal from a declaration made by Federal Court in a proceeding for indemnity under a policy of insurance — where respondent owned goods damaged by fire at insured premises — where primary judge concluded that on proper construction of “Interests of Other Parties” clause, respondent is entitled to indemnity as third party beneficiary under policy pursuant to s 48(1) of the *Insurance Contracts Act 1984 (Cth)* — whether “Interests of Other Parties” clause extends benefit of cover to third party — whether “Interests of

Other Parties” clause restricts scope of property covered in respect of third parties to whom insured was responsible for maintaining insurance — whether “owners” extends to third party — meaning and application of phrase, “specifically noted in the records of the Insured” in “Interests of Other Parties” clause — appeal dismissed

Words & phrases:

“owners”, “all other parties”, “specifically noted”

Legislation:

*Insurance Contracts Act 1984 (Cth)* ss 11, 48,

Cases cited:

*AMEV Finance Ltd v Mercantile Mutual Insurance Ltd* [1988] 1 Qd R 487,

*Australian Broadcasting Commission v Australasian Performing Rights Association Ltd* (1973) 129 CLR 99,

*Biki v Chessells* [2004] VSCA 70,

*Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500,

*Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640,

*Fraser Turner Ltd v PriceWaterhouseCoopers LLP* [2019] EWCA Civ 1290,

*Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451,

*HP Mercantile Pty Ltd v Hartnett* [2016] NSWCA 342,

*JKC Australia LNG Pty Ltd v CH2M Hill Co Ltd* [2020] WASCA 112,

*Liberty Mutual Insurance Company Australian Branch t/as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126,

*Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633,

*Mattinson v Multiplo Incubators Pty Ltd* [1977] 1 NSWLR 368,

*Maurice v Goldsborough Mort & Co* [1939] AC 452,

*Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd* [1998] 4 VR 559; (1997) 10 ANZ Insurance Cases ¶61393

*McCann v Switzerland Insurance Australia Limited* [2000] HCA 65; (2000) 203 CLR 579

*McVeigh v National Australia Bank Ltd* (2000) 278 ALR 429

*Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449

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

*Onley v Catlin Syndicate Ltd as Underwriting Member of Lloyd's Syndicate* (2018) 360 ALR 92

*Pacific Dunlop Limited v Maxitherm Boilers Proprietary Limited* [1996] VicSC 387; (1997) 9 ANZ Insurance Cases ¶61-357

*Quintis Ltd v Certain Underwriters at Lloyd's London* (2021) 385 ALR 639

*Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900

*Ramco (UK) Ltd v International Insurance Co of Hanover* [2004] EWCA Civ 675; All ER (D) 406

*Re Sigma Finance Corp (in administrative receivership)* [2010] 1 All ER 571

*Richmond v Moore Stephens Adelaide Pty Ltd* [2015] SASFC 147

*Robbins v Federal Commissioner of Taxation* (1974) 129 CLR 332

*The North British and Mercantile Insurance Co v Moffatt* (1871) LR 7 CP 25

*Tubemakers of Australia Ltd v Newcastle Pipe Line Co Ltd* (Unreported, NSWCA, Samuels, Mahoney and Clarke JJA, 23 December 1987)

*Waters v Monarch Fire and Life Assurance Co* [1843-60] All ER Rep 654; (1856) 119 ER 705; (1856) 5 El & Bl 870

*Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522

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Legh-Jones N, Birds J and Owen D, *MacGillivray on Insurance Law* (11th ed, Sweet & Maxwell, 2008)

Lewison K, *The Interpretation of Contracts* (6th ed, Sweet & Maxwell, 2020)

Division: General Division

Registry: New South Wales

National Practice Area: Commercial and Corporations

Sub-area: Commercial Contracts, Banking, Finance and Insurance

Number of paragraphs: 180

Date of hearing: 18 May 2021

Counsel for the Appellant: Mr G Watson SC with Mr D Lloyd SC

Solicitor for the Appellant: Lander & Rogers Lawyers

Counsel for the Respondent: Mr G Parker SC with Mr J de Greenlaw

Solicitor for the Respondent: Chambers Russell Lawyers

## ORDERS

**BETWEEN:** INSURANCE AUSTRALIA LTD TRADING AS CGU INSURANCE  
Appellant

**AND:** MOS BEVERAGES PTY LTD  
Respondent

**ORDER MADE BY:** BESANKO, MCKERRACHER AND DERRINGTON JJ

**DATE OF ORDER:** 17 SEPTEMBER 2021

**THE COURT ORDERS THAT:**

1. The appeal be dismissed.
2. The appellant pay the respondent's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**REASONS FOR JUDGMENT**

**BESANKO AND MCKERRACHER JJ:**

**INTRODUCTION**

1. This is an appeal from a declaration made by the Chief Justice sitting in the original jurisdiction of the Court on 18 December 2020. The declaration was made in a proceeding commenced by MOS Beverages Pty Ltd (MOS Beverages) against Insurance Australia Ltd trading as CGU

Insurance (CGU). In the proceeding, MOS Beverages sought indemnity under a policy of insurance with respect to loss and damage to goods it owned.

2. The primary judge formulated a separate question in the following terms:

Whether the applicant is entitled to indemnity from the respondent under s 48(1) of the *Insurance Contracts Act 1984 (Cth)* by reason of:

- a. the applicant being sufficiently noted in the records of Admiral International Pty Ltd in accordance with the clause titled “Interests of Other Parties”; and/or
  - b. the proper construction of endorsement SALESXB4.
3. The primary judge reached the conclusion that the question posed in paragraph a. should be answered in the affirmative. In other words, the primary judge reached the conclusion that on the proper construction of the policy and, in particular, the “Interests of Other Parties” clause, MOS Beverages is entitled to indemnity from CGU as a third party beneficiary under the policy (*MOS Beverages Pty Ltd v Insurance Australia Ltd trading as CGU Insurance* [2020] FCA 1716). Having expressed those conclusions, the primary judge then heard the parties as to the orders which should be made. The parties agreed that the answer to the separate question should be reflected in a declaration and the primary judge made the following declaration:

**THE COURT DECLARES THAT:**

- I. Upon the proper construction of the Industrial Special Risks policy issued by the respondent to Admiral International Pty Ltd, the applicant is entitled to an indemnity from the respondent under s 48(1) of the *Insurance Contracts Act 1984 (Cth)* by reason of the applicant being sufficiently noted in the records of Admiral International Pty Ltd in accordance with the clause titled “Interests of Other Parties”.

(*MOS Beverages Pty Ltd v Insurance Australia Ltd trading as CGU Insurance (No 2)* [2020] FCA 1820.)

**THE FACTS**

4. MOS Beverages carries on the business of importing alcoholic and non-alcoholic beverages into Australia. Since December 2015, in the course of its business, MOS Beverages has stored its imported goods from time to time and in varying quantities at a bonded warehouse operated by Admiral International Pty Ltd (Admiral). The primary judge noted that according to MOS Beverages’ further amended statement of claim, Admiral provided a number of services to MOS Beverages, including the collection and transport of containers of goods owned by MOS Beverages from Port Botany to the warehouse premises, the storage of goods under bond in the bonded section of the premises, the arrangement for payment of customs clearance fees into and out of bond, and the movement of bonded goods to the unbonded section of the premises upon payment of customs clearance fees by MOS Beverages.
5. In September 2017, CGU and Admiral entered into a policy of insurance. The policy was in the form of an Industrial Special Risks Insurance Policy (the Policy) and was modified by endorsements contained in a Policy Schedule. The policy period was from 4:00 pm on 30 September 2017 to 4:00 pm on 30 September 2018.

6. There was a fire at the warehouse premises of Admiral on 16 April 2018 and the loss, which is the subject of the claim by MOS Beverages, arose as a result of that fire. For the purposes of the determination of the separate question, the parties agreed that at the time of the fire, MOS Beverages had goods stored at the warehouse premises and that at least some of the goods that MOS Beverages had stored on the premises were destroyed in the fire. As the primary judge noted, the exact quantity and value of the goods owned by MOS Beverages which were destroyed in the fire would be determined at a later stage in the proceedings, should the separate question be answered in favour of MOS Beverages and should the parties not be able to reach agreement on the issue (at [7]).
7. The goods which MOS Beverages had stored at the warehouse premises at the time of the fire were not otherwise insured.
8. The primary judge noted that Admiral has sought indemnity from CGU under the Policy in relation to the damage caused by the fire and that that claim for indemnity is the subject of proceedings in the Supreme Court of New South Wales.
9. The parties filed a bundle of documents which they agreed constituted business records of Admiral. The primary judge's description of the documents was not in dispute and is as follows.
10. First, there was an email from the Managing Director of Admiral, Mr Fateev, to a Mr Kozinets dated 1 December 2015, which was described in the index to the bundle as "Admiral email to MOS re import quote". The contents of that email included a list of prices for various services, including "Bonded Storage" and "General Storage" which were both calculated at a price per pallet per week.
11. Secondly, there was a letter from Mr Fateev under the "Admiral International" letterhead dated 8 December 2015. The recipient of the letter is not identified. Nevertheless, the letter states the following:

Admiral International will accept customable goods on which duty has not been paid, on behalf of 'Mos Beverages Pty Ltd' (ACN: 609622380). We are prepared to accept goods under bond. We accept responsibility on receipt of the goods at our bonded premises, details which are listed below. Our company's standard procedures are suitable for recording under bond goods. We understand the provisions and requirements of section 61A of the [E]xcise Act 1901 and section 71E of the [Customs Act 1901](#).

12. Thirdly, there was a "Commercial Sublease Agreement" signed on 29 January 2016 in which Admiral purported to lease part of the warehouse premises to MOS Beverages for use as an office.
13. Fourthly, there were eight invoices from Admiral to MOS Beverages with dates ranging from 17 June 2016 to 1 March 2018, five "Customs/ATO Import records" of goods imported by MOS Beverages and delivered to the warehouse premises of Admiral with dates ranging from 15 June 2016 to 9 October 2017, and two statements of account from Admiral to MOS Beverages dated 9 January 2018 and 27 March 2018. The primary judge noted that each of the import records identifies the importer of the goods as MOS Beverages and the warehouse establishment as either "GH16H Admiral Bond — S79" or "GH16H Admiral International". The primary judge also noted that the import records note the vessel, voyage and date of import, and include an itemised list of imported goods with a description of the goods, and their quantity and value. The import records appear to correspond (in date and in the description of goods) to the invoices issued by Admiral to



MOS Beverages. The invoices also identify the vessel and voyage and several of the invoices contain charges for bond storage, with descriptions such as “Bond Storage (wine) 10 plts 1 week starts 13/03/17 — 19/03/17 (\$10.00 p/plt)”.

14. CGU conceded before the primary judge that the bundle of documents establishes that MOS Beverages was a customer of Admiral and, from time to time and in variable amounts, goods or products owned by MOS Beverages were kept at the warehouse premises of Admiral.

#### **THE PROVISIONS OF THE POLICY OF INSURANCE**

15. The “Insured” under the Policy is identified on page 1 of the Policy Schedule as follows:

Admiral International Pty Ltd, Admiral Corporate Group Trust and

- (a) subsidiary companies, organisations and other associated companies as defined under Section 50AAA of the Corporations Act 2001 (Commonwealth), and
- (b) social and sports clubs (including the committees and officers from time to time of unincorporated bodies) and the trustees of the Insured’s superannuation and pension funds and welfare organisations, and
- (c) all organisations and other entities to whom (whether mortgagees, lessors, joint ventures [sic: venturers] or other parties with a legal or equitable interest in the Property Insured) the named Insured has a responsibility to maintain insurance;

all for their respective interests, rights and liabilities and to the extent that they are not more specifically insured, but excluding none.

It was not contended by MOS Beverages that it fell within the definition of “Insured”.

16. The business of Admiral is defined on page 1 of the Policy Schedule to be “Principally: Customs and AQIS approved Depot FAK and FCL Packing, Unpacking Warehousing and Distribution Taxi Trucks and Hourly Hire AQIS approved wash bay, Licensed Bond Store, Project Shipping Management, Reefer Storage and any other activity incidental thereto”.
17. The indemnity in the material loss or damage section of the Policy, section 1, is in the following terms:

In the event of any physical loss, destruction or damage ... not otherwise excluded happening during the period of insurance at the Situation to the Property Insured described in Section 1 the Insurer(s) will, subject to the provisions of this Policy including the limitation on the Insurer(s) liability, indemnify the Insured in accordance with the applicable Basis of Settlement.

18. The “Property Insured”, also in section 1, of the Policy is defined to mean:

All tangible property both real and personal of every kind and description (except as hereinafter excluded) belonging to the Insured or for which the Insured is responsible, or has assumed responsibility to insure prior to the occurrence of any damage, including all

such property in which the Insured may acquire an insurable interest during the Period of Insurance.

19. Directly after section I of the Policy is a “Memoranda to Section I”. The first clause of the memoranda provides as follows:

#### **INTERESTS OF OTHER PARTIES**

The insurable interest of only those lessors, financiers, trustees, mortgagees, owners and all other parties specifically noted in the records of the Insured shall be automatically included without notification or specification; the nature and extent of such interest to be disclosed in event of damage.

Where the insurance covers the interest of more than one party, any act or neglect of an individual party will not prejudice the rights of the remaining party/parties; provided the remaining party/parties shall, immediately on becoming aware of any act or neglect whereby the risk of damage has increased, give notice in writing to the Insurer(s) and on demand pay such reasonable additional premium as the Insurer(s) may require.

20. The Policy Schedule contains a number of endorsements. On page 13 of the Policy Schedule, under the heading “SECONEH<sub>4</sub> SECTION I – MATERIAL LOSS OR DAMAGE” and sub-heading “PRPRTYH<sub>4</sub> *THE PROPERTY INSURED*”, are the following two endorsements:

#### **SALESXB<sub>4</sub> CUSTOMERS’ GOODS**

The policy extends to insure goods belonging to the Insured’s customers at the Premises, to the extent that such goods are not otherwise insured.

#### **PROPBXS<sub>4</sub> PROPERTY INSURED (B)**

The first paragraph of the definition of The Property Insured is amended to read:

“All tangible property both real and personal of every kind and description (except as hereinafter excluded) belonging to the Insured or for which the Insured is responsible, or has assumed responsibility to insure prior to the occurrence of any Damage, including all such property in which the Insured may acquire an insurable interest or for Damage to which the Insured becomes responsible or assumes responsibility to insure, after the commencement of the Period of Insurance”.

21. Page 13 of the Policy Schedule also contains an endorsement addressing liability for duty, under the sub-heading “INDEMIH<sub>4</sub> *THE INDEMNITY*”:

#### **LDUTYVB<sub>4</sub> LIABILITY FOR DUTY**

The policy extends to include the Insured’s liability for customs, excise and other duties that the Insured becomes liable to pay in the event of Damage to Property Insured.

22. The sub-limit for section I in respect of “Customers Goods” is stated in the Policy Schedule to be \$4,000,000. This sub-limit is significantly higher than the other sub-limits for section I of the

Policy, reflecting, as the primary judge said, the fact that as the operator of a bonded warehouse, customers' goods likely comprised a significant proportion of the property situated on Admiral's premises (PJ at [17]).

## THE LEGISLATIVE PROVISIONS

23. MOS Beverages is not a party to the Policy. However, the company claimed that it had a right to recover from CGU by reason of s 48(1) of the *Insurance Contracts Act 1984 (Cth)* (the Act) and having regard to the terms of the Policy. Section 48(1) of the Act is in the following terms:

A third party beneficiary under a contract of insurance has a right to recover from the insurer, in accordance with the contract, the amount of any loss suffered by the third party beneficiary even though the third party beneficiary is not a party to the contract.

24. The term "third party beneficiary" is defined in s 11 which is the interpretation section in the Act. The definition is as follows:

*third party beneficiary*, under a contract of insurance, means a person who is not a party to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends.

## THE REASONS OF THE PRIMARY JUDGE

25. The issue before the primary judge was largely one concerning the proper construction of the Policy. His Honour's statement of the relevant legal principles was not in dispute on the appeal. For present purposes, it is sufficient to refer to two authorities. In *McCann v Switzerland Insurance Australia Limited* [2000] HCA 65; (2000) 203 CLR 579, Gleeson CJ made the point (at [22]) that a policy of insurance is a commercial contract and should be given a businesslike interpretation. A commercial contract is to be interpreted by reference to the language used by the parties, the commercial circumstances which the document addresses and the objects it is intended to secure. The Court is to put itself in the position of a reasonable businessperson, and in considering the objects or commercial purpose, may consider the genesis of the transaction, the background, the context and the market in which the parties are operating. The construction exercise should be carried out with a view to avoiding commercial nonsense or a result which is commercially inconvenient (*Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 at [35] per French CJ, Hayne, Crennan JJ and Kiefel J, (as her Honour then was)).
26. The principal conclusions of the primary judge were as follows.
27. First, his Honour agreed with a number of observations made by Teague J in *Pacific Dunlop Limited v Maxitherm Boilers Proprietary Limited* [1996] VicSC 387; (1997) 9 ANZ Insurance Cases ¶61-357 (*Pacific Dunlop* at first instance) about the operation of an "Interests of Other Parties" clause. Adapted to the circumstances of this case, those observations were as follows: (1) the mere presence of the provision in the Policy makes it clear that the contracting insured intended that certain third parties were to be treated as third party beneficiaries; (2) the measure of protection which the provision was intended to provide was limited given that the Policy is essentially a policy of property insurance, and not of liability insurance; (3) the provision contains an automatic element. The word, "automatically" in the provision is reinforced by the words, "without notification or specification". The language "automatically included without notification or specification" indicates that the insurer was not concerned with the precise

identities of the other interested parties or the nature or extent of their insurable interests. The requirement is that they be specifically noted in the records of the insured; and (4) the second paragraph of the provision supports the intention of the parties to allow certain third parties to claim directly under the Policy in that it addresses the potential problem of how rights between the insurer, the contracting party and any potential claimant third party are to be adjusted (PJ at [33]).

28. Second, the primary judge said that the definition of “Property Insured” as amended by the endorsement meant that any property for which the insured was responsible, including as a bailee in possession, was insured under the Policy. The SALESXB4 endorsement extended the property insured under section I of the Policy to include all goods of Admiral’s customers, including MOS Beverages, which are stored at the premises to the extent that they are not otherwise insured. The combined effect of the definition of “Property Insured” and of the SALESXB4 endorsement is that a customer’s goods are insured to their full value, not just for the liability of Admiral to the customer as bailee and bailor (see *Waters v Monarch Fire and Life Assurance Co* (1856) 119 ER 705; (1856) 5 El & Bl 870 (*Waters v Monarch Fire and Life Assurance*)) (PJ at [36]).
29. Third, the primary judge said that the “Interests of Other Parties” clause further extends the protection given to Admiral’s customers by ensuring that they have a direct claim to indemnity from CGU providing the requirements of the clause are met (PJ at [36]).
30. Fourth, the primary judge said that MOS Beverages is a third party with a specific interest, being ownership in property insured under the Policy. That is an insurable interest. It is not a case where there is no more than mention of its name in the Policy; MOS Beverages is specifically identified in Admiral’s records in the context of it being a customer whose goods are stored at the premises (PJ at [38]).
31. Fifth, the primary judge said that the records of Admiral identify the nature of the insurable interest of MOS Beverages and the property in which it holds that insurable interest. It is not the case that the “Interests of Other Parties” clause requires that the insurable interest of the third parties needed to be recorded in a form that related it expressly to the Policy. A flexible approach accords with the language of the clause and with reasonable and practical business common sense. A broad and flexible approach should be taken having regard to the context of a bonded warehouse where goods owned by various customers are coming and going on a regular basis and the difficulties associated with keeping a schedule or register of insurable interests (PJ at [34] and [39]).
32. Sixth, the primary judge noted that the case of MOS Beverages is far removed from the examples of absurd results said by CGU to follow from a broad approach to the “Interests of Other Parties” clause (PJ at [40]).
33. Seventh, the primary judge considered that the submission that MOS Beverages could have taken out insurance over the goods did not advance CGU’s argument because it would exclude the operation of the SALESXB4 endorsement which would mean that even Admiral was prevented from making a claim in relation to the goods, unless the goods otherwise fell within the definition of “Property Insured” (PJ at [41]).
34. Finally, the primary judge said that although there was something to be said for MOS Beverages’ argument that it ought to succeed by reference to the provisions of the SALESXB4 endorsement

alone, the better view is that it clarifies the property that is covered under the Policy and should not be interpreted as excluding the requirement for the notation of third party interests (including customers' interests) in the records of Admiral, as required by the "Interests of Other Parties" clause. The primary judge noted that it was strictly unnecessary for him to decide the point.

## ANALYSIS

35. CGU advanced four arguments in support of its appeal. The arguments related to one or both construction issues concerning the "Interests of Other Parties" clause, namely, the meaning of the words "lessors, financiers, trustees, mortgages, owners and all other parties" and the meaning of the words "specifically noted". This second construction issue merges fairly readily into an issue of fact to be determined in the circumstances of the particular case.
36. CGU's first argument is that MOS Beverages does not fall within any of the classes described in the phrase "lessors, financiers, trustees, mortgagees, owners and all other parties". The submission is that a customer with goods kept in the warehouse premises does not fall within the clause because such a person or entity is neither a lessor, financier, trustee, mortgagee or, when read in context and having regard to the approach embodied in the ejusdem generis principle, an owner or other party. This must be done, so CGU submits, to avoid what would otherwise be absurd consequences resulting from a broad construction of the words.
37. The "absurd results" identified by CGU in its written submissions in the Court below were that the clause would otherwise cover property of a service provider such as Telstra or a photocopier owned by a third party and leased to Admiral and kept in an office in the warehouse premises.
38. In submissions to this Court, CGU repeated the first example and added the example of a visitor to the warehouse premises who dropped his mobile phone and thereby damaged it. The latter example can be put to one side immediately because it is not reasonably to be supposed that a visitor's ownership of his mobile phone would be noted in the records of Admiral.
39. CGU submitted that the clause was not intended to cover these examples and that, therefore, a limitation on what might otherwise appear to be the general words of the clause must be inferred or is implicit. The limitation suggested by CGU was that the clause would only apply where there is some degree of mutuality of interest between the insured and the "other party" and such mutuality would be present where the other party had an interest in the premises for which the insured conducts its business or has an interest in the business itself or in the property of the insured. As explained by counsel for CGU in submissions, a lessor within the clause may be a lessor of the premises or of an item of equipment in the premises and used in the course of the business such as a forklift. A mortgagee within the clause may have a security interest in the premises or in the insured's business. A financier within the clause might have an interest in items of plant and equipment and an owner may be the owner of the premises or of particular items of plant and equipment.
40. In the course of his submissions with respect to this first argument, counsel for CGU referred to the similarities between the class identified in the "Interests of Other Parties" clause and the class identified in paragraph (c) of the definition of "Insured". Although he referred to this, he was candid enough to say that he was not sure whether this was "helpful or unhelpful". We are unable to see how some degree of similarity between the two is of any significance in terms of the present issue.

41. Counsel for CGU sought to bolster the limitation CGU proposed by pointing out that the “Interests of Other Parties” clause uses the word “owners”, whereas the SALESXB<sub>4</sub> endorsement uses the words “customers’ goods” suggesting that “owners” means something different from “customers’ goods”. Counsel also argued that CGU’s interpretation is more workable than that of MOS Beverages because it is very easy to “specifically note” transactions such as leases and mortgages.
42. We reject CGU’s first argument. We find the reference to examples of what were said to be the absurd consequences of a broad interpretation confusing and unconvincing. In the end, we think they are a distraction. We also find the limitation suggested by CGU to be itself somewhat ambiguous and uncertain. As we read the primary judge’s reasons, his Honour did not attempt to resolve all issues that might arise about the proper construction of the clause. In our respectful opinion, his Honour was correct to take that approach. This case was not on the peripheral or near the outer boundaries of the scope of the clause. As his Honour noted, the examples given by CGU were far removed from the position of MOS Beverages as an owner of property insured under the Policy by reason of the SALESXB<sub>4</sub> endorsement and whose ownership of the property and, therefore, its insurable interest was noted in the records of Admiral. Further, it was a customer and the storage of its goods together with the goods of other customers was at the core of Admiral’s business as noted in the Policy Schedule.
43. CGU’s second argument is that the construction of the “Interests of Other Parties” clause advanced by MOS Beverages is not commercial from either its point of view as insurer or from the point of view of Admiral as contracting insured. It was submitted that from CGU’s point of view, the construction advanced by MOS Beverages would mean that it would be automatically covering indeterminate property without knowing whether it was, for example, dangerous or not. The short answer to this point (if we understand it correctly) is that that is, in any event, the effect of both the definition of “Property Insured” and the SALESXB<sub>4</sub> endorsement. The proposition that the bailee may insure the bailed goods to their full value is well established (see *Waters v Monarch Fire and Life Assurance* and Legh-Jones N, Birds J and Owen D, *MacGillivray on Insurance Law* (11th ed, Sweet & Maxwell, 2008) (*MacGillivray*) [1-173] to [1-176]). The same may be said of the argument put by CGU that Admiral received no benefit and was paying a hefty premium for someone else’s goods to be insured. Admiral does get a commercial benefit in that the effect of the definition of the “Property Insured” and the SALESXB<sub>4</sub> endorsement is that Admiral is insured in relation to its customers’ goods in any event, unless the customer has insured his or her own goods. As the authors of *McGillivray* note (at [1-175]):

It is obviously a matter of commercial importance to any person entrusted with the care of goods to be able in the event of loss to hand over their full value to the owner and so avoid any question of his own liability in respect of negligence or otherwise ...

44. CGU then argued that in terms of customers’ goods, the “Interests of Other Parties” clause provided no benefit to Admiral over and above the benefit provided by the SALESXB<sub>4</sub> endorsement. That argument must be rejected. It is of benefit to Admiral to be able to offer to its customers the protection of a direct right of indemnity.
45. CGU’s third argument overlaps with the point just addressed and is that there is no point to the SALESXB<sub>4</sub> endorsement if the “Interests of Other Parties” clause covers customers’ goods stored at the warehouse premises. The answer to that submission is that provided by the primary judge. The SALESXB<sub>4</sub> endorsement provides a basis for the contracting insured to recover the full value

of customers' goods, whereas the "Interests of Other Parties" clause provides a basis with s 48 of the Act for a third party to bring his or her own action against the insurer.

46. CGU's fourth argument is that MOS Beverages' insurable interest in the goods was not "specifically noted" in Admiral's records and, in that context, CGU relied on *Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd* [1998] 4 VR 559; (1997) 10 ANZ Insurance Cases ¶61393 (*Pacific Dunlop* on appeal). CGU described that case as a longstanding authority in its favour, although it acknowledged that the comments upon which it relies were obiter. It is not necessary to set out the facts of that case. The "Interests of Other Parties" clause in issue was in the following terms:

The insurable interest of Lessors, Financiers, Trustees, Mortgagees, Owners and all other parties as more specifically noted in the records of the Insured shall be automatically included without notification or specification, the nature and extent of such interest to be disclosed in the event of damage.

47. We have already referred to *Pacific Dunlop* at first instance and to certain observations made by Teague J. His Honour rejected a narrow construction of the clause such that "a record of the latter's interest which was something more than the usual records relating to the purchase of goods". His Honour rejected that argument and said at 76,95676,957:

I concluded that the construction which he proposed was inappropriate, essentially because it was too narrow when the whole of the provision was read together. The provision is framed in terms that suggest that the insurer was prepared to take a flexible rather than a fixed approach to recording and communication. That flexible approach, confirming the acceptance of minimal rather than maximal formality is particularly obvious in the use of the adverb "automatically", reinforced by the words "without notification or specification".

The provision refers to the records of the insured, but does not spell out a requirement that any register of interests of other special records be maintained. It seems to me that the absence of any words clearly requiring special records to be maintained, and the presence of words obviating the need for communication on a transaction by transaction basis ought to be treated as material. I accept that the use of the word "more" before "specifically noted" could be seen as an indication of something more than usual being called for. However, if it was intended that there should be something more, one would have thought that the provision would have included at least a basic indication of what was called for. I think that if it was contemplated as between the insurer and the contracting insured that there should be a heightened degree of formality applying as to transactions involving situations where there were different insurable interests, that should have been spelt out with greater particularity.

48. In obiter observations in *Pacific Dunlop* on appeal, Buchanan JA (with whom Ormiston JA agreed; Callaway JA expressing no opinion on the point) said at 74,180:

The parties accepted that the memorandum required "the insurable interest" rather than "the other parties" to be more specifically noted. More specific notation may require recording the interest in a form that relates it expressly to the insurance policy. It may not be sufficient that the interest of an owner is noted by the existence of documents of sale

such as quotations, purchase orders and invoices, from which the proprietary rights of the seller can be inferred. I need not decide the point, for in my opinion Maxitherm had no insurable interest to be noted.

49. As in *Pacific Dunlop*, the “Interests of Other Parties” clause in this case requires an insurable interest to be noted. Unlike *Pacific Dunlop* where the requirement was that the interest be *more* specifically noted, the requirement in this case is that it be specifically noted.
50. CGU submits that the mere mention of MOS Beverages in Admiral’s records is not sufficient to satisfy the “Interests of Other Parties” clause or s 48(1) of the Act. That is correct, but as the primary judge pointed out, there was a good deal more than that in this case. The finding was (as conceded by CGU) that the documents established that MOS Beverages was a customer of Admiral and from time to time, and in variable amounts, goods or products owned by MOS Beverages were kept at Admiral’s warehouse premises.
51. In *Pacific Dunlop* on appeal, Buchanan JA suggested that the insurable interest might need to be recorded in a form that relates it expressly to the insurance policy and that documents of sale from which ownership may be inferred may not be sufficient. His Honour did not decide the point, nor did he articulate the form which he considered would be sufficient or the reasons he was inclined to the view he expressed. It might be inferred that one form which his Honour considered would satisfy the clause is the creation of a register of interests for the purposes of the policy of insurance. That may involve a substantial exercise in the case of a bonded warehouse, although there was no precise evidence in this case about the turnover of goods at the premises. None of the above is intended to be critical of his Honour’s observations. He did not have to decide the point and he expressed himself provisionally.
52. In our opinion, the construction adopted by the primary judge is correct. If the parties had in mind a maintenance of a register, it would have been easy enough for them to have said so. More importantly, it is not apparent what purpose such a register would serve. The documents kept by Admiral in this case are likely to be as reliable, if not more reliable, than a register and the automatic nature of the cover means that formality is not required for the purposes of providing notice to the insurer. Furthermore, as Teague J pointed out in *Pacific Dunlop* at first instance, the extended cover is not made dependent on an activating process such as the completion of forms suggesting that the parties were prepared to take a broad and flexible approach.
53. We reject CGU’s fourth argument.

## CONCLUSION

54. All of the arguments advanced by CGU fail and, in those circumstances, the appeal must be dismissed with costs.

I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Besanko and McKerracher.

Associate:



Dated: 17 September 2021

## REASONS FOR JUDGMENT

DERRINGTON J:

### INTRODUCTION

55. The appellant insurer, Insurance Australia Ltd trading as CGU Insurance (CGU), appeals from a determination of the learned primary judge as to the construction of an Industrial Special Risks Insurance Policy (the policy) which it had issued to Admiral International Pty Ltd (Admiral), the operator of a bonded warehouse. The respondent, MOS Beverages Pty Ltd (MOS), was a stranger to the contract of insurance but claimed the “Interests of Other Parties” clause (the IOP clause) in the policy extended cover to its interests in its goods which were stored in the warehouse. This, so it says, afforded it an entitlement pursuant to s 48(1) of the *Insurance Contracts Act 1984 (Cth)* (ICA) to seek indemnity directly from CGU when those goods were destroyed in a fire. It persevered with this position whilst acknowledging that Admiral had not assumed any obligation to maintain insurance in respect of its interests. CGU does not deny that its policy provided cover to the named insured, Admiral, and that indemnity extended to Admiral’s interests as bailee or warehouseman of MOS’s goods. However, it denies that the IOP clause extends the benefit of cover under the policy to MOS such that s 48(1) of the ICA is engaged.
56. Despite the grounds on which the appeal was argued, there exists an alternative construction of the policy which supports the conclusion that the appeal should be allowed. It is that the IOP clause operates as a machinery provision to facilitate the extension of cover to the entities identified in paragraph (c) of the definition of “The Insured”, being those to whom the named insured has assumed a responsibility to maintain insurance. Business operators frequently enter into financial arrangements through which they acquire the use of or right to use goods without actually obtaining full ownership. Leases, hire-purchase agreements, mortgages, trust arrangements, and joint ventures are only some examples of arrangements by which plant and equipment is financed. Almost invariably the business operator is required to maintain insurance in respect of the counterpart’s insurable interest in the subject goods. Necessarily, such arrangements will be entered into from time to time with the attendant obligation to maintain insurance simultaneously arising. Such ubiquitous arrangements are accommodated in CGU’s policy by paragraph (c) of the definition of “The Insured” and the IOP clause. The former is ambulatory in nature and affords cover to the additional insureds (the financiers) as they emerge, whilst the latter removes the named insured’s obligation to notify the insurer of the increased risk so long as the additional insured and or their insurable interests are noted in its records. Neither of the parties to the appeal sought to propound that construction rendering it inappropriate to determine the matter on that basis. Nevertheless, it provides some light in which to evaluate the competing interpretations which were made.
57. For the reasons identified in this judgment, the appeal should be allowed. The construction propounded by MOS seeks to attribute to the IOP clause an unusually wide operation by

extending the policy's cover to a broad range of third parties. If accepted, it would, by an inferential side wind, render obsolete the parties' express agreement as to the scope of those entitled to indemnity by removing the limitation in paragraph (c) of the definition of "The Insured" that cover is extended to only those third parties to whom the named insured has assumed a responsibility to maintain insurance. Further, it renders the specific mention of particular categories of third parties in the IOP clause irrelevant, fails to attribute to the expressions "owners" and "customers" in the policy the different meanings which the parties seemingly intended, makes inutile the express extension of the insured's cover to its interests in its customers' goods which is a significant part of the policy, is not consistent with the existence of agreed policy limits and differential deductibles, and would result in an unbusinesslike operation of the policy.

58. It should be kept steadily in mind that it was not in dispute that the policy responded to Admiral's claim for its loss in respect of the destruction of MOS's goods stored at the warehouse. That is, its liability to MOS in respect of that loss. The issue was whether the policy extended "cover" to MOS in its own right, despite that entity not being within the wide scope of the definition of "The Insured". Although, in this light, the point might appear to be somewhat inconsequential, it has wider implications for the construction of policies of insurance of the nature under consideration. It can also be accepted that the existing authorities on IOP clauses are neither numerous nor unequivocal.

## **BACKGROUND**

59. The facts which gave rise to the dispute are not contentious and may be briefly stated as follows.
60. Admiral conducted the business of operating a bonded warehouse together with associated services in the suburb of Alexandria, Sydney, New South Wales.
61. MOS is an importer of alcoholic and non-alcoholic beverages into Australia. Since December 2015, it has stored its imported goods in varying quantities at Admiral's bonded warehouse. In the course of providing its services to MOS, Admiral would collect goods imported by MOS directly from Port Botany where they had been off-loaded from vessels, transport them to its warehouse, store them under bond in the bonded section of its premises, arrange for payment of customs clearance fees into and out of bond, and then move goods to the un-bonded section of the premises as required.

### **The policy**

62. In September 2017, CGU granted an Industrial Special Risks Insurance Policy, numbered 01R2096618, to Admiral. It is comprised of standard ISR terms together with substantial endorsements or extensions. The policy period was from 4:00pm on 30 September 2017 to 4:00pm on 30 September 2018.
63. "The Insured" identified in the policy schedule was stated in the following terms:

Admiral International Pty Ltd, Admiral Corporate Group Trust

and

- (a) subsidiary companies, organisations and other associated companies as defined under Section 50AAA of the Corporations Act 2001 (Commonwealth), and
- (b) social and sports clubs (including the committees and officers from time to time of unincorporated bodies) and the trustees of the Insured's superannuation and pension funds and welfare organisations, and
- (c) all organisations and other entities to whom (whether mortgagees, lessors, joint ventures [sic: venturers] or other parties with a legal or equitable interest in the Property Insured) the named Insured has a responsibility to maintain insurance;

all for their respective interests, rights and liabilities and to the extent that they are not more specifically insured, but excluding none

64. It is useful here to observe the extended scope of the policy's express definition of the "Insured". "Admiral International Pty Ltd" and "Admiral Corporate Group Trust" are the "named Insured[s]" and presumably the parties to the contract insurance. (It is not clear whether "Admiral Corporate Group Trust" refers to a distinct legal entity and, for convenience, these reasons hereinafter refer to a singular "named insured"). The policy also extends the indemnity to a range of additional entities as "Insureds". They include, by paragraph (a), entities which are broadly within the corporate group of the named insured and, by paragraph (b), organisations of or associated with the previously identified insureds. Paragraph (c) further expands the scope of the "Insureds" to additional organisations or entities who have an interest in the property insured by the policy, but only where the named insured has a responsibility to maintain insurance in respect of the organisation or entity. As will be apparent, this limitation, based upon the named insured having a responsibility to maintain insurance, is replicated in the definition of the "Property Insured".

65. The insuring clause under the Material Loss or Damage part of the policy provides as follows:

In the event of any physical loss, destruction or damage ... not otherwise excluded happening during the period of insurance at the Situation to the Property Insured described in Section I the Insurer(s) will, subject to the provisions of this Policy including the limitation on the Insurer(s) [sic] liability, indemnify the Insured in accordance with the applicable Basis of Settlement.

66. Any entity falling within the description of the "Insured" is accorded the benefit of the indemnity granted by the insuring clause. *Prima facie*, each "Insured" is a person "to whom the benefit of the insurance cover provided by the contract extends" and may claim upon the policy directly against CGU as a "third party beneficiary" pursuant to s 48 of the ICA, despite not being a party to the contract of insurance. As was mentioned above, MOS acknowledges that it is not entitled to claim as an "Insured".

67. Where the relevant loss or damage occurs in relation to the property interests of an entity, being either the named insured or within the expanded description of the "Insured", the insurer will provide indemnity in relation to that loss or damage in accordance with the policy. However, as the insuring clause makes clear, the cover is given only to loss or damage to property which is

within the scope of the expression “Property Insured” and where the loss or damage occurs at the insured “Situation”. The cover is otherwise subject to the provisions of the policy.

68. The endorsements to the policy amended the definition of “Property Insured” contained in the standard terms and conditions to the following:

**PROPBXS4 PROPERTY INSURED (B)**

The first paragraph of the definition of The Property Insured is amended to read:

All tangible property both real and personal of every kind and description (except as hereinafter excluded) belonging to the Insured or for which the Insured is responsible, or has assumed responsibility to insure prior to the occurrence of any Damage, including all such property in which the Insured may acquire an insurable interest or for Damage to which the Insured becomes responsible or assumes responsibility to insure, after the commencement of the Period of Insurance.

69. It is apt to note that, consistent with the limitation of insured entities to the named insureds and other parties with an interest in the insured property to whom the named insured has a responsibility to maintain insurance, the definition of “Property Insured” is similarly limited. Relevantly, it includes all property “belonging to the Insured” and “for which the Insured ... has assumed responsibility to insure prior to the occurrence of damage”. This includes “all such property in which the Insured may acquire an insurable interest or for Damage to which the Insured ... assumes responsibility to insure, after the commencement of the Period of Insurance”. This is totally consistent with the notion that, apart from Admiral’s cover for its own property or that of related organisations or entities, the only added insureds are those for whom it has promised to maintain insurance.
70. There is a further category of “Property Insured”, being “property ... for which the Insured is responsible”. CGU’s written submissions advanced a construction of those words as referring to property for which the named insured has a responsibility to insure. As this does not materially affect the real issues on appeal, it is strictly unnecessary to decide this point. However, when read in context, it is apparent that the words refer to property for which Admiral is merely responsible. If CGU’s construction were to be accepted, in addition to the category of property for which Admiral has assumed responsibility to insure, there would be a practically identical category of property for which it is responsible to insure.
71. It is also convenient to observe at this point the regular use of the term, “Insured”, in the policy where it is apparent from the context that a reference to the “named insured” only is intended. This was a common issue. For example, the definition of the “Property Insured” refers to property “for which the Insured ... has assumed responsibility to insure”. Even acknowledging the limitations in the insuring clause, the definition is only sensible and workable where the references to the “Insured” are read as references to the “named Insured”.
72. Immediately following Section I of the policy is a section entitled “Memoranda to Section I”, the chapeau to which reads:

Except to the extent to which this Policy is hereby modified under the following Memoranda, the terms, Conditions and limitations of this Policy shall apply.

73. The first clause of the Memoranda provides:

**INTERESTS OF OTHER PARTIES**

The insurable interests of only those lessors, financiers, trustees, mortgagees, owners and all other parties specifically noted in the records of the Insured shall be automatically included without notification or specification; the nature and extent of such interest to be disclosed in event of damage.

Where the insurance covers the interest [sic] of more than one party, any act or neglect of an individual party will not prejudice the rights of the remaining party/parties; provided the remaining party/parties shall, immediately on becoming aware of any act or neglect whereby the risk of damage has increased, give notice in writing to the Insurer(s) and on demand pay such reasonable additional premium as the Insurer(s) may require.

74. A number of extensions and endorsements were contained in the policy schedule under the heading, "SECONEH<sub>4</sub> SECTION I – MATERIAL LOSS OR DAMAGE", and sub-heading, "PRPRTYH<sub>4</sub> THE PROPERTY INSURED". One such extension was:

**SALESXB<sub>4</sub> CUSTOMERS' GOODS**

The policy extends to insure goods belonging to the Insured's customers at the Premises, to the extent that such goods are not otherwise insured.

75. This clause is obviously directed to the cover provided to the named insured and its interests in its customers' goods. It cannot be a reference to the customers' interests because it refers to the "Insured's customers", implying that the named insured is the party who is holding the goods for its customers. Putting aside the proper construction of the IOP clause, the "SALESXB<sub>4</sub> Customers' Goods" does not operate to enable Admiral's customers to claim under the policy. They do, however, obtain derivative protection by Admiral's cover in respect of its responsibility to its customers. In the event they suffer loss, they may recover from Admiral, subject to any limitations in the terms upon which their goods are held. Admiral may, in turn, claim upon the policy in respect of its liability for the customers' losses.

76. The policy schedule also contained an endorsement addressing liability for duty which read:

**LDUTYVB<sub>4</sub> LIABILITY FOR DUTY**

The policy extends to include the Insured's liability for customs, excise and other duties that the Insured becomes liable to pay in the event of Damage to Property Insured.

77. The policy schedule identified relevant "Declared Values (in accordance with the Basis of Settlement)". Under that heading, the following appeared:

**Section I – Material Loss or Damage**

Buildings	Not Insured
Contents (other than stock)	\$150,000

Stock	\$4,000,000
Section I Total	\$4,150,000

78. Under the heading of “Sub-Limit(s) of Liability (100%)”, the following was stated:

The liability of the Insurer(s) shall be further limited in respect of any one loss or series of losses arising out of any one event at any one Situation as set out hereunder and it is understood and agreed that such Sub-Limit(s) shall not increase the liability of the Insurer (s) beyond the Limit(s) of Liability expressed above. The Sub-limits of Liability apply in excess of any applicable Deductible.

Loss or destruction of or damage by/to:

**Section I – Material Loss or Damage**

...

Customers [sic] Goods	\$4,000,000
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...

Works of Art, Antiques & Curios	\$50,000
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...

Theft of Property in Open Air	\$25,000
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...

Money	\$10,000
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Property in the Open Air (Storm)	\$25,000
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Fusion	\$25,000
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79. The policy schedule identified Admiral’s “business” as being:

Principally:

Customs and AQIS approved Depot FAK and FCL Packing, Unpacking Warehousing and Distribution Taxi Trucks and Hourly Hire AQIS approved wash bay, Licensed Bond Store, Project Shipping Management, Reefer Storage

and any other activity incidental thereto

80. It also identified the following under the heading “The Situation and/or Premises”:

Principally:

Unit I 64-66 Burrows Road ALEXANDRIA NSW 2015

and any other situation/premises in Australia owned or occupied by the Insured for the purposes of the Business or elsewhere in Australia where used by the Insured or where the Insured is undertaking work or has good or property (including where goods or property are stored, or undergoing processing, repairs, maintenance, overhaul or improvements).

## The Loss

81. Pursuant to the statement of agreed facts before the primary judge, goods belonging to MOS were stored at Admiral's warehouse premises when, on 16 April 2018, a fire broke out. The fire destroyed at least some of MOS's goods which, it was agreed, were not otherwise insured.
82. MOS sought indemnity from CGU under the policy in respect of the losses which it had sustained consequent upon the damage to its goods. In doing so, it claimed to be a "third party beneficiary" to the insurance contract under s 48(1) of the ICA.
83. CGU declined indemnity and MOS commenced the present proceedings.
84. As is noted in the primary judge's reasons (at [9]), Admiral has also sought indemnity from CGU for the damage sustained in the fire. That claim is the subject of litigation in the Supreme Court of New South Wales and, on the material before the Court, is not yet resolved.

## The proceedings in this Court

85. The proceedings in this Court proceeded before the primary judge by way of a separate question and, following a hearing, his Honour made a declaration in the following terms:

Upon the proper construction of the Industrial Special Risks policy issued by [CGU] to Admiral International Pty Ltd, [MOS] is entitled to an indemnity from [CGU] under s 48(1) of the *Insurance Contracts Act 1984 (Cth)* by reason of [MOS] being sufficiently noted in the records of Admiral International Pty Ltd in accordance with the clause titled "Interests of Other Parties".

## The decision of the primary judge

86. It is necessary to acknowledge the limited scope of the dispute before the learned primary judge. The parties had proceeded on the basis that an entity within the operation of the IOP clause was a "third party beneficiary" for the purposes of ss 11 and 48 of the ICA. It was also common ground that it was a third party's "insurable interest", rather than its identity, which must be "specifically noted" in order to attract the operation of the IOP clause. What was relevantly in dispute was the nature of the requirement that an insurable interest be "specifically noted" in the records of the named insured and whether the notation of MOS's insurable interest in Admiral's records met that requirement.
87. There is no need to assay the reasons of the learned primary judge in relation to those issues in any great detail at this point. It is sufficient to observe that his Honour found that the IOP clause did not require the insurable interest of a third party to be recorded in a form that related it expressly to the policy. In that regard, his Honour followed the approach of Teague J in relation to a similarly worded clause in *Pacific Dunlop Limited v Maxitherm Boilers Pty Ltd* (1997) 9 ANZ Insurance Cases ¶61-357 (*Pacific Dunlop v Maxitherm Boilers*). That approach was to the effect that the clause endorses a flexible rather than a fixed approach to the recording and notification of additional interests which were to be insured by the policy and that no formal recording or register of interests was required. This approach is encapsulated in the following passage of the primary judge's reasons (at [35]):

In my view, a reasonable businessperson would have understood the terms of the “Interests of Other Parties” clause to mean that owners of property insured under the Policy would have a direct avenue to claim against CGU, **provided that their insurable interest was noted in the records of Admiral in some acceptable businesslike way**, prior to the loss being sustained. ...

(Emphasis added).

88. It is clear from that passage that the learned primary judge accepted MOS’s submission that it was an “owner” for the purposes of the IOP clause. This was apparently not contentious below.
89. The reasons of the learned primary judge do not elaborate upon the requirement of notation “in some acceptable businesslike way”. His Honour’s reasons do record (at [27]) that CGU had conceded that Admiral’s records established that “[MOS] was a customer of Admiral and from time to time and in variable amounts, goods or products owned by [MOS] were kept at Admiral’s warehouse premises.” His Honour later held (at [38]) that MOS’s ownership interest was specific and (at [39]) that Admiral’s records “identify the nature of [MOS’s] insurable interest and the property in which [MOS’s] insurable interest vests.” MOS’s insurable interest had therefore been “specifically noted” in Admiral’s records for the purposes of the IOP clause.
90. His Honour summarised the operation of the policy in relation to Admiral’s customers as follows (at [36]):

**The definition of “Property Insured”, as amended by the endorsement, meant that any property for which Admiral was responsible was insured under the Policy. This included property which Admiral took into its possession as bailee. The SALESXB4 endorsement extended the property insured under section I of the Policy to include all goods of Admiral’s customers (including MOS Beverages) which were stored on the premises, to the extent they were not otherwise insured. These clauses together have the effect of insuring customers’ goods for their full value, not just for the liability of Admiral to the customer as bailee and bailor: see *Waters v Monarch Fire and Life Assurance Co* (1856) 119 ER 705; 5 El & Bl 870; *Maurice v Goldsbrough Mort & Co Ltd* [1939] AC 452; 3 All ER 63; *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451; 1 All ER 418; and *Darlington Commodities Ltd v Gibbs* (1982) 2 ANZ Insurance Cases ¶60-486. The “Interests of Other Parties” clause further extends the protection afforded to Admiral’s customers by ensuring that they have a direct claim to indemnity from CGU (provided that the requirements in the clause are satisfied and the goods are not otherwise insured).**

(Emphasis added).

91. The extension of the benefit of the policy to Admiral’s customers effected by the IOP clause, his Honour earlier observed, made commercial sense where the named insured operated a bonded warehouse and customers’ goods would come and go on a regular basis: at [34].
92. The remaining issue at first instance was whether MOS was a “third party beneficiary” for the purposes of ss 11 and 48 of the ICA by reason of the SALESXB4 extension alone. In view of the earlier conclusions, his Honour observed that it was strictly unnecessary to decide this issue and did not do so. Nevertheless, he observed that the better view was that the extension merely clarifies the scope of the “Property Insured” rather than obviating the requirement in the IOP clause that third party interests be “specific noted”. This was not an issue pursued on appeal.



## Statutory provisions

93. There are two sections of the ICA which relate to the issues on appeal, being s 48(1) and the definition of “third party beneficiary” in s 11.
94. Section 48(1) provides:

### 48 Contracts of general insurance—entitlements of third party beneficiaries

- (1) A third party beneficiary under a contract of general insurance has a right to recover from the insurer, in accordance with the contract, the amount of any loss suffered by the third party beneficiary even though the third party beneficiary is not a party to the contract.

95. The expression “third party beneficiary” is defined as follows in s 11:

*third party beneficiary*, under a contract of insurance, means a person who is not a party to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends.

## CONSIDERATION

96. The issues raised on appeal focussed upon the proper construction of the IOP clause and whether it applied to extend cover to MOS in the present case. In particular, CGU contended that MOS’s insurable interest was not sufficiently identified to attract the operation of the IOP clause and, accordingly, it was not a person to whom the benefit of the cover extended for the purposes of ss 11 and 48 of the ICA. Although not advanced before the primary judge, CGU also contended that MOS was not an “owner” for the purposes of the IOP clause.

## General principles of interpretation of policies of insurance

97. The general principles of construction of policies of insurance were lucidly identified by the learned primary judge in his reasons and there is no need to restate them here. Similar observations were made in *Onley v Catlin Syndicate Ltd as Underwriting Member of Lloyd’s Syndicate* (2018) 360 ALR 92 where the Full Court emphasised that, in the process of the construction of insurance policies, it is important to keep their commercial essentiality steadily in mind. It summarised the proper approach to construction as follows (at 100 – 101 [33]):

The Applicants’ arguments before this Court concern the interpretation of the Advancement Extension in the context of the policy and, to some degree, the existence of an implication preventing the insurer from exercising its entitlements under s 28. Such arguments call for the application of the well-established principles concerning the construction of policies of insurance as commercial contracts. Those principles were not in dispute between the parties. Necessarily, a policy of insurance is assumed to be an agreement which the parties intend to produce a commercial result: *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* (2014) 251 CLR 640; 306 ALR 25; [2014] HCA 7 at [35]; as such, it ought to be given a businesslike interpretation being the construction which a reasonable business person would give to it: *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 343 ALR 58; [2017] HCA 12 (*Ecosse Property Holdings*)

at [17] ; *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85; 339 ALR 200; [2016] HCA 47 at [78] ; *Todd v Alterra at Lloyd's Ltd (on behalf of underwriting members of Syndicate 1400)* (2016) 239 FCR 12; 330 ALR 454; 112 ACSR 1; [2016] FCAFC 15 at [42] ; *Weir Services Australia Pty Ltd v AXA Corporate Solutions Assurance* [2018] NSWCA 100 at [52] . The contract is naturally enough interpreted, in a temporal sense, as at the date on which it was entered into: *Ecosse Property Holdings* at [16] per Kiefel, Bell and Gordon JJ; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; 325 ALR 188; [2015] HCA 37 ( *Mount Bruce Mining* ) at [47] ; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; 211 ALR 342; [2004] HCA 52 at [40] . The Courts frequently have regard to the contextual framework in which a contract is formed, to the extent to which it is known by both parties, to assist in identifying its purpose and commercial objective: *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579; 176 ALR 711; [2000] HCA 65 per Gleeson CJ at [22] ; *Mount Bruce Mining* at [47] ; *Franklins Pty Ltd v Metcash Ltd* (2009) 76 NSWLR 603; 264 ALR 15; [2009] NSWCA 407 per Allsop P at [19] . It goes without saying that a construction that avoids capricious, unreasonable, inconvenient or unjust consequences, is to be preferred where the words of the agreement permit.

98. However, the necessity of keeping in mind the overarching understanding that policies of insurance are commercial agreements and should be construed as such is not to deny the applicability of the standard norms and processes for the construction of instruments. Nor does it authorise an approach which seeks to identify some ambiguity and utilise that as a gateway to according the document an operation which is said to conform to the Court's opinion of what advances some perceived commercial purpose. Ultimately, the application of a businesslike construction involves ascertaining what a reasonable business person would understand the words in issue to mean: *Electricity Generation Corp v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 – 657 [35] ; and so the actual words used maintain their centrality in the process of interpretation. See also the recent comments in *Liberty Mutual Insurance Company Australian Branch t/as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126 [152] .
99. Here, the process urged upon the Court by MOS was one which sought to diminish the relevance of the words used in favour of an attempt to discern what it said was a commercial operation of the policy. Whilst construing a policy of insurance to have a commercial or businesslike operation is always appropriate in cases of ambiguity, weight needs to be given to the words which the parties have agreed to use to create and record their bargain. In all cases, the interpretation of contracts, policies and agreements should commence with the words used so as to identify the manner in which the parties' agreement has been expressed. In the attempt to attribute meaning to particular words or clauses, it is necessary to consider the context in which they appear, including the location of the words or clause in the agreement as a whole.

#### *Context and coherency in the construction of agreements*

100. Whilst regularly expressed as “trite law”, it remains undoubted that the duty of a court when construing a document is to discover its meaning by considering it “as a whole”: *Australian Broadcasting Commission v Australasian Performing Rights Association Ltd* (1973) 129 CLR 99 at 109. However obvious that might appear to be, the application of the principle is significantly more complex. It can now be said to include the following facets:
- (1) The assumption underpinning the requirement that contracts are to be interpreted in their context and as a whole is that they have been drafted with an inherent logic,

rationality and coherence. That is especially applicable to many documents such as policies of insurance, commercial contracts, bank mortgages and other securities which, *ex facie*, exhibit those characteristics. Conversely, there are many other agreements where, due to an obvious paucity in their drafting, the same assumption can be quickly dispelled. In that latter case, the principle might not be applied with the same rigour.

- (2) One rationale for construing a document as a whole is that “any one part of it may be revealed by other parts” with the consequence that “the words of every clause must if possible be construed so as to render them all harmonious one with another”: *Australian Broadcasting Commission v Australasian Performing Rights Association Ltd* at 109. Necessarily, preference is given to “a construction supplying a congruent operation to the various components of the whole”: *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at 529 [16]; *Metropolitan Gas Co v Federated Gas Employees’ Industrial Union* (1925) 35 CLR 449 at 455. This reasoning evolves from the maxim, *ex antecedentibus et consequentibus fit optima interpretatio*, or “the preferable interpretation is to be obtained by a consideration of what goes before and what follows”.
- (3) Reading a contract as a whole also requires according due weight to its nature and object: *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510; as well as its “purpose” to the extent to which that is different from object: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [46].
- (4) The requirement to interpret a contract in context may necessitate reference to “any contract, document or statutory provision referred to in the text of the contract”: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* at 116 [46]; Heydon JD, *Heydon on Contract* (Thomson Reuters, 2019) [8.590], [8.1520]. It may also require reference to agreements which are entered into between parties other than those to the agreement being construed: *McVeigh v National Australia Bank Ltd* (2000) 278 ALR 429 at 451 [77]; *Quintis Ltd v Certain Underwriters at Lloyd’s London* (2021) 385 ALR 639 at 650 – 651 [35]; *KC Australia LNG Pty Ltd v CH2M Hill Co Ltd* [2020] WASCA 112 [80].
- (5) The practical application of the principle that an agreement is to be construed as a whole requires, fundamentally, the undertaking of an “iterative process” — “checking each of the rival meanings against the other provisions of the document and investigating its commercial consequences”: *HP Mercantile Pty Ltd v Hartnett* [2016] NSWCA 342 [134]; *Re Sigma Finance Corp (in administrative receivership)* [2010] 1 All ER 571 at 582 [12]; *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at 2911 [28]; *Richmond v Moore Stephens Adelaide Pty Ltd* [2015] SASCFC 147 [98]. As Leeming JA said in *HP Mercantile Pty Ltd v Hartnett* (at [134]):

The process of working through the consequences of the competing literal or grammatical meanings enables a court to assess whether either party’s preferred legal meaning gives rise to a result that is more or less internally consistent and avoids commercial absurdity.

- (6) The iterative process which seeks to produce a harmonious operation of a document gives rise to a range of subsidiary principles, including that every word of an agreement should be given effect such that courts will strain against an

interpretation that a particular clause is rendered nugatory, redundant or unnecessary; that words used more than once in the same agreement will have the same meaning: but see *Robbins v Federal Commissioner of Taxation* (1974) 129 CLR 332 at 339; and that different words are intended to have different meanings.

- (7) A number of interpretive techniques have been developed which assist in achieving coherency in the construction of an agreement as a whole. First, it is possible to construe provisions which at first appear to be inconsistent as, in fact, an instance of one provision qualifying another. Second, assuming that some provisions (specific) take precedence over others (general). Third, when necessary, adopting a robust construction including a rejection of repugnant clauses, the elision of words, or the transposing, modifying or correcting parts of the agreement. That said, the extent to which the English principle of “corrective interpretation” exists in Australia (as distinct from the doctrine of rectification) may not yet be settled: Leeming JA in *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633 at 661 [117] – [118].
- (8) The interpretive obligation to read an instrument as a whole and its provisions in context is supported by maxims of construction which, although not rules of law, guide the process in appropriate cases. They include *noscitur a sociis* meaning, “known by its associates”; the *ejusdem generis* principle; *generalia specialibus non derogant*, roughly translated as meaning that general words do not derogate from special words; and *expressum facit cessare tacitum* meaning, “what has been expressed causes to cease that which is implied”, amongst others.

101. It is appropriate to observe in relation to this latter point that the perceived import of constructional maxims has vacillated in the past 75 years, if not longer. The opposing views as to their relevance are discussed in *Heydon on Contract* [8.720] – [8.730]. The learned author, quoting Herzfeld P, Prince T and Tully S, *Interpretation and Use of Legal Sources* (2nd ed, Thomson Reuters, 2013) [25.3.320], states (at [8.740]):

What is more, correctly analysed, the reasoning underlying the maxims often does possess strength. The maxims are based on linguistic, grammatical and contextual considerations. As three learned authors have observed:

Many are applications of the principle that documents should be construed as a whole. In the modern interpretative scheme they can be understood as reflecting a working hypothesis as to the reasoning process employed by a reasonable person faced with the task of determining the meaning of a document. They are not rules of law and cannot be applied unthinkingly or mechanically.

(Footnotes omitted).

### **The context of the policy in this case**

102. In the present case, the document being construed is a policy of insurance granted in favour of Admiral in relation to its business of operating a bonded warehouse. As the primary judge observed, a necessary concomitant of Admiral’s business is that it will have possession and control of the goods of its customers. In that context, the existence of the endorsement, “SALESXB4 Customers’ Goods”, which extends cover to the named insured in respect of its

interests in goods belonging to its customers at the insured Premises is unsurprising. It was not in issue that this clause had the consequence of entitling Admiral, pursuant to its indemnity, to recover the value of its customers' goods which are lost or damaged whilst stored at the bonded warehouse: *Maurice v Goldsborough Mort & Co* [1939] AC 452 at 462 – 463; although it could not retain greater than its interest in the goods and is required to account to them (or any other person bearing the loss) for any amount which it receives in excess of its loss: *Ramco (UK) Ltd v International Insurance Co of Hanover* [2004] EWCA Civ 675; All ER (D) 406 [7] (*Ramco v IICH*). This is supported by reference to the terms of the definition “Property Insured” which refers to the “property ... for which the insured is responsible” and is consistent with the indemnity extending to include goods in Admiral’s possession as bailee, being for its liability for their loss and not for the goods themselves: *The North British and Mercantile Insurance Co v Moffatt* (1871) LR 7 CP 25. This anomalous, albeit commercially convenient, form of cover for warehousemen and bailees is historically well-established: *Waters v Monarch Fire & Life Assurance Co* (1856) 5 E & B 870; [1843-60] All ER Rep 654; *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451; and regarded as being too old to overrule: *Ramco v IICH* [32]. The point was concisely stated by Derrington J in *AMEV Finance Ltd v Mercantile Mutual Insurance Ltd* [1988] 1 Qd R 487 at 494 :

There was a further argument relating to a principle expounded in *Maurice v. Goldsborough Mort and Co. Ltd* (1939) 61 C.L.R. 367 and *Hepburn v. A. Tomlinson (Hauliers) Ltd* [1966] A.C. 451. That principle is to the effect that when a bailee of goods insures the goods solely in his own name for their full amount, he is entitled to recover from the insurer the full indemnity for any loss to the goods, and that right to indemnity is not limited by the fact that he is not the owner of the goods but only a bailee. He is entitled to recover indemnity in respect of the bailor’s insurable interest in the goods as well. That is very appropriate in that class of case. It is a clear rule that has stood for many years and there is no doubt as to its validity although it constitutes a theoretical anomaly to the general doctrine. ....

### **MOS was not an “Insured”**

103. It was not contended that MOS was within the meaning of the “Insured” as that expression is defined by the terms of the policy and no claim was advanced on that basis. In particular, it was not suggested that it was within paragraph (c) of the definition; being an entity to whom Admiral had a responsibility to maintain insurance.

### **The Interests of Other Parties clause**

104. As is mentioned above, the primary judge concluded that the IOP clause had the consequence that MOS was a “third party beneficiary” under the policy because it came within the term “owners” and its insurable interest was “specifically noted” in Admiral’s records. As such, it was an entity to whom the benefit of the insurance cover provided by the policy extended and it was therefore entitled to rely upon s 48 of the ICA and claim directly against CGU. Although the IOP clause is set out above, it is convenient to restate the terms of its first paragraph here:

The insurable interests of only those lessors, financiers, trustees, mortgagees, owners and all other parties specifically noted in the records of the Insured shall be automatically included without notification or specification; the nature and extent of such interest to be disclosed in event of damage.

### **A preferred construction**

105. The parties' submissions as to the proper construction of the IOP clause assumed that if MOS was an "owner" and its insurable interests were adequately noted in Admiral's records, s 48 of the ICA operated to give it an entitlement to make a claim to CGU. There is, however, a preferred construction of the policy which accords that clause a sensible and appropriate operation but does not rest upon that assumption. On this alternative construction, it is the definition of the "Insured" which defines the scope of the entities to whom the benefit of the insurance cover in the policy extends whether or not they are parties to the contract. The IOP clause operates concordantly with paragraph (c) of that definition to ensure that the interests of certain third parties, to whom a named insured has assumed a responsibility to maintain insurance, are automatically covered without the need for notification to the insurer. However, it does not, itself, extend the benefit of the cover to third parties.
106. As this alternative construction was not the subject of submissions by the parties, it would be inappropriate to decide the appeal on that basis. However, given the prevalence of the IOP clause as a standard term in ISR policies, it is appropriate to identify this alternative construction, lest it be thought that there is unequivocal approval of the basis upon which the parties advanced their submissions. This is all the more appropriate where commercial certainty might be said to necessitate the continued adoption of a construction based upon the assumption that a similarly worded "Interests of Other Parties" clause is sufficient to attract the operation of s 48 of the ICA: see generally *Heydon on Contract* [8.960] – [8.990].

*Expressum facit cessare tacitum*

107. It is important to appreciate that the parties' submissions, and especially those of MOS, proceeded upon the assumption that, although the definition of the "Insured" expressly articulated the scope of entities to be so described, the IOP clause ought to be construed as impliedly intended to further expand the scope of those entities. That is the reverse of the usual approach to contractual interpretation.
108. Under the heading, "The Insured", the policy provides, in clear terms, the scope of the entities to be accorded a right of indemnity under it as insureds. They are the named insured, entities specifically associated with it, and, by paragraph (c), others to whom the named insured has a responsibility to maintain insurance. The cover is expressed to be provided in relation to their respective interests, rights and liabilities.
109. There is no reason to suppose that the parties to the contract of insurance, having gone to some lengths to stipulate the identity of the classes of insureds, intended to expand them by a later clause dealing with insurable interests. It is wholly inconsistent with the intent of the definition of the "Insured" to widen it by implication to cover a much wider range of persons, possibly including everyone who has a loss through the risk. In this respect, the common sense maxim *expressum facit cessare tacitum* would seemingly apply with some force. As to that canon construction, Ormiston J in *Biki v Chessells* [2004] VSCA 70 said (at [26]):

A moment's thought will show that such an approach to construction of contracts and other instruments is not only common, but frequently resorted to when considering the implication of terms or rights. It is simply a wider form of inconsistency, namely one based on the common sense precept that, if parties explicitly provide for the giving of rights in a

stated way, it is unlikely that they have intended to subject themselves by implication to some regime of rights and duties of a similar kind which goes beyond the terms upon which they have agreed.

110. More generally, it is inappropriate to imply or infer some wider agreement on a topic to which the parties have otherwise specifically turned their mind: see Lewison K, *The Interpretation of Contracts* (6th ed, Sweet & Maxwell, 2020) [7.61] – [7.65]. The learned author refers (at [7.64]) to the decision in *Fraser Turner Ltd v PriceWaterhouseCoopers LLP* [2019] EWCA Civ 1290, where Vos C (with whom Males LJ and Snowden J agreed) relied upon the observations of the trial judge that there was:

no absolute rule that, if there is an express term covering a particular subject, that necessarily excludes the possibility of any implied term where there is no linguistic inconsistency. Rather, the correct approach, reflecting common sense, is that the existence of such an express term makes the co-existence of a further implied term on the same subject unlikely and especially so in a lengthy and carefully drafted document on which legal professionals have been advising.

111. Here, as is discussed below, MOS submitted that the IOP clause extended the scope of those insured by the policy, and therefore entitled to claim upon CGU, to any entity whose insurable interests in property at the insured Situation were noted in the records of the named insured. However, one must ask why the clause should be so construed when the scope of the insureds has been specified by the express definition. If it were intended that such additional entities were to be entitled to rely upon the indemnity, surely it would be appropriate to reference them in that part of the policy expressly dealing with that topic. In effect, the consequence of MOS's proposed construction is to render paragraph (c) of the definition of the "Insured" obsolete. Provided its insurable interest is sufficiently noted in the records of the named insured, any entity whose goods are at the insured Situation would be indemnified, regardless of whether the named insured has a responsibility to maintain insurance for them. As such, that construction renders the latter requirement entirely redundant. For this reason alone, the IOP clause ought not to be read as expanding the scope of the insureds under the policy.

#### *The coordinate operation of paragraph (c) and the IOP clause*

112. The better interpretation is that the IOP clause operates harmoniously with paragraph (c) as a convenient machinery provision which ensures the interests of entities to whom the named insured has a responsibility to maintain insurance are covered, regardless of whether they are notified to the insurer or specifically recorded in the named insured's records as entities to which the insurance cover will extend. This construction is apparent from an analysis of the operation of paragraph (c) together with the IOP clause.
113. Paragraph (c) appears to be concerned with other entities with an interest in property at the insured Situation. Particular reference is made to mortgagees, lessees and joint venturers whom, it would appear, have a relationship with Admiral in the specified capacity. That is, the named insured is the lessee to the lessor, the mortgagor to the mortgagee and a co-venturer with the other joint venturer. Otherwise, paragraph (c) extends to those more generally described entities who have a legal or equitable interest in the Property Insured. In the context of the clause, it might be assumed that those other parties have their legal or equitable interests in property in respect of which the named insured has also some right, title or interest. It is commonplace that

such relationships as those described in paragraph (c) arise where a business operator acquires plant and equipment pursuant to some form of financing arrangement. Such arrangements include leases, hire-purchase agreements, chattel mortgages, trusts, joint venture agreements, finance arrangements involving circulating securities where ownership of the goods remains with the financier and the like. Necessarily, these involve the business operator acquiring limited rights, title or interests in or to the subject goods. Conversely, ownership or substantial ownership in the goods often remains with the financier. It is a common, if not invariable, feature of such arrangements that the user of the goods undertakes to maintain insurance with respect to them, not only for their own rights and interests but also for those of the other parties to the arrangements. The assumption of such a responsibility to maintain insurance is recognised and catered for in the policy presently under consideration both in paragraph (c) of the definition of the “Insured” and in the definition of “Property Insured”.

114. It is also common experience that such arrangements are entered into on a regular basis as new plant and equipment is acquired or existing arrangements are renewed. New or replacement goods may be acquired pursuant to an arrangement with a new financier or provider, or some or all existing arrangements might be refinanced. Importantly, these arrangements will often be entered into during the course of a policy period. Absent terms in the policy such as those under consideration, the fulfilment of the business owner’s obligation to effect insurance for the interests of other parties would oblige them to obtain specific additional insurance or advise its current insurer of the additional risk and seek an extension of cover for that other party.
115. These matters are the concern of paragraph (c) and the IOP clause. Paragraph (c) operates to include the other parties interested in the plant and equipment as “Insureds” under the policy, giving them the benefit of the indemnity and, concurrently, fulfilling the named insured’s obligation to maintain insurance for them. The IOP clause facilitates that extension of cover by an informal process which absolves the named insured from disclosing or notifying to the insurer the additional insured entities who have come within the policy’s cover and their particular insurable interests in the insured property.
116. In the course of the appeal, reference was made to the application of the *ejusdem generis* rule and it is discussed in more detail below in relation to the parties’ submissions as to the proper construction of the IOP clause. It also applies to the words in parenthesis in paragraph (c), “(whether mortgagees, lessors, joint ventures [sic: venturers] or other parties with a legal or equitable interest in the Property Insured)”. The operational effect of that maxim of construction is to limit, where appropriate, an open-ended sweeping expression intended to avoid omitting a part or parts of a relevant class. Here, the words in parenthesis are intended to limit or characterise the class of “all organisations and other entities” to whom the named insured may have a responsibility to maintain insurance which attracts the operation of paragraph (c). They provide the requirement that those within the class have some form of interest in property in which the named insured also has some right, title or interest. That is, a mortgagee or lessor to the named insured or a joint venturer with it, and the expression “other parties with a legal or equitable interest” can be taken to refer to those who have a similar relationship with the named insured.
117. Given the extended definition of the “Insured” in paragraph (c), absent the IOP clause, it would be incumbent on the named insured on the placing or on any renewal, to provide the insurer with the details of those entities to whom it has become responsible to maintain insurance. That is part of the named insured’s duty of utmost good faith which necessitates the provision of any



information which affects the insurer's risk. In the circumstances under consideration, that would include the identity of the third parties, details of the property in respect of which they have an interest, and the nature and extent of their interests. That duty continues during the course of the policy period and must be fulfilled if the named insured assumed responsibility to additional parties to maintain insurance with respect to property. That would occur in those circumstances referenced above where the named insured has acquired further plant and equipment pursuant to some financing or other arrangement or were to refinance existing arrangements with a new financier. Necessarily, the addition of further insureds or the expansion of the property covered by the policy increases the insurer's risk requiring proper disclosure to be made. See generally the observations of the learned authors in Eggers PM, Picken S & Foss P, *Good Faith and Insurance Contracts* (3rd ed, Lloyd's List, 2010) [10-18] – [10-31] and especially the discussion on "held covered" clauses.

118. In this way, the IOP clause has an important function. It applies so that the identified insurable interests of the third parties are automatically covered without the named insured being required to give the insurer any notification or specification in relation to those parties. It ensures that, for the purposes of crystallising an extension of the cover provided in paragraph (c), Admiral is not required to make disclosure of the additionally covered insureds or their insurable interests when they come into existence. That construction is supported by the concluding words, "the nature and extent of such interest to be disclosed in the event of damage", which signifies the clause's concern is as to Admiral's obligation of disclosure to CGU. When, therefore, the named insured becomes responsible to a third party to maintain insurance prior to placing or in the course of the policy period, that third party's interests are covered without any further notification to the insurer so long as the insured's records contain the appropriate notation.
119. The next issue is as to the scope of the third parties which might fall within the IOP clause. In the discussion later in these reasons dealing with the parties' submissions, reference is made to the application of the *ejusdem generis* rule and the scope which the parties sought to give to the IOP clause. On the preferred construction, the entities referred to in the IOP clause should be consistent with those referenced in paragraph (c); namely third parties to whom the named insured has a responsibility to maintain insurance and who have an interest in property in respect of which the named insured also has some right, title or interest. That is not to deny the possibility of an alternative construction which extends the reach of the clause to those who have bailed goods to Admiral and for whom it has agreed to maintain insurance.
120. The relevant limitation to the operation of the IOP clause is that it applies only if there is adequate notation in the records of the named insured. Whilst Admiral may well have assumed responsibility to maintain insurance in relation to the interests of third parties in property located at the insured Situation, the cover extended by paragraph (c) to those parties will not attach unless and until there is adequate notation in Admiral's records. The learned primary judge accepted the parties' submissions that this required notation of the third party's insurable interest as opposed to their identity. For the reasons discussed below in relation to the constructions advanced by the parties, the better view is that all that is required by the IOP clause is that the identity of the relevant additionally insured entity be noted in the named insured's records and that notation of the insurable interests is not required. In many cases involving financing arrangements in respect of plant, equipment, machinery and the like, the requisite noting will automatically occur. Such arrangements generally require the execution of formal transactional documents in which the financier, lessor, mortgagee or other party providing goods or finance will necessarily be specifically noted. It may be that the mere identification in Admiral's records

of the third party will suffice, although, as is discussed below, in this case there is no need to reach a final conclusion as to the degree and manner of noting required.

121. As an aside, it may be implied that if there are parties who fall within paragraph (c) but are not noted in Admiral's records, such persons and their insurable interests would need to be specifically notified to the insurer for cover to attach. Again, there is no need to reach any conclusion on this issue.
122. The use of the expression the "Insured" in the IOP clause rather than the "named Insured" is another instance of poor drafting. This may have arisen from the expansive definition of "The Insured", the only place in the policy terms where the latter expression is used. As was mentioned above, the policy does not seem to fully reflect the difference between an "Insured" and the named insured. There is, for instance, no consistency between the use of the expression "named Insured" in paragraph (c) where reference is made to the assumption of responsibility to insure and the definition of Property Insured where reference is made to the assumption of that responsibility by the "Insured". As with the definition of the "Property Insured", reading the expression "Insured" in the IOP clause as referring to the named insured gives the policy a sensible and workable operation. Were it otherwise, the policy would have a circular operation.

*A potential variation giving greater weight to the limitation in paragraph (c)*

123. The essence of the preferred construction is that paragraph (c) of the definition of the "Insured" and the IOP clause operate with respect to entities to whom the named insured, Admiral, has a responsibility to maintain insurance. No doubt this is readily applicable to those entities identified above who are specifically identified in the clauses, being those with whom the named insured has an interest in the insured property such as financiers, lessees, mortgagees, trustees and the like. It may be that, absent the application of the *ejusdem generis* rule as discussed above, a reasonable argument can be made that the operation of the clauses extends to those owners who have bailed their goods to Admiral on terms that the latter will maintain insurance. On this broader construction, all of the specified types of parties, including "owners" in the broad sense and all others in the IOP clause, are entities to whom it might be contemplated that the named insured might promise insurance. This broader construction:
  - (a) conforms to and is harmonious with the limitation in paragraph (c);
  - (b) avoids obvious conflict with that limitation;
  - (c) avoids a most unbusinesslike projection of cover to all others in Admiral's records and without limitation, even without the need of a promise of insurance. (This uncommercial aspect of MOS's submission is discussed in detail below); and
  - (d) assuming that Admiral would surely record the names of its bailors, avoids the curious result that the IOP clause would, for all practical purposes, render redundant the cover provided to Admiral in respect of its customers' goods.
124. In the absence of the limiting effect of the requirement that the named insured has a responsibility to maintain insurance, the scope of those to whom indemnity is granted would be vague and uncommercial for the insurer. The presence in the IOP clause of "all other parties" cannot be ignored when considering whether the list in which it is contained should be read as subject to some limitation informed by the text as a whole. This is where the factor of the promise

of insurance provides an obvious answer and, on this basis, it would be a necessary characteristic of “owner” where that expression is used.

### ***Conclusion with respect to the preferred construction***

125. The purpose of the IOP clause is threefold. For clarity, it implies and confirms that it is not necessary that the interests of the “Insureds”, as defined in paragraph (c), need be notified or specified to CGU in order for their interests to be covered. But it does not leave this open-ended. By the machinery of recording in the named insured’s records, it limits the scope of this concession so that it includes only the interests of those Insureds, so defined, who are so recorded. Though not well drafted, it is a practical and logical approach to the plain problem of the fluidity of those who would be coming to and going from the ranks of the added insureds, that is, those to whom the named insured has promised insurance. On the broader construction, it might also address the far greater fluidity of the goods stored by Admiral at the warehouse, to the extent it promises to maintain insurance to its customers. Regardless of which of the above constructions are adopted, MOS would not be entitled to indemnity under the policy, not being an organisation or entity to whom the named insured has a responsibility to maintain insurance.
126. Ultimately, however, as the appeal was not argued on the above basis, it is perhaps not appropriate to reach a final conclusion on that interpretation, but to determine the matter as best as may be achieved, on the basis of the submissions advanced. Nevertheless, the preceding discussion highlights some important aspects of the policy’s operation.

### ***The parties’ opposing constructions***

127. Both parties’ submissions proceeded, more or less, upon the assumption that the IOP clause extended the scope of those entitled to indemnity under the policy to entities not otherwise within the scope of the express definition of the “Insured”. This was of obvious importance to MOS which had accepted that it did not fall within that definition. It was also the approach adopted by the learned primary judge. However that may be, there is a degree of artificiality in approaching the interpretive task in that manner and that is especially so when complying with the obligation to read the policy as a whole and the disputed clause in its context.
128. The IOP clause is in a form commonly appearing in Australian ISR policies. Despite its apparent ambiguity, it is, surprisingly, not regularly litigated. As with all contractual clauses, it must be construed in the context of the agreement as a whole. That includes the specifically wide definition of the “Insured”, the operation of the insuring clause, the definition of the “Property Insured”, and keeping in mind that the cover concerns loss or damage happening at the insured “Situation”; being principally Admiral’s business premises at Alexandria in Sydney but also extending to other places where it undertakes business.
129. There are three overlapping issues raised by the parties’ submission on appeal. They are, whether it is a third party’s “insurable interests” or its identity which must be “specifically noted” in Admiral’s records, what degree of noting is required, and whether the *ejusdem generis* rule limits the expressions “owners” and “all other parties” to a class or genus defined by the preceding specific categories. Although the meaning attached to each of those elements of the IOP clause might influence the meaning ascribed to the others, it is nevertheless appropriate to examine them separately, at least in the first instance.

### ***The parties’ general submissions as to the Interests of Other Parties clause***

130. In its written submissions, CGU somewhat correctly submitted that the IOP clause “confines rather than amplifies coverage”. However, thereafter it submitted that the clause “extends cover to certain specified parties with certain specific interests in the property insured”; being those in one of the identified categories who, mutually with the named insured, have some form of right or proprietary interest in or with respect to the property covered by the policy. This construction was said to be achieved by the application of the *ejusdem generis* rule. So the submission went, if the named insured’s property which is covered by the policy is the subject of a lease, financier’s interest, a trust or a mortgage, or the named insured’s interest is something less than a full personal ownership, then the rights and interests of others in the property are afforded cover. On this construction, cover is provided only because the “other party” has a right or interest in insured property used by the named insured at the premises from which it conducts business. The class identified as “owners” are those who also have a proprietary interest in insured property at the insured Situation and in respect of which the named insured has some right or interest. The owner of goods which are the subject of a hire-purchase agreement is one example. This, so it was said, was consistent with the fact that Admiral’s records will inevitably include reference to the goods, plant and equipment which it holds subject to financing arrangements and those records will concurrently identify those other entities who have a concomitant interest in that property. The relevant information will appear in mortgages, leases, hire-purchase agreements, trust documents and the like. It was submitted that this provides the clause with a workable operation.
131. MOS submitted that the clause operates to expand the cover provided by the policy to indemnify any third party in respect of property on the named insured’s premises or under its control when the insurable interest of the third party is noted in the named insured’s records. It submitted it was the “owner” of goods stored at the warehouse as was recorded in Admiral’s records and this was sufficient to attract cover. In effect, it submitted that no relevant genus or class was created by the clause and that the phrases “owners” and “all other parties” were otherwise unconfined such that the only relevant limitation was that the third party’s insurable interest be noted in Admiral’s records. It was not suggested that the clause was limited to customers’ goods stored at Admiral’s bonded warehouse. Indeed, it is a significant aspect of MOS’s submissions that it refrained from attempting to identify any boundary to the scope of the clause. Rather, it simply submitted that it fell within its scope and there was no need to attempt to define its limits.

*What must be “noted” to activate the Interests of Other Parties clause?*

132. The first issue to be considered is the ascertainment of what must be noted in the named insured’s records in respect of a third party in order to trigger the operation of the IOP clause and the alleged extension of cover to the third party.
133. CGU submitted that it is the “insurable interests” of the other parties which must be recorded, not merely their identity and, in this respect, the clause should be construed in the same manner as the similarly worded clause considered in *Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd (1998) 4 VR 599 (Maxitherm Boilers v Pacific Dunlop)*. It was also submitted that the natural meaning of the words indicated that the clause was concerned with the “insurable interests” of third parties and it was those interests which needed to be recorded. In support of that construction, it was said that if the extended cover was activated merely by the noting of a third party’s identity and their property in the named insured’s records, then the clause would have somewhat extreme or, at least, uncommercial, results. The records of any trading business would record the identity of

numerous entities which would result in the clause having an unusually wide operation which could not have been intended. With respect, that overly broad submission does not take into account the other limitations on the clauses' operation. Specifically, it is confined by the insuring clause to damage occurring at the insured "Situation" being the bonded warehouse at Alexandria in Sydney and the other locations specifically identified such that, in general terms, it will only extend to property damage occurring in those places. Similarly, that submission does not take into account the limitation imposed by the specification of specific categories of entities whose identity might be noted, although it is acknowledged that MOS's submissions eschewed the acceptance of any such limit.

134. CGU further submitted that its construction made commercial sense as the insurable interests of the types of entities mentioned in the clause would be easily identified. The interests of a financier or a mortgagee would be noted in the relevant financing agreements, and the insurable interest of a trustee "lessor" or "owner" would be recorded or appear in the relevant transactional documents through which any agreement was put in place.
135. Although MOS generally agreed with the submission that it was the "insurable interests" of third parties which needed to be "specifically noted", there is not insignificant difficulty with that submission. First, the reliance on the decision in *Maxitherm Boilers v Pacific Dunlop* was somewhat misplaced. There, it had also been agreed between the parties that the IOP clause under consideration required the noting of the "insurable interests" of the identified entities and the point was not in issue. More importantly, the structure of the clause was materially different from that presently under consideration. It read, "The insurable interest of Lessors, Financiers, Trustees, Mortgagees, Owners and all other parties *as more specifically* noted in the records of the Insured", which may be taken to suggest the "insurable interest" was the intended subject of the sentence. In the policy presently under consideration, the clause reads, "The insurable interests of *only those* lessors, financiers, trustees, mortgagees, owners and all other parties specifically noted in the records of the [named] Insured". The inclusion of the words "only those" focuses attention on the entities which have the "insurable interest", rather than the interest itself. In order to give the expression, "only those", any relevant work to do it is necessary to identify some relevant limitation and the only one available is found in the phrase, "specifically noted in the records of the [named] Insured". Put another way, it is *only those* entities of the several descriptions which are noted in Admiral's records whose insurable interests are covered by the policy. This gives the clause a sensible operation in terms of what has to be noted, whereas CGU's preferred construction tends to render the words, "only those", inutile or obsolete.
136. The concluding phrase of the clause supports the above construction. The words, "the nature and extent of such interest to be disclosed in event of damage", strongly suggest that the insurable interest need not be noted prior to the occasioning of damage. However, it is unlikely that the identity of the third party in a commercial relationship with Admiral might be noted without some indication or description of its insurable interest.
137. To a degree, the resolution of this aspect of the appeal is unnecessary as the learned primary judge concluded (at [38] – [39]) that MOS, as well as its insurable interests in the goods stored at the warehouse, was noted in Admiral's records. There was no challenge to this finding on appeal. Nevertheless, the issue assists in the overall interpretation of the clause and, in that context, the more natural construction is that what is required is the notation of the identity of the relevant lessor, financier, trustee, mortgagee, owner or other party, although it can be assumed that their identification will carry with them some indication of their interest in the property in

question. This, it might be noted, accords with the previous discussion in these reasons under the heading, “A preferred construction”.

### *The required degree of noting*

138. The second issue to be considered is CGU’s submission that the requirement that “insurable interests” be “specifically noted in the records of the [named] Insured” necessitated more than mere mention in the records of entities who had interests in property on Admiral’s premises or under its control. It submitted that a degree of formality or specification was required and that it was insufficient that the named insured’s business records merely mentioned the names of entities or their insurable interests as part of the day-to-day business operations.
139. For this proposition, Mr Watson SC for CGU again relied upon the decision of the Victorian Court of Appeal in *Maxitherm Boilers v Pacific Dunlop*. In that matter, an autoclave acquired by Pacific Dunlop from the supplier Maxitherm Boilers exploded at Pacific Dunlop’s premises whilst being tested and prior to its final commissioning. Pacific Dunlop claimed damages from Maxitherm for breach of contract. By a third party notice, Maxitherm Boilers sought indemnity under an industrial special risks policy of insurance taken out by Pacific Dunlop which contained an “Interests of Other Parties” clause in the following terms:

The insurable interest of Lessors, Financiers, Trustees, Mortgagees, Owners and all other parties as more specifically noted in the records of the Insured shall be automatically included without notification or specification, the nature and extent of such interest to be disclosed in the event of damage.

140. Maxitherm submitted that it retained an insurable interest in the autoclave although the evidence before the Court established that Pacific Dunlop had fully discharged its obligation to pay each instalment of the purchase price prior to the explosion. Nevertheless, Maxitherm submitted that it retained an “insurable interest” because it remained liable for any damage caused by the machine if it malfunctioned as it had. At first instance, Teague J held that the policy did not respond to provide cover for Maxitherm Boilers. The Court of Appeal largely agreed and held that the IOP clause extended cover to provide indemnity in respect of the proprietary interests of other persons interested in the insured’s property. As Maxitherm Boilers had no remaining interest in the autoclave by the time of the explosion, the policy was found not to respond to its liability for the loss and damage arising from the explosion. Buchanan JA (with whom Ormiston JA agreed) identified (at 570) that the parties had accepted that the clause required “the insurable interest” rather than “the other parties” to be more specifically noted in the records of Pacific Dunlop. In relation to the noting requirement, his Honour said (at 570 – 571):

More specific notation may require recording the interest in a form that relates it expressly to the insurance policy. It may not be sufficient that the interest of an owner is noted by the existence of documents of sale such as quotations, purchase orders and invoices, from which the proprietary rights of the seller can be inferred. I need not decide the point, for in my opinion Maxitherrn had no insurable interest to be noted.

141. The point was left open by Callaway JA.
142. In reliance on the above, CGU submitted that the absence of any formal recording, whatever that may be, of MOS’s interest in the goods stored on the premises had the consequence that the extended cover was not activated in its favour.

143. The learned primary judge below declined to follow Buchanan JA's approach as to the construction of the clause, instead preferring the reasoning of Teague J at first instance who rejected the proposition that Pacific Dunlop needed to maintain a record of the interests of third parties which was something more than the usual records relating to the storage of goods. Teague J had held (at 76,956) that the framing of the provision suggested that the insurer was prepared to take a flexible rather than fixed approach to the recording and communication of the interests of third parties with the consequence that there should be minimal, rather than maximal, formality in the conduct which brought those interests within the scope of the policy. This effectively eschewed any requirement for the insured to maintain a formal register of interests. His Honour further observed (at 76,957) that the words "more specifically noted" could be seen as requiring something additional to the mere mention of matters in the insured's records, but then held that, if that was so intended, one might have expected the provision to provide some basic guidance as to what was required. If the insurer required a higher degree of specificity or formality in the recording of third party insurable interests, that ought to have been expressly stipulated.

144. In the present matter, the primary judge noted that the word "more", as used in the phrase "more specifically noted", did not appear in the clause in the CGU policy and, presumably, this somewhat reduced the force of CGU's submission. He adopted Teague J's approach that the clause endorsed a flexible approach to notification and with minimal formality and that was consistent with what a reasonable business person would expect. That conclusion, so his Honour found, was buttressed by the automatic operation of the clause which made it plain that the insurer was not concerned with the precise identities of the other interested parties or the precise nature and extent of their interests. Additionally, he observed that the policy was granted in favour of an insured who operated a bonded warehouse and the flexible approach to the inclusion of interested third parties was consistent with the manner in which business would be conducted by the insured. The difficulties of maintaining specific schedules of insurable interests in connection with the operation of such a business were obvious. His Honour said (at [33]):

The language "automatically included without notification" makes plain that the insurer was not concerned with the precise identities of the other interested parties or the precise nature and extent of the interest, provided that the other interested parties were specifically noted in the records of the insured prior to the loss being sustained. Finally, the second paragraph in the provision represents an attempt to address the potential problem as to how rights between the insurer, the contracting party and any potential claimant third party are to be adjusted, further supporting the intention of the parties to allow certain third parties to claim directly under the Policy.

145. The interpretation adopted by Teague J accords little relevance to the adverb, "specifically", where it is used in the phrase, "more specifically noted in the records of the [named] Insured", which might generally require something of "a definite or special form or manner". If all that was required was the appearance somewhere in the named insured's records of a third party of the type described, the word "specifically" might seem to be redundant. On the other hand, as Teague J held, there is nothing in the clause which provides any reference point from which to ascertain whether a recording in the company's books was specific or not. Those concerns might be allayed to an extent by the learned primary judge's adoption of a more pragmatic standard that noting must be "in some acceptable businesslike way". This too reflects the apparent intention that interested third parties were to be included in a flexible and informal manner, but is

qualified by the common sense notion that the necessary noting would be no hurdle at all to inclusion within the scope of the policy unless it met some minimum threshold.

146. CGU sought to rely upon the suggestion by Buchanan JA in *Maxitherm Boilers v Pacific Dunlop* that the requirement for an entity to “specifically noted” may necessitate the recording of their insurable interest in a form that relates it expressly to the insurance policy and that mention in documents of sale such as quotations, purchase orders and invoices would be insufficient. However, those comments are not binding and nor are they dicta, considered or otherwise. At their highest, they were merely the identification of a possible interpretation of the clause.
147. For the reasons which are discussed below, there is no need to determine this question. Nevertheless, there is force in the view that mere mention somewhere in the named insured’s records of the existence of another party is insufficient to note them as an entity whose interest is covered by the insurance. Some degree of formality might be required by the use of the word “specifically”, although given the conclusion that the subject of the noting is an entity within the category created by the clause (as to which see below), it will be unusual were they not automatically to be specifically noted by the named insured. It is true that a degree of informality and flexibility exists by the operation of the clause in that the extended cover will be affected without recourse to the insurer and merely by the named insured specifically noting in its records the existence of another entity which has an interest in property in which it also has an interest. However, there is no necessary warrant for applying that informality and flexibility to the method by which the noting of the other party occurs. Nevertheless, in the earlier discussion in these reasons under the heading, “A preferred construction”, reference was made to the many and varied circumstances in which the third parties who may come within the IOP clause might materialise and it will often happen in the day-to-day course of a business’s operation. On that expectation, it is probable that so long as the third party is noted in some specific manner – such as in a lease, mortgage, hire-purchase agreement – that would suffice. The mere mention of the third party in a letter which is kept in Admiral’s records may not constitute noting in an “acceptable businesslike way”.

### *The ejusdem generis rule*

148. Ultimately, on the basis on which the appeal was argued, the quintessential issue concerned the meaning of the expressions “owners” and “all other parties” as they are used in the IOP clause. CGU submitted that, properly construed, they were limited by the *ejusdem generis* rule and confined to entities in circumstances akin to lessors, financiers, trustees or mortgagees which have an interest together with the named insured in the latter’s property. MOS’s submissions did not suggest or accept the existence of any relevant limitation and advanced the proposition that, regardless of the clause’s scope, it was clear that it fell within it as the “owner” of goods stored at the bonded warehouse.
149. MOS’s submission as advanced cannot be accepted. To do so would carry with it the necessary concomitant that there is no genus or class created in the IOP clause and that the expression, “all other parties”, is unlimited, subject to the presence of noting in Admiral’s records and the goods being damaged at the insured Situation. Such a construction would result in an uncommercial operation of the policy by which cover would be extended to a wide variety of entities whose property might be damaged whilst at Admiral’s premises or other places where the cover runs. This unreasonable or uncommercial consequence of MOS’s construction formed a



significant part of CGU's submissions to this Court, yet MOS avoided any attempt to substantially respond to that criticism.

150. The *ejusdem generis* rule is a rule of construction commonly applied in the interpretation of policies of insurance and is well explained in Derrington DK & Ashton RS, *The Law of Liability Insurance* (3rd ed, LexisNexis, 2013) in the following terms (at 484 [3-126]):

An expression may draw colour from the words around or associated with it, particularly if they are gathered into a category so that there is a sense of cohesion. This can lead to the conclusion that it should be at least of the same general kind — the *ejusdem generis* rule; or that it should not be inconsistent with its friends and neighbours — the *noscitur a sociis* rule. It is said that, 'A word is known by the company it keeps', but the nature of the relationship is perhaps of more importance. For example, while a spa, like a deck or television receiving dish, might normally come within the meaning of 'structure' if 'structure' is used after 'building', it may be limited to mean an edifice or building, which would not include a spa.

The rule is applied in practice as follows. If a passage to be construed enumerates by name several particular things and concludes with a general term of enlargement, the latter is to be construed as being of the same kind or class as the things specifically named unless there is something to show that a wider sense was intended. If it were intended that the general words were to be used in their unrestricted sense, no mention need have been made of the particular classes.

(Footnotes omitted)

151. Numerous instances of the rule's application are provided at page 484 of that work, specifically in relation to the construction of insurance policies.
152. There appears to be no reason why that rule ought not to apply to the interpretation of the IOP clause. Its structure generates the paradigmatic circumstance to which it is relevant and it is almost imperative that it does. If, as MOS's submissions with respect to the meaning of "owner" necessarily imply, the expression "all other parties" is unconfined, the words "lessors, financiers, trustees, mortgagees, owners" are superfluous or redundant and that is a conclusion any process of construction will strive to avoid. See *Mattinson v Multiplo Incubators Pty Ltd* [1977] 1 NSWLR 368 at 374. This, of itself, provides a solid foundation for the application of the rule and the expression "all other parties" should be regarded as a "sweeping clause" to guard against the accidental omission of the entities who might be within the class described by the several identified categories.
153. It is worth reiterating here that acceptance of MOS's construction would deny any operation to paragraph (c) of the definition of the "Insured" in that any third party whose property was damaged at the insured Situation would be entitled to indemnity regardless of whether Admiral had a responsibility to maintain insurance in respect of their interests. That also provides a powerful reason for rejecting the proposed interpretation.

***What is the relevant genus or class?***

154. In this present discussion, the central issue concerns the meaning of the word “owners” in the IOP clause and not the phrase “all other parties”, although the two are inextricably linked. If the application of the *ejusdem generis* rule establishes a relevant genus so as to limit the expression “all other parties”, it will in doing so ascribe a definition to “owners”.
155. CGU identified the class created by the IOP clause as one consisting of entities which have a mutual right, title or interest with the named insured in the Property Insured. In particular, the class concerned those entities which provide plant, equipment or other property to the named insured pursuant to arrangements in which they retain some interest, such as by lease, mortgage, trust or other financing arrangement. Initial support for that can be derived from the references to lessors, financiers, trustees, and mortgagors, each of whom are immediately associated with the provision and financing of plant and equipment used in business. That is supported by the cover only extending to property located at the insured Situation, as that term is defined. Logically, the only such property, in which lessors, financiers, mortgagees, trustees or owners who might be noted in the named insured’s records have an insurable interest, is that used by the named insured in the course of its business.
156. It would seem that the clause is drawn to encompass a wide range of such business arrangements. It undoubtedly includes property which is leased, subject to a mortgage, a circulating security or a financing arrangement, or used under a hire-purchase agreement. It is also specifically directed to property owned by a service trust or by a third party “owner” and used by the named insured under some other arrangement. Examples of such property which pertain to the business in question might include forklifts, vehicles, computer and office equipment as well as furniture, all of which may be leased or subject to hire-purchase or other security arrangements. It may also include racking used in the warehouse and cooling plant and machinery if that were used. Although these examples are referable to the business in question, the clause is obviously generic and would apply to the property used by any insured in business and in which it and a third party have mutual rights and interests.
157. It is also in the insured’s commercial interests to maintain insurance cover for the property interests of any of the specified types of entities referred to above. It is a regular aspect of property financing agreements that the lessee, mortgagor, hirer or user of goods remains responsible for payment for their use, regardless of whether they are damaged or lost. In that way, the extended cover offers *prima facie* protection to the insured in respect of its ongoing obligations under any such financing arrangements. Further, as has been mentioned, the financing arrangements under which use of the property is made available usually impose an obligation on the insured to maintain insurance for the interests of the financiers.
158. With great respect to MOS’s submissions to the contrary, the enumerated items in the clause provide a sufficient basis for the existence of the genus or class identified by CGU; being those entities which have a mutual right or interest in Admiral’s property at the insured Situation and which is insured under the policy. There is nothing in the clause itself to suggest that it is wide enough to include the interests of others who do not have a coincidence of ownership or rights in the property with the named insured. In this context, the word “owner” necessarily means the owner of goods in which the named insured has some form of right or interest. For example, in relation to leased goods, it is the owner/lessor of the goods or, in respect of a true chattel mortgages (as opposed to a hypothecation or charge), the mortgagee. It would extend also to the

owner of goods under a hire-purchase agreement. There is nothing in the context of the IOP clause which suggests that it would include owners of property in which the named insured has no right or interest.

159. It is relevant that the decision of Teague J in *Pacific Dunlop v Maxitherm Boilers*, on which the primary judge relied, supports the above conclusion. In considering the cognate clause in that case, Teague J had observed (at 76,953) that it made commercial good sense for the insured “to have cover not only on property unquestionably owned by it, but also on property as to which there might be an element of uncertainty at any given time as to whether ownership lay in the plaintiff [the insured] or in some other person.” In context, it is apparent that his Honour accepted the clause operated in relation to property in which the insured and some other entity held complementary rights or interests. He referred to the enumerated groupings in the clause as “categories of interest holders”. He also observed that, in the case before him, Maxitherm Boilers was a vendor of the autoclave to Pacific Dunlop which was in possession of it and that had “similarity with the other categories”. That was, no doubt, particularly so given that the purchase price was paid by instalments. An unpaid vendor would fit within the class.
160. Teague J’s observations are confirmatory of the conclusion that the clause presently under consideration is concerned with those third parties who have some right, title or interest together with the named insured in the property covered by the policy. There is nothing to suggest that the wording of the clause in question or that considered in the above case was concerned with third parties in whose property the principal insured has no right or interest.

*The distinction between the words “owners” and “customers”*

161. CGU sought to support the above construction by reference to the extension referred to as the SALESXB4 clause which is set out above. It extends cover to the “goods belonging to the [named] Insured’s customers at the Premises”. The reference to “customers” is important and obviously refers to those who engage the named insured to store goods in its warehouse. It follows, as Mr Watson SC for CGU submitted, the policy draws a distinction between “customers” on the one hand and “owners”, as that expression is used in the IOP clause, on the other. It is a relevant aspect of the rule that documents be read in context and as a whole that, where the same word is repeated, it is to have the same meaning throughout the document, and that different words have different meanings. In the latter respect, Mahoney JA in *Tubemakers of Australia Ltd v Newcastle Pipe Line Co Ltd* (Unreported, NSWCA, Samuels, Mahoney and Clarke JJA, 23 December 1987) observed that:

A lawyer, when drafting a document, will ordinarily use the same word when the same meaning is intended: he will be conscious that, when a different word is used, the presumption will be that a different meaning was intended. Those not confined by the rules and techniques of legal drafting are less confined in the use of language: they are apt to use different words where the same meaning is intended and to see verbal felicity in this.

162. Although it cannot be fully known that the policy in question was drafted by lawyers, it is apparent on its face that it is the product of a somewhat considered drafting process by an insurer which is in the business of issuing policies of insurance. It might be assumed that it has been drafted with some degree of care and intentionality. Although the presumption above may not apply with the same force to insurance policies as it will to carefully crafted legal documents, here it can nevertheless be accepted that the word “owners” was intended to be used in

contradistinction to “customers”, the latter being those who have engaged Admiral to store goods on the premises.

163. It can be further accepted that the use of the word “customers” in the Extensions portion of the policy was intentional and for the purposes of providing Admiral with cover in respect of loss or damage to Admiral’s clients’ goods. It is not self-evident why cover would be extended to customer-owners by the IOP clause if the goods were already within the scope of that express extension. That, correspondingly, supports the conclusion reached by the application of the *ejusdem generis* rule that the word “owners” in the IOP clause relates to owners of property in which the named insured also has an interest.
164. The above distinction is supported by reference to the various deductibles specified in the policy schedule and, in particular, that a deductible of \$10,000 applies in relation to claims for “Accidental Damage to Customers [sic] Goods”, and, for all other claims, a deductible of \$5,000 applies. This tends to indicate that damage to customers’ goods is to be treated differently and separately to damage to the goods in which entities with the relationships to the named insured of the several types referred to in the IOP clause have an insurable interest. Mention has previously been made to the policy limits for customers’ goods on the one hand and property and contents on the other.

*Conclusion as to the application of the ejusdem generis rule*

165. On the basis on which the case was argued, CGU’s submissions as to the applicability of the *ejusdem generis* rule ought to be accepted. The enumerated entities in the IOP clause creates the genus or class which confines the operation of the expression “owner” (or indeed “all other parties”) to those who have rights or an interest in or in respect of insured property in which or in respect of which the named insured also has some right or interest. In the present case, MOS had no interest in property in which Admiral also had some proprietary right or interest. It was the sole “owner” of the goods which it stored at the premises and is not within the scope of the IOP clause. This conclusion sits comfortably with the previous discussion concerning the preferred construction and interrelationship between paragraph (c) and the IOP clause in that the identity of the third parties in each clause are co-ordinate.
166. It is worth reiterating that, on the preferred construction identified above, the IOP clause does not itself provide or extend “cover”. It merely facilitates that which is provided by the policy to those within the definition of the “Insured”. Although the above discussion proceeded on the basis on which the appeal was argued, namely that it extended or defined cover to some extent, it should not be taken as endorsing that approach.

*Do MOS’s submissions have uncommercial or unbusinesslike results*

167. It is also trite that constructions which give rise to unreasonable consequences will be rejected in favour of available constructions which have a more businesslike or commercial operation. Here, CGU submitted that MOS’s interpretation might well have absurd or, at least, unreasonable consequences. On the latter’s construction, the expression “owners” (or “all other parties”) would include any entity (such as it) whose property was located on the named insured’s premises at Alexandria or at such other place to which cover runs and whose name or property interest was noted in Admiral’s records. As Mr Watson SC submitted, the telecommunication company, Telstra, would be one such entity and hence be entitled to cover. It is almost axiomatic that Telstra’s name would be recorded somewhere in Admiral’s records and that it would have

infrastructure at the insured premises. That being so, on MOS's construction of the scope of the entities in respect of whom the IOP clause operates, Telstra would be entitled to indemnity if its property were damaged as the result of a fire. The same might be said of other utility providers. Similarly, given the nature of the business of a bonded warehouse, it is quite possible that Admiral will keep records of all vehicles entering its premises as well as the identity of their owners. Again, if such a vehicle were damaged at the premises, on MOS's construction, the damage would be covered by the policy. Further, employees' cars which are brought to the premises would, *prima facie*, also be covered by the IOP clause. Again, there is the possibility that such persons will be noted in Admiral's records with the result that any property owned by them and brought to the site will be indemnified against damage under the IOP clause. (As an aside, this construction would render the extension in relation to employees' property, "CLUBPPC4 Property of Employees and Clubs", partly redundant). Even a casual visitor whose name is recorded on entry will be covered if they drop their mobile phone and it is damaged. The list might be extended. Indeed, the cover could include very valuable property stored gratuitously for a friend, provided that it was recorded, if only for the purposes of identification of its location.

168. Absent some restriction of the scope of the words "owners" and "all other parties", there is a real possibility that indemnity would extend to a wide range of entities and that is a construction unsupported by any commercial rationale. At the very least, MOS did not lead evidence to show that the true position would support its construction. No reason was offered as to why Admiral should insure the assets of such other parties, many of which are able to bear the burden of such insurance for themselves.
169. MOS sought to limit the consequences of its construction by stressing that the cover only applied if the entity who had an insurable interest was noted in the records of the named insured. However, all the examples on which CGU relied included the circumstance that the relevant entity would be noted in Admiral's records. In the ordinary course, the names of all utility companies would be recorded in Admiral's records, as would the identity of vehicles and persons visiting Admiral's premises. It would be somewhat unusual for there not to be careful recording of the identity of persons and vehicles entering the confines of a bonded warehouse, the operations of which are tightly regulated under Part V of the *Customs Act 1901 (Cth)*. None of the illustrations of the uncommercial consequences of MOS's interpretation were shown to be strained or fanciful. Similar reasoning is applicable if what is required to be recorded is the insurable interest of the third party although, admittedly, not as forcibly. Ultimately, MOS sought to attribute a broad meaning to the word "owners" but did not provide any limitation which would negate the apparent anomalous consequences.
170. That issue as to the commerciality of the clause's operation is strengthened by reason of the sub-limits of cover provided in the policy. The policy's substantial cover is directed to "customers' goods" with much less cover provided in relation to the named insured's property. It would follow that, on the wide scope of the IOP clause sought to be given by MOS, in the case of a severe or devastating fire, the ability of the named insured to recover in respect of the loss of its own property would be diminished by the existence of multiple claims from other "owners".
171. CGU submitted that the primary judge gave presumptive weight to the general principle that policies should be given a commercial operation over the operation of the *ejusdem generis* rule. It said that his Honour did not deal with the above identified consequences of giving the expressions "owners" and "all other parties" a wide and unconfined meaning. As Mr Watson SC submitted, his Honour disposed of this issue by identifying that MOS's circumstances were "far

removed” from the examples relied upon by CGU: at [40]. Whilst that observation may have been correct, as Mr Watson SC submitted, the difficulty is that the construction which would result in MOS’s interests being indemnified under the IOP clause has the necessary consequence that it would impose on the policy an unreasonable operation. There is force in that submission and Mr Parker QC did not to provide any explanation as to how the provision might operate in a commercial or businesslike manner, absent some restriction.

172. The consequences of MOS’s proposed construction necessitate the ascertainment of some commercial or logical restriction on the clause and it is sufficiently provided by the *ejusdem generis* rule. If, however, the starting point was the preferred construction referred to above, such that the IOP clause operated to facilitate the identity of those to whom cover was provided by paragraph (c), different considerations might apply. On that basis, a commercial construction might be achieved by regarding the class of entities within the IOP clause to be unrestricted so long as the named insured had a responsibility to maintain insurance for them.

#### *The existence of the SALESXB4 Customers’ Goods clause*

173. The construction of the IOP clause for which CGU contends (as well as the preferred construction) is coherent with the existence and operation of the SALESXB4 clause which provided that the policy extends to insure goods belonging to the named insured’s customers at its Premises. This was undoubtedly an important extension in this policy where the schedule reveals the limit of cover for “Customers’ Goods” was \$4,000,000 and that this was the most significant coverage provided. As discussed earlier, such a clause ensures that protection is provided under the policy, albeit by the creation of a form of liability insurance cover for Admiral, for the loss or damage to its customers’ goods.
174. Assuming the existence of cover for the customers’ goods was an important commercial aspect of the policy, that requirement was met by the extension and there was no appreciable need to accord the IOP clause an expansive operation to cover the ground a second time. Indeed, the extension in SALESXB4 offers superior cover for the named insured’s customers because it is not limited to the “owners” of goods. It may well be that the named insured’s customers do not own the goods which they store in the bonded warehouse. They might merely be importers for others or freight forwarding agents or the terms on which the goods have been acquired may not, as at the time they are stored, have passed title to the customers. In terms of the named insured’s customers, the SALESXB4 clause provides greater security than does the IOP clause and its existence removes any need or impetus for an expansive construction of the latter.

#### *Was there a purpose to giving the Other Parties a direct claim against the insurer?*

175. It was submitted for MOS that the purpose of the IOP clause was to give the members of the identified groups a direct claim against CGU for losses which they have sustained in respect of their property at the insured Situation. This was said to accord Admiral’s customers advantages over and above the derivative path to indemnity under extension SALESXB4. Whilst it is correct that the learned primary judge held that MOS as an owner under the IOP clause had a direct right of indemnity by virtue of s 48 of the ICA, it was not a matter which assisted in identifying the scope of the expressions “owners” or “all other parties”. On appeal, the Court was specifically referred to paragraph 36 of the primary judge’s reasons which provided:

... The “Interests of Other Parties” clause further extends the protection afforded to Admiral’s customers by ensuring that they have a direct claim to indemnity from CGU

(provided that the requirements in the clause are satisfied and the goods are not otherwise insured).

176. With respect, such a conclusion can be reached only by a wide interpretation of the word “owners” in the IOP clause (on the assumption that it extends “cover”) and, again, the fact that a third party falling within it may have a direct claim against the named insured does not assist in determining the antecedent question. It might also be noted that MOS did not explain the proviso identified in the passage quoted above concerning goods being not otherwise insured. That proviso was an element of the SALESXB4 Customers’ Goods clause and does not appear in the IOP clause. The same limitation appears in the definition of the “Insured” but that was neither part of the primary judge’s reasons and, indeed, its application would have excluded MOS in any event. If the construction advanced by MOS is correct and the IOP clause extends indemnity to it, any claim by it is not limited by the existence of other insurance whereas a claim by the named insured or any entity within the extended definition would be. That result is not only unbusinesslike, it is most unlikely.
177. It is also not self-evident that a construction which provides the named insured’s customers with a direct right to indemnity for loss and damage to their stored goods is either a commercial or a businesslike interpretation as far as the insurer is concerned. It cannot be assumed that the storage of those goods at the bonded warehouse are not subject to the terms and conditions agreed upon between the customer and the warehouseman. Although those particular terms and conditions are not before the Court, it can be assumed they may well include terms which regulate Admiral’s liability as bailee, including restrictions on liability and claims as well as obligations on the customers to accurately disclose the content of the products stored. The logical conclusion of MOS’s construction is that, although in some circumstances a customer may be unable to recover against Admiral in respect of the loss and damage sustained to goods or that right is limited to some extent, all such limitations on recovery could be avoided by the customer claiming directly from CGU. No explanation was forthcoming as to why that result should have been intended by the inclusion of the IOP clause.

#### CONCLUSION ON THE APPEAL

178. On the agreed facts before the Court, MOS did not come within paragraph (c) of the definition of the “Insured” as it was not an entity to whom Admiral had a responsibility to maintain insurance. Putting aside the preferred construction, MOS has no entitlement to indemnity under the policy. Any construction which would lead to that result would necessarily render the policy’s operation uncommercial. The range of those entitled to indemnity would be expanded beyond any defensible scope which would render obsolete paragraph (c) of the definition of the “Insured”. The IOP clause could not be intended to provide some open-ended extension to cover and, in the absence of the restriction which the preferred construction would provide, some appropriate limitation is necessary. CGU’s submissions, which incorporated the mode of reasoning inherent in the *ejusdem generis* rule, provide that in a logical and commercial manner,
179. The appeal should be allowed. The declaration and orders of the learned primary judge should be set aside. CGU is entitled to a declaration in the following terms:

Upon the proper construction of the Industrial Special Risks policy issued by the appellant, Insurance Australia Ltd trading as CGU Insurance to Admiral International Pty Ltd, the respondent, MOS Beverages Pty Ltd, is not entitled to indemnity as a third party beneficiary.

180. The respondent should pay the appellant's costs of the appeal and the costs of the proceedings before the primary judge.

I certify that the preceding one hundred and twenty-six (126) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington.

Associate:

Dated: 17 September 2021

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### Cited by:

*Admiral International Pty Ltd v Insurance Australia Ltd; Brightcity International Trading Pty Ltd v Admiral International Pty Ltd* [2021] NSWSC 1440 (08 November 2021) (Fagan J)

221. Brightcity's direct claim for indemnity in reliance on the IOP clause and s 48(1) of the Act must be upheld on the authority of the decision of the Full Court of the Federal Court in *Insurance Australia Ltd v MOS Beverages Pty Ltd* [2021] FCAFC 165. The insured in that case, MOS Beverages Pty Ltd ("MOS"), has been referred to earlier in this judgment. It was another customer of Admiral. Its goods were also damaged in the fire that is the subject of the proceedings now before this Court. MOS, like Brightcity, sought indemnity directly from CGU under the ISR policy.

*Insurance Australia Ltd trading as CGU Insurance v MOS Beverages Pty Ltd (No 2)* [2021] FCAFC 192 (05 November 2021) (Besanko, McKerracher and Derrington JJ)

i. On 17 September 2021, the Court delivered judgment dismissing this appeal and ordering that Insurance Australia Ltd trading as CGU Insurance pay MOS Beverages Pty Ltd's costs. At the delivery of judgment, an order was made that the parties have seven days to submit either consent orders or short written submissions for any different costs order. MOS Beverages submits that CGU should pay its costs from 16 February 2021 on an indemnity basis following CGU's failure to accept two offers of compromise.

*Insurance Australia Ltd trading as CGU Insurance v MOS Beverages Pty Ltd (No 2)* [2021] FCAFC 192 (05 November 2021) (Besanko, McKerracher and Derrington JJ)

In *Insurance Australia Ltd trading as CGU Insurance v MOS Beverages Pty Ltd* [2021] FCAFC 165, I concluded that the appeal should be allowed and that the respondent should be ordered to pay the appellant's costs of the appeal and of the proceedings before the primary judge. By the orders made on 17 September 2021, the parties were permitted to file written submissions if they could not agree on the appropriate order as to costs. Unsurprisingly, the written submissions which each party filed rested upon the conclusion of my learned colleagues that the appeal should be dismissed and identified nothing relevant to the issue in the alternate reality in which I was not in dissent in concluding that the appeal should be allowed. It follows that I am not dissuaded from my earlier conclusion as to the appropriate order. However, were I to have reached the same



conclusion as Besanko and McKerracher JJ on the appeal, I would have agreed that there is no basis for ordering that the appellant pay any part of the respondent's costs of the appeal on an indemnity basis.