AIG Insurance Australia v McMurray - [2023] WASCA 148

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : AIG INSURANCE AUSTRALIA LTD -v- MCMURRAY [2023] WASCA 148

CORAM : BUSS P
MITCHELL JA
VAUGHAN JA

HEARD : 20 - 22 DECEMBER 2022

DELIVERED : 20 OCTOBER 2023

FILE NO/S : CACV 93 of 2021

BETWEEN : AIG INSURANCE AUSTRALIA LTD
Appellant

AND

FREDERICK WILLIAM MCMURRAY
First Respondent

JENNIFER GRACE MCMURRAY
Second Respondent

RUSSELL BRESLAND
Third Respondent

BRESLAND CONSULTANTS PTY LTD
Fourth Respondent

HANS BO KRISTIAN HOLGERSSON trading as HOLGERSSONS COMPLETE HOME SERVICE
Fifth Respondent

MOSMAN BAY CONSTRUCTION PTY LTD (in liq)
Sixth Respondent

ON APPEAL FROM:

Jurisdiction : SUPREME COURT OF WESTERN AUSTRALIA

Coram : SMITH J

Citation : McMURRAY v AIG INSURANCE AUSTRALIA LTD [No 5] [2021] WASC 300

File Number : CIV 2962 of 2016

Catchwords:

Contract - Construction of contracts - Contract of insurance - Insured property destroyed by fire - Insurer sought to rely on contract works exclusion clause to deny liability - Whether renovations to insured property constituted a 'structure' or 'structures' for the purposes of the contract works exclusion clause - Principles applicable to construction of insurance contracts - Consideration of purpose or object of insurance contract - Whether primary judge failed to take a background fact into account - Whether primary judge erred in applying contra proferentem principle - Construction of 'structure' by primary judge upheld

Evidence - Where insurer pleaded that the fire was caused by the selfcombustion of oily rags in a bin - Insurer claimed no conflicting or competing inference could be drawn from the evidence - Where 'intruder theory' was not pleaded by any party - Whether primary judge erred in allowing intruder theory to be advanced - Whether primary judge erred in finding that intruder theory rose above mere speculation - Whether primary judge erred in finding that both theories were equally possible so that the choice between them was mere conjecture - Whether statement made day after fire should have been admitted as evidence under business records exception in s 79C(2a) of *Evidence Act 1906* (WA) - Whether statement should have been admitted as part of the res gestae - Whether primary judge erred in failing to draw ***Jones v Dunkel*** inferences against plaintiffs for failure by fourth-party to call witnesses - Turns on own facts

Interest - Challenge to interest award made pursuant to s 57 of *Insurance Contracts Act 1984* (Cth) - Determination of date from which it was unreasonable for insurer to withhold payment - Finding by primary judge that overlapping insurance policies complicated assessment in error - Error established in primary judge's interest determination - Consideration of time required for investigation and determination of claim - Redetermination of date from which withholding payment became unreasonable - Turns on own facts

Legislation:

Evidence Act 1906 (WA), s 79C(2a), s 79C(6)
Insurance Contracts Act 1984 (Cth), s 57

Result:

Appeal dismissed
Cross-appeal allowed in part

Category: B

Representation:

Counsel:

Appellant	:	M T McCulloch SC & C P K Russell
First Respondent	:	G R Hancy
Second Respondent	:	G R Hancy
Third Respondent	:	J R B Ley SC & G J Pynt
Fourth Respondent	:	J R B Ley SC & G J Pynt
Fifth Respondent	:	D J Pratt & B A Winburn-Clarke
Sixth Respondent	:	No appearance

Solicitors:

Appellant	:	Wotton + Kearney
First Respondent	:	Solomon Brothers
Second Respondent	:	Solomon Brothers
Third Respondent	:	Sparke Helmore Lawyers
Fourth Respondent	:	Sparke Helmore Lawyers
Fifth Respondent	:	McCabe Curwood
Sixth Respondent	:	Edwards Mac Scovell Legal

Case(s) referred to in decision(s):

Armstrong v The State of Western Australia [2012] WASCA 42; (2012) 220 A Crim R 274
Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] HCA 36; (1973) 129 CLR 99

Australian Communication Exchange Ltd v Deputy Federal Commissioner of Taxation [2003] HCA 55; (2003) 77 ALJR 1806

Australian Securities and Investments Commission v Hellicar [2012] HCA 17; (2012) 247 CLR 345

Black Box Control Pty Ltd v TerraVision Pty Ltd [2016] WASCA 219

Blatch v Archer (1774) 1 Cowp 63, 65; (1774) 98 ER 969

Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1

Chong v CC Containers Pty Ltd [2015] VSCA 137; (2015) 49 VR 402

City of Noarlunga v Fraser (1986) 61 LGRA 324

Darlington Futures Ltd v Delco Australia Pty Ltd [1986] HCA 82; (1986) 161 CLR 500

Darwin Fibreglass Pty Ltd v Kruhse Enterprises Pty Ltd (1998) 146 FLR 37

Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd [2017] HCA 12; (2017) 261 CLR 544

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

House v The King [1936] HCA 40; (1936) 55 CLR 499

JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd [No 2] [2020] WASCA 112

Johnson v American Home Assurance Co [1998] HCA 14; (1998) 192 CLR 266

Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298

Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11; (2010) 243 CLR 361

Life Insurance Co of Australia Ltd v Phillips [1925] HCA 18; (1925) 36 CLR 60

Lithgow City Council v Jackson [2011] HCA 36; (2011) 244 CLR 352

Luxton v Vines [1952] HCA 19; (1952) 85 CLR 352

Maxwell v Highway Hauliers Pty Ltd [2013] WASCA 115; (2013) 45 WAR 297

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

McMurray v AIG Insurance Australia Ltd [No 5] [2021] WASC 300

Mineralogy Pty Ltd v The State of Western Australia [2005] WASCA 69

Morley v Australian Securities and Investments Commission [2010] NSWCA 331; (2010) 247 FLR 140

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37; (2015) 256 CLR 104

Olympic Holdings Pty Ltd v Windslow Corporation Pty Ltd (in liq) [2008] WASCA 80; (2008) 36 WAR 342

Papakosmas v The Queen [1999] HCA 37; (1999) 196 CLR 297

Payne v Parker (1976) 1 NSWLR 191

Pilbara Iron Ore Pty Ltd v Ammon [2020] WASCA 92

Poland v The State of Western Australia [2015] WASCA 136

Police (SA) v Kyriacou [2009] SASC 66; (2009) 193 A Crim R 490

Proudlove v Burridge [2017] WASCA 6; (2017) 79 MVR 257

R v Rose [1965] QWN 35

Ryledar Pty Ltd v Euphoric Pty Ltd [2007] NSWCA 65; (2007) 69 NSWLR 603

Settlement Wine Co Pty Ltd v National General Insurance Co Ltd (1994) 62 SASR 40

Sino Iron Pty Ltd v Mineralogy Pty Ltd [2019] WASCA 80; (2019) 55 WAR 89

Symeou v NRMA Insurance Ltd (1988) 5 ANZ Insurance Cases 60851

The Trustees of the Property of Cummins v Cummins [2006] HCA 6; (2006) 227 CLR 278

Tokio Marine & Nichido Fire Insurance Co Ltd v Hans Bo Kristian Holgersson trading as Holgerssons Complete Home Service [2019] WASCA 114

Transfield Services (Australia) Pty Ltd v Hall [2008] NSWCA 294

V L Credits Pty Ltd v Switzerland General Insurance Co Ltd (No 2) [1991] 2 VR 311

Vocisano v Vocisano [1974] HCA 14; (1974) 130 CLR 267
Walker v The State of Western Australia [2020] WASCA 85
Warren v Coombes [1979] HCA 9; (1979) 142 CLR 531
WFI Insurance Ltd v Verini [2016] WASCA 143
Wilkie v Gordian Runoff Ltd [2005] HCA 17; (2005) 221 CLR 522

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JUDGMENT OF THE COURT:

Overview

1. This appeal concerns litigation after a substantial residential home undergoing renovation works (said by the primary judge to be more properly described as 'refurbishment of the original house') [1] was destroyed by a fire and had to be demolished. The fire started in a green rubbish bin in the dining room. The plaintiffs[2] (the property owners) sued AIG[3] (the insurer under a home insurance policy) and the Bresland parties[4] (the plaintiffs' insurance broker and the principal of the insurance broker). Among others, AIG joined MBC[5] as a thirdparty. MBC was the builder performing the renovation works. In turn, MBC joined Holgerssons[6] in fourth-party proceedings. Holgerssons was a subcontractor engaged by MBC; it performed interior painting works on the home.

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[1] ***McMurray v AIG Insurance Australia Ltd [No 5]*** [2021] WASC 300 (primary reasons) [93], [508]. See also [136], [501].

[2] Frederick and Jennifer McMurray. The McMurrays are the first and second respondents in the appeal and the cross-appellants in the cross-appeal. It is convenient to refer to them as 'the plaintiffs'.
[3] Referring to AIG Insurance Australia Ltd. AIG is the appellant in the appeal and a respondent to the crossappeal.
[4] Referring to Russell Bresland and Bresland Consultants Pty Ltd. Mr Bresland is the third respondent in the appeal. Bresland Consultants Pty Ltd is the fourth respondent in the appeal. Each is a respondent to the cross-appeal.
[5] Referring to Mosman Bay Construction Pty Ltd (in liq). MBC is the sixth respondent to the appeal. MBC did not take part in the appeal. MBC gave notice that it would accept any order made by this court other than as to costs: WAB 6.
[6] Referring to Holgerssons Complete Home Service (the trading name of Hans Holgersson). Mr Holgersson is the fifth respondent to the appeal and a respondent to the cross-appeal.

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2. The AIG home insurance policy contained a 'contract works exclusion' clause (see [27] below). Among other things, AIG relied on the exclusion clause to deny indemnity under the insurance policy and to defend the plaintiffs' claim. The Bresland parties admitted that they were negligent if the exclusion clause was engaged.

3. At trial there were two theories as to the possible cause of the fire. We will refer to the first as the 'oily rags theory'.[7] This, in substance, posited that the cause of the fire was the selfheating and spontaneous combustion of rags infused with a product described as 'Loba Oil' [8] put in the green rubbish bin in the dining room by the painters.[9] The Loba Oil was a product being used by the painters to stain various timber surfaces in the house.

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[7] The primary judge described it as the 'oily rags in the bin theory'.
[8] The primary judge used this name to describe the product known as Lobasol HS 2K ImpactOil and ImpactOil Colour: primary reasons [10].
[9] See also primary reasons [100] - [101], [216](10).

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4. The second theory - referred to as the 'intruder theory' - was that an intruder entered into the house and lit a fire in or near the green rubbish bin.[10] AIG contended that the intruder theory was not open on the pleaded case. The primary judge held that the pleading point was misconceived. [11] In any event, given the way in which the trial was conducted, the primary judge would have allowed an amendment to deal with the pleading point.[12]

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[10] See also primary reasons [100] - [101].
[11] Primary reasons [394]. See also [395] - [415].
[12] Primary reasons [416] - [418].

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5. Broadly summarised, the primary judge found that: (1) the point of origin of the fire was the green rubbish bin in the dining room; [13] (2) AIG did not prove that there were any Loba Oil soaked rags in the green rubbish bin at the time the fire started; [14] (3) the intruder theory could not be dismissed as merely speculative;[15] (4) the cause of the fire could not be determined; [16] (5) properly construed, the contract works exclusion clause did not apply to the renovation works carried out by MBC, this failing on various levels.[17] It followed that the plaintiffs succeeded against AIG but failed as against the Bresland parties.

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[13] Primary reasons [426].
[14] Primary reasons [434].
[15] Primary reasons [444] - [446].
[16] Primary reasons [447]. See also [10], [676] and, more generally, primary reasons section 4.5.3.
[17] Primary reasons [482] - [504].

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6. The primary judge also found that interest ran from 16 June 2017 - that being the day from which it was unreasonable for AIG to withhold payment indemnifying the plaintiffs for the damage suffered.[18]

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[18] Primary reasons [621] - [622], [625], [631] - [634].

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7. The primary judge ordered that:[19]

    1. AIG pay the plaintiffs an amount of $4,698,764 (par 1) and their costs of the action to be assessed (par 5).

    2. The plaintiffs' claim against the Bresland parties be dismissed (par 2).

    3. AIG's claim against MBC be dismissed (par 3).

    4. MBC's claim against Holgerssons be dismissed (par 4).

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[19] BAB 1 - 2.

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8. AIG now appeals challenging the order that it pay the plaintiffs the $4,698,764 with costs. Indeed, the appeal notice says that AIG appeals against all substantive orders other than the order that AIG's claim against MBC be dismissed.[20] As to this, prima facie AIG had no

standing to challenge the order that MBC's claim against Holgerssons be dismissed. It is, however, unnecessary to consider this point any further. The orders wanted in AIG's appellant's case restrict AIG's appeal to setting aside the orders that AIG pay the plaintiffs the $4,698,764 with costs.[21]

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[20] WAB 1.
[21] WAB 36.

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9. The appeal grounds fall into two categories:[22]

    1. Appeal grounds concerning the proper construction of the contract works exclusion clause (grounds 1 - 6). AIG asserts error in the primary judge's construction of the contract works exclusion clause. According to AIG, these grounds do not require the cause of the fire to be established. For this reason AIG says that it is convenient to deal first with these grounds.[23]

    2. Appeal grounds concerning the cause of the fire (grounds 7 16). These concern whether, contrary to the primary judge's conclusion, AIG established on the balance of probabilities that the fire was caused by rags soaked in Loba Oil which were put in the green rubbish bin in the dining room.

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[22] AIG's submissions par 1 WAB 14.
[23] AIG's submissions par 22 WAB 19 - 20.

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10. The plaintiffs oppose the appeal, supported by the Bresland parties. As will be seen, the Bresland parties face potential liability if AIG succeeds in the appeal. Holgerssons does not seek to be heard on the construction issues as to the contract works exclusion clause. However, Holgerssons asserts standing and seeks to be heard on matters related to the cause of the fire.

11. The plaintiffs crossappeal challenging: (1) the order that the plaintiffs' claim against the Bresland parties be dismissed; and (2) the time from which interest on the judgment amount should be recoverable - the plaintiffs seek interest from 7 June 2016 rather than the 16 June 2017 as allowed by the primary judge.

12. As to the challenge to the order that the plaintiffs' claims against the Bresland parties be dismissed, the plaintiffs' relevant ground in the crossappeal is premised on the judgment in favour of the plaintiffs being set aside on appeal.[24] Accordingly, this aspect of the crossappeal does not arise if AIG's appeal fails. The challenge to the interest determination is advanced irrespective of the outcome on the appeal. The plaintiffs claim that, if the appeal is allowed, the Bresland parties should pay interest from 7 June 2016 (presumably on the basis that the first aspect of the crossappeal succeeds).[25]

[24] Grounds of appeal in cross-appeal par 1 WAB 143.
[25] Grounds of appeal in cross-appeal par 2.3 WAB 144.

13. AIG makes no submissions on the first aspect of the crossappeal. However, AIG opposes the crossappeal as to interest. AIG also advances a notice of contention in the crossappeal providing a further suggested reason to uphold the primary judge's determination as to when interest ought to commence to run.

14. The Bresland parties oppose this court making substitutive findings as to liability on their part, raising a number of defences and other matters. They also advance a notice of contention in support of their position. It is not necessary to consider these matters unless the first aspect of the crossappeal falls for determination because the appeal is to be allowed. Otherwise the Bresland parties adopt AIG's position as to interest, including relying on AIG's notice of contention.

15. Holgerssons oppose the Bresland parties' contentions so far as those contentions relate to Holgerssons and the cause of the fire.

16. For the reasons that follow, AIG's appeal fails. In substance, the primary judge's construction of the contract works exclusion clause was correct. Moreover, AIG has not established material error in terms of the appeal grounds concerning the cause of the fire. However, the plaintiffs' crossappeal should be allowed in part. The plaintiffs should be allowed interest on the judgment debt from an earlier time than was provided for by the award made by the primary judge. The issues as between the plaintiffs and the Bresland parties do not arise for determination given the failure of AIG's appeal.

The broad factual context

17. What follows in this section of these reasons is taken from the primary reasons. Where necessary, what was found by the primary judge is amplified by references from the contemporaneous documents. Except where stated to the contrary, we have not included anything that is controversial in the appeal.

18. In summary, the plaintiffs purchased a property at 179 Wellington Street, Mosman Park in August 2014 for $8.95 million. The plaintiffs intended to live in the home on the property. Before moving into the property the plaintiffs engaged MBC to carry out renovations to the house. The renovations began in mid-2015 and were almost complete by 15 January 2016. By that time the plaintiffs had spent more than $1 million on the renovations. On 16 January 2016 the house was destroyed by a fire. The damage was so extensive that the house had to be demolished.

The AIG home insurance policy

19. The plaintiffs had an existing relationship with the Bresland parties at the time the plaintiffs purchased the property. On purchasing the property Mr McMurray contacted Mr Bresland to

arrange insurance cover. Mr McMurray told Mr Bresland that the plaintiffs were about to buy a new house worth $4.5 million but would not be moving in immediately as the plaintiffs were going to carry out renovations to the value of $500,000 - $600,000. Mr McMurray told Mr Bresland that the plaintiffs wanted the house to be insured, wanted the insurance to cover the renovations, and the house needed to be 'fully covered for every eventuality'. Mr Bresland told Mr McMurray that he would arrange the appropriate cover.

20. Initially insurance cover was arranged with Chubb Insurance Company of Australia Ltd. However, Mr Bresland formed the view that the Chubb deductible was too high. On 21 September 2014 Mr Bresland sought a quotation to insure the property from AIG. In requesting the quotation, Mr Bresland stated that renovations to the property were planned within the next 12 months and that the type of renovations were: 'Internal - bring up to new standard $600,000'. The disclosure was made in a pro forma AIG 'quotation request' form in answer to questions posed under the heading 'Residence Information'.[26]

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[26] GAB 3.

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21. AIG relies on this aspect of the factual context in appeal ground 1.

22. AIG provided a quotation to Mr Bresland on 24 September 2014. Based on the quotation Mr Bresland recommended to Mr McMurray that the plaintiffs take out an insurance policy with AIG for the duration of the renovations. Mr McMurray accepted Mr Bresland's advice. When Mr Bresland and Mr McMurray had this conversation, Mr McMurray was not made aware (as was in fact the case) that in submitting its quotation AIG included a proposed endorsement in the form of the contract works exclusion clause. Nor was Mr McMurray provided with a copy of the quotation.

23. Mr Bresland accepted the AIG quotation, on behalf of the plaintiffs, and cancelled the Chubb home insurance policy.

24. The AIG home insurance policy between AIG and the plaintiffs is comprised of: (1) a Product Disclosure Statement; (2) Policy Wording (this sets out the general terms applying to the home insurance policy); (3) Home & Contents Insurance Schedule; and (4) Endorsements.[27] The contract works exclusion clause is the sole subject of the Endorsements. The PDS, Policy Wording, Schedule and the Endorsements are to be read as one document.[28]

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[27] See generally GAB 31 - 80.
[28] Policy Wording section I: GAB 46.

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25. The Bresland parties failed to bring the contract works exclusion clause to Mr McMurray's attention prior to 23 October 2015.

26. The material terms of the AIG home insurance policy were that, subject to any applicable exclusion, in the event of physical loss or damage to the house that occurred by accident, AIG would make payments to the plaintiffs that included:

    1. the amount required to restore or repair, replace or rebuild, a structure with materials and workmanship of like kind and quality as the house up to the sum insured of $4.725 million; and

    2. the reasonable costs necessary to demolish damaged buildings and remove the debris.

27. The contract works exclusion clause of the AIG home insurance policy provided:[29]

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[29] GAB 80.

Contract Works Exclusion

Notwithstanding any terms or conditions to the contrary no cover shall be provided under the Your Policy for:

1. Damage:

   - in connection with the Contract Work, Temporary Work, Free Issue Materials or Works;

   - in connection with any Maintenance or Defects Liability Period; or

   - which manifests, incurs or arises after any Maintenance or Defects Liability Period as a result of any activities or works undertaken during such Maintenance or Defects Liability Period:

2. Property Damage to the Contract Work, Temporary Work or Free Issue Materials

In the event of the operation of this exclusion no coverage shall be provided under Your Policy for Construction Materials, Rebuilding for Compliance, Precautionary Repairs, Rebuilding or Reconstruction Costs as more fully specified and defined in Your Policy.

For the purposes of this exclusion the following definitions apply:

Damage means any loss, fine, penalty, cost, charge, liability, physical loss or Property Damage including any Earth Movement

Contract Work means any and all *structures* constructed or in the course of construction wheresoever located or whilst in transit and which are *incorporated or are to be incorporated into a permanent structure* at the Location

Free Issue Materials means any and all building and construction materials (including debris) wheresoever located, or in transit and which are supplied or are to be supplied in connection with the Contract Work, Temporary Work or Works and shall include but not be limited to:

- any and all plant, tools and equipment; or

- temporary buildings and structures and their contents

Location means 179 Wellington Street, Mosman Park WA 6012

Maintenance or Defects Liability Period means a set period of time as agreed to in writing by You which commences after completion of the Contract Work and attendant Works and during which any defects in the Contract Works is remedied by any third party or any maintenance obligations in respect of the Contract Work are undertaken by any third party.

Temporary Work means any and all structures constructed or in the course of construction wheresoever located or whilst in transit that are necessary for access or support to the Contract Work and which will be dismantled and removed at the date of completion of the Contract Works or Works.

Works means any and all operations or activities undertaken in connection with the Contract Work and/or Temporary Work

All other terms utilised in this exclusion shall be defined in accordance with the applicable definition of such terms as found in Your Policy. (emphasis added)

28. The term 'Property Damage' is defined in the Policy Wording (section II). It means 'physical damage to, destruction of or loss of use of tangible property'.[30]

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[30] GAB 48.

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29. The proper construction of the contract works exclusion clause is at the heart of appeal grounds 1 - 6. Also, as will be seen, AIG accepted that it must succeed in relation to its preferred construction of the contract works exclusion clause if it was to succeed on the appeal.

30. The contract works exclusion clause uses a number of defined terms. For the purpose of the appeal four critical defined terms are 'Damage', 'Contract Work', 'Free Issue Materials' and 'Works'. These are all defined within the contract works exclusion clause itself. Also, as can be seen, 'Free Issue Materials' and 'Works' are defined, in a material respect, by reference to the term 'Contract Work' (including through the definition of 'Temporary Work' which in turn relies on the defined term 'Contract Work'). A key concept in the defined term 'Contract Work' is whether there is a 'structure' constructed or in the course of construction which is incorporated or is to be incorporated into a 'permanent structure'.

31. What is meant by the term 'structure', and whether in fact the renovations or aspects of the renovations constituted a 'structure' or 'structures' for the purpose of the definition of 'Contract Work', was a critical issue at trial and is a critical issue on appeal.

The renovations to the home

32. The plaintiffs engaged MBC to renovate the house in late 2014 or early 2015. MBC's director was a David Walling. The site supervisor employed by MBC for the renovations on the property was a Ralph Thomas. Both Mr Walling and Mr Thomas were called to give evidence at the trial. AIG called Mr Walling and Holgerssons called Mr Thomas. The primary judge did not make any general findings as to the credibility, accuracy and reliability of their evidence. However, in one significant respect - the location of the green rubbish bin in the dining room when Mr Thomas left the house in the afternoon of 15 January 2016 - the primary judge found that Mr Thomas' evidence was cogent and consistent with the whole of his evidence.[31]

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[31] Primary reasons [445](6).

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33. MBC arranged for a separate insurer (Tokio)[32] to insure the renovation works.

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[32] Referring to Tokio Marine & Nichido Fire Insurance Co Ltd. Tokio was the third defendant and the second third party in the primary proceedings. However, for reasons which will become apparent, Tokio is not a party to the appeal.

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34. At least some of the renovation works were subcontracted. In particular, MBC entered into an interior paint subcontract in relation to the renovation works. There was a dispute in the proceedings about the precise identity of MBC's counterparty to the interior paint subcontract. It was not necessary for the primary judge to resolve that dispute. Nor is it necessary to go into the dispute for the purposes of the appeal. It suffices to state that, at various times, the interior painting work was carried out by one or both of Holgerssons and another contract painter. The second contract painter was a Mark Simpson or a company associated with Mr Simpson. The primary judge found that Mr Holgersson and Mr Simpson each had a separate contract painting business; but, from time to time for bigger jobs, Mr Holgersson and Mr Simpson worked together as joint contractors. In relation to the property, as between Mr Holgersson and Mr Simpson it was agreed that Mr Simpson would run the internal painting works on the house.

35. Holgerssons and Mr Simpson also engaged other painters to assist them with the interior painting for the renovation works. Two other painters were at the property on the afternoon of 15 January 2016 - Radford Milton and Jason Roach.

36. MBC commenced the renovation works in May 2015. The primary judge made detailed findings as to the nature and extent of the renovation works (which her Honour characterised as a 'refurbishment' of the original home).[33] In substance:

    1. The layout and size of the original house remained substantially unchanged. [34] Except for the repurposing of some rooms, and the installation of a section of wall to close off an entry near a lift and the removal of a wall to create a new entry from the lift and laundry area, none of the ground floor internal walls were moved or changed. [35]

    2. The interior works were effectively to:

    strip out and demolish the existing fixtures and fittings, including tapware, cabinets, appliances, flooring, and windows, some, if not all, doors, including door and window frames, to create new openings, replace some ceilings and replace part of two walls in the entry. [36]

    3. New timber flooring was installed to most, if not all, of the ground floor interior. [37]

    4. New decking (at the rear) and a fishpond (under a bridge to the front entry) were built to the exterior of the house. [38] Also, the rear terrace area of the ground floor had been enclosed and its use designated as a loggia.[39]

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[33] Primary reasons [93], [508].
[34] Primary reasons [94].
[35] Primary reasons [98]. See also [99](d).
[36] Primary reasons [94].
[37] Primary reasons [98].
[38] Primary reasons [97]. See also [99](b) - (c).
[39] Primary reasons [99](b).

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37. By the end of the workday on 15 January 2016 (the day before the night of the fire):

    part of the entry walls (to the dining room and the sitting room) were replaced with new timber frames with recesses for timber sliding doors or what are sometimes referred to as pocket doors;

    a gyprock lined and flat oak lined column (described by AIG as a faux column) was constructed in the dining room in the corner between the entry wall and the wall between the dining room and bathroom, which corner was near the stairs leading down to the spiral staircase;

the walls of the entry were covered by linear oak battens on timber panels, and the timber sliding doors to the dining room and the sitting room were covered with a mirror face with linear oak battens affixed to the mirrored surface. [40]

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[40] Primary reasons [99](e) - (h). See also [106] - [108].

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38. The plaintiffs' interior designer had specified that Loba Oil was to be used on the wood wall panels and battens (to match the new floorboards installed in the house). The work to stain the timber surfaces with Loba Oil commenced before Christmas 2015. As at 15 January 2016 the oak timber lining in the dining room had been, or was in the process of being, stained by the painters using Loba Oil to match the new timber flooring. However, a final finish of Loba Oil to some of the woodwork on the walls had not been completed.

39. In terms of its application, the Loba Oil was mixed with a hardening agent and then applied to the timber by a brush. The painters used a scraper to remove excess oil. After that white rags were used to 'feather in' the Loba Oil to render its application consistent across the wood surfaces. The rags were pre-cut to approximately one foot and had been purchased in bulk. The white rags could not be reused once they became saturated with Loba Oil as they could not be cleaned.

40. Mr Simpson knew that oily rags had a tendency to selfheat and selfignite if not disposed of properly. Accordingly, a process was in place for the disposal of the used white rags.

41. As described by Mr Simpson, the Loba Oil rags were disposed of as follows:

    1. The rags were dried out by hanging them on the side of a skip bin outside the house on the street verge.

    2. Once the rags were dry, either later that day or the next morning, the rags were disposed of by putting them inside the skip bin.

42. Mr Simpson told Mr Milton and Mr Roach not to screw the rags up and put them in a confined space. Mr Simpson also told Mr Milton and Mr Roach not to put the oily rags in the inside rubbish bins (as will be seen there were various rubbish bins located in the house). Mr Simpson's instructions were that the oily rags were to be put in the outside skip bin or, if they were not too far gone and might be used further, to be laid out flat to dry across planks and ladders near a store area at the rear of the property.

43. The painters ran out of supplies of Loba Oil in the week before the fire. Consequently, the timber staining was interrupted. The staining work recommenced a day or so before the night of the fire when a new supply of Loba Oil arrived at the house. This is relevant to the evidence that there was a suspicious fire in the skip bin outside the property on 12 January 2016 (see [44] - [47] below).

A diversion: the 12 January 2016 fire in the skip bin

44. Mention has already been made of the skip bin outside the house on the street verge. The skip bin was to the front of the plaintiffs' house. A fire occurred in the skip bin early on the morning of Tuesday, 12 January 2016. CCTV footage from a neighbouring property, to the west of the plaintiffs' property, shows the fire.[41] However, as the primary judge noted, the CCTV footage only shows a very small image of, at best, part of the western edge of the skip bin; it does not show the eastern or northern sides of the bin. [42] The CCTV footage does not exclude the possibility of a person approaching the skip bin and starting the fire either intentionally or unintentionally. [43]

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[41] Exhibit A.146; exhibit A.147.
[42] Primary reasons [353].
[43] Primary reasons [356].

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45. A firefighting crew attended the fire. It was recorded as 'suspicious'.

46. The primary judge noted the possibility that the skip bin fire was caused by the selfcombustion of Loba Oil soaked rags disposed of in the skip bin. Her Honour found that this was speculative. As the painters had run out of Loba Oil, if there were any oily rags in the skip bin in the early hours of 12 January 2016, those rags would have been in the skip bin since about Thursday the preceding week. [44]

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[44] Primary reasons [354].

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47. The primary judge found that the cause of the fire in the outside skip bin could not be determined. Nor could it be established on the evidence that there was any link between the fire in the skip bin on 12 January 2016 and the fire that destroyed the plaintiffs' house in the early hours of 16 January 2016. These findings are not challenged in the appeal.

The state of the site on the day of the fire

48. The primary judge identified a number of contested factual issues about the state of the site on the day of the fire.

49. It was common ground that there was a green rubbish bin in the dining room on the day before the night of the fire. This was the only rubbish bin on the ground floor (there were other like rubbish bins elsewhere on site). There was, however, a contested factual issue as to whether the green rubbish bin was moved after Mr Thomas locked up and left the house at about 3.30 pm on 15 January 2016.

50. The primary judge held, in substance, that the green rubbish bin in the dining room was moved from a position in the dining room away from the entry area where the sliding doors

opened (where Mr Thomas said it was when he locked up and left the house) to another location in the entry to the dining room close to where the sliding doors opened into the entry (where the remains of the bottom of a rubbish bin were found after the fire on the following morning). [45]

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[45] Primary reasons [445](6). See also [124] - [125], [148] - [150], [278].

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51. This finding is not challenged on appeal. Indeed, AIG said that disagreement as to the precise location of the bin within the dining room was immaterial to the appeal.[46]

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[46] AIG's submissions par 16 WAB 16.

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52. The primary judge identified two other 'highly contested' factual issues. The two issues are closely related:

    1. Whether, on 15 January 2016, the painters had placed into the green rubbish bin in the dining room any oily rags which had been used to apply the Loba Oil.

    2. Whether, when Mr Thomas locked up the house after everyone had finished work in the afternoon on 15 January 2016, any oily rags which had been used to apply the Loba Oil were in the green rubbish bin in the dining room.

53. In addition, if it was found that there were oily rags in the green rubbish bin, there was a third highly contested issue - whether the oily rags selfheated and subsequently selfignited causing the fire that destroyed the house.

54. Mr Holgersson had not been working at the house for two to three weeks before the fire.

55. On the last working day before the fire (ie on 15 January 2016), Mr Simpson was carrying out interior painting works inside the house with the two other painters, Mr Milton and Mr Roach. Holgerssons called Mr Simpson to give evidence. Neither Mr Milton nor Mr Roach were called to give evidence. At trial AIG sought to rely on a ***Jones v Dunkel*** [47] inference by reason of the omission to call Mr Milton and Mr Roach. The primary judge concluded that it was not open to draw a ***Jones v Dunkel*** inference and that, in any case, the inference sought to be drawn by AIG went beyond a ***Jones v Dunkel*** inference. These conclusions are challenged by appeal ground 13.

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[47] Referring to ***Jones v Dunkel*** [1959] HCA 8; (1959) 101 CLR 298.

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56. On 15 January 2016 the painters applied Loba Oil to a small section of the linear oak battens affixed to the sitting room entry wall near the stairs. There was no application of Loba Oil to any timber inside the dining room. Nevertheless, as the primary judge observed, it was the case that the painters were using rags to apply Loba Oil to wooden surfaces on the afternoon before the night of the fire. [48]

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[48] Primary reasons [400].

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57. Mr Simpson left the property at about 2.30 pm on 15 January 2016. Mr Milton and Mr Roach continued with their painting work. Accordingly, Mr Simpson was not at the house to supervise or check whether Mr Milton and Mr Roach disposed of the oily rags correctly.

58. There was a good deal of evidence about what was put in the green rubbish bin generally and on the day of the fire. Relevantly:

1. Mr Thomas said that the inside green rubbish bins were for lunch and trade waste whereas the outside skip bin was for building waste. [49] Mr Thomas also said that:[50]

   (a) small pieces of wood might have been disposed of in the green rubbish bins; and, while sawdust should not have been disposed of in those bins and he never saw any sawdust in the green rubbish bin in the dining room, this may have occurred;

   (b) he never saw rags hanging over the side of the green rubbish bins;

   (c) he did not see any rags near the green rubbish bin in the dining room on 15 January 2016 and could not recollect putting any rags in the bin that day;

   (d) before leaving for the day (after the tradespeople had left) he picked up a half-empty water bottle and drill bit and threw them into the green rubbish bin. Mr Thomas was one to two metres away but could see into the top section of the bin. It appeared to Mr Thomas that the green rubbish bin in the dining room was reasonably empty.

2. Mr Simpson said that he did not hang rags over the side of the green rubbish bin in the dining room or put rags inside the bin. Nor did he ever see Mr Milton or Mr Roach do so. [51] Mr Simpson gave evidence that was consistent with Mr Thomas' evidence as to what was to be disposed of in the green rubbish bin.

3. Niall Woods, a carpenter, was at the property on 15 January 2016. He did not put anything in the green rubbish bin in the dining room and did not see anyone else put anything in the bin. Nor did Mr Woods see the bin completely full. [52]

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[49] Primary reasons [146].
[50] Primary reasons [146] - [147], [150].
[51] Primary reasons [153].
[52] Primary reasons [159].

59. Mrs McMurray visited the house every day. She never saw rags in any green rubbish bin or rags hanging over the side of any green rubbish bin. Nor did Mrs McMurray see the green rubbish bin full.[53] It appeared to Mrs McMurray that the rubbish bins were emptied regularly. [54]

[53] Primary reasons [160] - [162], [428].
[54] Primary reasons [161].

60. The primary judge found that it was not known, exactly, what was in the dining room green rubbish bin on the night of the fire. However, her Honour was satisfied that 'there was some sawdust, a water bottle and a drill bit'. [55]

[55] Primary reasons [400]. See also [277], [467], [487].

61. More generally, the primary judge was satisfied, on the evidence, that Mr Thomas kept a clean and tidy work site.

62. The primary judge found that there was no admissible direct evidence given by any witness that rags used by the painters to apply Loba Oil were placed in the green rubbish bin. [56] The reference to 'admissible' and 'direct' evidence was deliberate. As will be seen, AIG sought to rely on a statement to the contrary - ultimately attributed to Mr Simpson - and invoked s 79C (2a) of the *Evidence Act 1906* (WA) in this respect. The primary judge rejected the admissibility of that material (see [90] below). This determination is challenged by appeal grounds 11 and 12. At the appeal hearing, senior counsel for AIG accepted that, but for that matter, there was no direct evidence that used rags from the application of Loba Oil were left in the green rubbish bin in the dining room on the day before the night of the fire.[57]

The fire

[56] Primary reasons [427].
[57] Appeal ts 89 - 90.

63. The house was locked when the fire occurred. Mr Thomas locked the house when he left at about 3.30 pm on 15 January 2016. On some occasions Mr Thomas left a key outside so that contractors could enter. Mr Thomas did not do so on the afternoon of 15 January 2016.

64. The primary judge referred to and apparently accepted evidence that the plaintiffs visited the property at about 10.30 pm on 15 January 2016. The plaintiffs attended the property to check the water in the pool. The plaintiffs did not enter the house. However, as the plaintiffs left, at about 10.45 pm, Mr McMurray saw a man walking diagonally across a vacant block two blocks to the east of the plaintiffs' property.

65. The primary judge also referred to CCTV footage of the house on the night of 15 January 2016 and the early morning of 16 January 2016. AIG alleges, by appeal ground 8.D, that the primary judge erred in relation to the use of the CCTV footage. Accordingly, there will need to be further reference to the CCTV footage when evaluating the grounds of appeal.

66. However, it was not in issue that a person could enter the plaintiffs' house from its eastern side, or a laundry door to the western side of the house, without being seen on the available CCTV footage.[58]

[58] Primary reasons [170] - [171].

67. A fire in the house was first detected, and a 'triple zero' call was registered, at 1.21 am on 16 January 2016. The primary judge also said, somewhat inconsistently, that the fire was first seen by neighbours at 1.02 am.[59] There was, however, no evidence from a neighbour. We suspect that her Honour was referring to what is revealed by viewing the CCTV footage on the neighbouring property to the west of the plaintiffs' property. That CCTV footage shows a bright light, consistent with the fire on the property, first becoming visible just after 1.02 am on 16 January 2016.[60]

[59] Primary reasons [445](5).
[60] Exhibit A.153.

68. Firefighters who attended had to use force to enter the property.

69. At trial four witnesses gave forensic fire investigation evidence. They were James Bell, James Manser, Mark Pollard and Maurice Tong. Mr Bell was a fire investigation officer employed in the Fire Investigation and Analysis Unit of the Department of Fire and Emergency Services. He attended the property at 3.10 am on 16 January 2016, as firefighters were putting out the fire, and remained at the house until 10.22 am. Mr Bell was called by AIG. Mr Pollard was called by the plaintiffs. Mr Manser and Mr Tong were called by

AIG. The primary judge found that Mr Pollard, Mr Manser and Mr Tong were amply qualified to give expert evidence in the areas of fire origin, the point of origin, fire language, fire paths and the cause of a fire. Mr Bell was also qualified as an expert fire investigator.

70. The primary judge provided a detailed account of the substance of the forensic fire investigation evidence.[61] Most of that may be passed over for the purpose of the appeal. Relevantly, based on the forensic fire investigation evidence the primary judge made findings that:

1. The area of origin of the fire was the dining room and the point of origin of the fire was the green rubbish bin. [62]

2. The failure or malfunction of electrical equipment or lighting was discarded as a potential cause of the fire. So too was smoking or the discarding of a cigarette.[63]

3. When hosed down, the floor in the dining room did not show any residual ignitable liquids. [64]

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[61] Primary reasons [204] - [351].
[62] Primary reasons [426]. This was consistent with the opinion of Mr Bell (primary reasons [216](10), [217]), Mr Manser (primary reasons [274] - [275), Mr Tong (primary reasons [325], [329], [335] - [336], [340]) and, in part, Mr Pollard (primary reasons [349] - Mr Pollard opined that the fire started in the immediate area of the bin but could not say that the fire started in the bin). See also [419] - [425].
[63] Primary reasons [216](9).
[64] Primary reasons [213].

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71. The primary judge also found that Loba Oil (being an organic oil) had the propensity or capacity to selfheat.[65] (However, as will be seen at [101] - [102] below, the primary judge made further findings that are adverse to the acceptance of AIG's selfcombustion case as underpins the oily rags theory.)

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[65] Primary reasons [400], [435].

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72. These various findings are not challenged in the appeal. There is, however, a significant issue in the appeal as to the admissibility of certain statements recorded in Mr Bell's fire investigation report[66] and field notes[67] (see appeal grounds 10 - 11). That is best left for more detailed discussion in that context. In summary, however, Mr Bell's report and notes recorded what Mr Bell was informed of by Mr Walling as to a telephone conversation between Mr Walling and Mr Simpson. Mr Simpson (referred to generically as 'the painters')

was recorded as confirming that 'they gathered the rags they used to clean up the wood/timber staining & placed them in the bin'. [68] The primary judge found that Mr Bell's record of this conversation should not be admitted into evidence. [69]

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[66] GAB 88 ('Mr [redacted] confirmed by a phone call to the painters; post fire that they had cleaned up all their rags and placed them in the rubbish bin …').
[67] GAB 898 ('[Mr Walling] contacted the painters in my presence; they confirmed they gathered the rags they used to clean up the wood/timber staining & placed them in the bin in the front western room at approx. 3 pm on Friday 15/1/16').
[68] Primary reasons [225]. See GAB 898.
[69] Primary reasons [218].

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73. After the fire, a forensic locksmith, Brian Tisdale, was engaged to inspect the property to examine the locks at each point of entry to determine whether there was any evidence of unauthorised entry. Mr Tisdale found no evidence that any of the locks on the doors or gates had been picked or manipulated with one exception. The exception was the external laundry door on the western side of the house. Mr Tisdale found a piece of wire outside the laundry door that resembled a lock manipulation tool.

74. Mr Tisdale was able to pick the deadlock on the external laundry door to the west of the home using the tool. However, the use of the tool by Mr Tisdale left no evidence that the lock had been picked. So far as, by subsequent examination, Mr Tisdale identified marks on the locking bolt, there was nothing that suggested one way or the other that the tool had been used on an earlier occasion to open the external laundry door.

The litigation

75. Immediately after the fire, the plaintiffs made a claim on the home insurance policy with AIG. AIG denied liability. The plaintiffs eventually sued AIG for damages. In the alternative the plaintiffs sued the Bresland parties. The plaintiffs also sued Tokio. The plaintiffs' claim against Tokio was settled prior to trial. The settlement amount was taken into account in determining the damages claimed by the plaintiffs.[70]

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[70] Primary reasons [618] - [619].

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76. AIG denied liability on the ground that the contract works exclusion clause applied. The primary judge explained the basis for AIG's claim that the contract works exclusion clause applied in the following terms, namely, that AIG claimed that:

(a) the fire was caused by the selfignition (spontaneous combustion) of oil soaked rags, being used by painters, placed in a plastic rubbish bin in the front western room on the ground floor of the house; and

(b) this painting work was an excluded activity as it was an activity undertaken in connection with the Contract Work, Temporary Work, Works or Free Issue Materials and/or Property Damage to the Contract Work, Temporary Work, Works or Free Issue Materials as defined in the Contract Works. [71]

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[71] Primary reasons [9].

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77. This was, broadly speaking, consistent with AIG's pleaded defence.

78. AIG pleaded that the house was undergoing extensive renovations. The renovations were said to constitute 'Contract Work' or 'Works' or 'Temporary Work' as defined in the contract works exclusion clause. AIG said that a plastic rubbish bin was put in the front dining room and used in connection with the Contract Work, Temporary Work, Free Issue Materials or Works. This was because the green rubbish bin was used by tradespeople working on the renovations to dispose of rubbish generated by the work carried out on site. AIG pleaded that the rubbish included timber shavings, sawdust, sandpaper, cleaning cloths and rags. Those contents of the green rubbish bin were said to constitute 'Free Issue Materials' as defined in the contract works exclusion clause. According to AIG, the point of origin of the fire was inside the green rubbish bin. Thus the damage the subject of the plaintiffs' claim was either 'Damage' in connection with the Contract Work or Temporary Work or Works or Free Issue Materials (ie within par 1 of the contract works exclusion clause). Alternatively, the damage was 'Property Damage' to the Contract Work or Temporary Work or Free Issue Materials (ie within par 2 of the contract works exclusion clause).[72]

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[72] AIG's further amended defence dated 5 June 2019 (AIG's defence) par 6 BAB 246 - 247.

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79. AIG both elaborated on and articulated alternative bases for the plea invoking the contract works exclusion clause in further paragraphs of its defence.

80. AIG pleaded that the fire was caused by the selfignition of rags infused with Loba Oil placed in the green rubbish bin by painters conducting renovation activities.[73] Moreover, the use of the rags infused with Loba Oil was in connection with the staining of timber panelling and doors. These were pleaded to be 'structures' that had been (or were being) constructed at the property. Alternatively, the timber panelling and doors were being stained to match new wood floors that had been (or were being) constructed at the property. In both cases, according to AIG, the use and disposal of the Loba Oil infused rags constituted an activity in connection with Contract Work.[74]

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[73] AIG's defence par 7 BAB 247.
[74] AIG's defence par 8 BAB 247 - 248.

81. Accordingly, on AIG's pleaded case:[75]

    1. There were relevant 'structures' (ie structures within the meaning and for the purpose of the 'Contract Work' definition in the contract works exclusion clause) in the form of timber panelling, doors and new wood floors.

    2. The contents of the green rubbish bin in the dining room constituted 'Free Issue Materials' within the meaning and for the purpose of the definition in the contract works exclusion clause.

[75] See also primary reasons [466] (where the primary judge identified the 'structures' relied on by AIG so far as activities needed to be in connection with a structure).

82. AIG did not plead that the green rubbish bin itself was Free Issue Materials. However, AIG seemingly advanced a case to this effect at trial.[76]

[76] ts 610, 1372, 1409, 1502. See also ts 1410 - 1411.

83. When AIG's defence is stripped of unnecessary verbiage, it is apparent that AIG invoked the contract works exclusion clause in two distinct ways:

    1. First, AIG said that the damage claimed by the plaintiffs constituted 'Damage' in connection with 'Contract Work', 'Free Issue Materials' or 'Works' because the fire started in the green rubbish bin and the bin was put in the dining room and used in connection with the renovation works (the renovation works constituting 'Contract Work' or 'Works'). See AIG's defence par 6.

    2. Second, to the extent something more was required, the fire was caused by the selfignition of rags infused with Loba Oil placed in the bin by painters undertaking activities as part of the renovations (the rags being used to stain timber panelling and doors to match new wood floors). AIG initially advanced this on the basis that it sufficed if the activities were undertaken in connection with the renovations. In the alternative, AIG said that the activities were undertaken in connection with the staining of relevant 'structures' (ie the timber panelling, doors and wood floors). See AIG's defence pars 7 & 8.

84. AIG brought third-party proceedings against MBC and Tokio. The third-party proceedings against Tokio were discontinued prior to trial. Among other things, the third-party proceedings against MBC alleged that the fire was caused by the negligence of MBC's painting subcontractor (said to be a company associated with Mr Simpson). The third-party proceedings against MBC failed for reasons that are irrelevant on appeal.[77] MBC commenced fourth-party proceedings against Holgerssons. MBC alleged that it entered into an interior painting subcontract for the renovation works with Holgerssons. Holgerssons pleaded that the interior painting subcontract was formed jointly with himself and Mr Simpson (or a company associated with Mr Simpson).

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[77] Primary reasons [12], [643] - [666].

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85. The plaintiffs contended there was no evidence establishing that the painters placed Loba Oil rags in the green rubbish bin. They argued that AIG's allegation in this respect was speculative. According to the plaintiffs, the cause of the fire could not be ascertained. In those circumstances the plaintiffs did not seek to join MBC, Holgerssons or any other subcontractors engaged by MBC.

86. MBC ceased to be an active party in the litigation before trial because it could no longer fund its defence. However, Holgerssons wanted the fourth-party proceedings to remain on foot and be decided because of allegations made against Holgerssons by AIG and the Bresland parties. In the circumstances MBC remained a party to the action but took no further part in the proceedings. Orders were made that evidence in the main action be evidence in the third-party proceedings and the fourth-party proceedings; and that evidence in the third-party proceedings and the fourth-party proceedings be evidence in the main action.

The primary judge's reasons

87. It is not necessary to repeat the substance of the primary judge's findings which are uncontroversial on appeal and have been summarised earlier in these reasons (see generally [17] - [74] above).

88. The primary judge identified three main issues for determination in the proceedings. These were: (1) whether the court was able to determine how the fire started; and, if so, what was the cause of the fire; (2) the proper construction of the contract works exclusion clause; and (3) the quantum of the loss suffered by the plaintiffs. Apart from interest, the primary judge's quantum determinations are not challenged in the appeal. Nothing needs to be said as to this aspect of the primary judge's reasoning.

89. After dealing with the evidence, doing so comprehensively, the primary judge dealt with the three matters for determination. Relevantly for the purposes of the appeal, the primary judge addressed the cause of the fire in section 4.5 of the primary reasons[78] and the construction of the contract works exclusion clause in section 5.4 of the primary reasons.[79] Accordingly, the primary judge dealt first with the evidence going to the cause of the fire.

Primary judge's findings relevant to the cause of the fire

[78] Primary reasons [358] - [447].
[79] Primary reasons [476] - [506].

90. The primary judge concluded that Mr Bell's records of the telephone conversation between Mr Walling and Mr Simpson (see [72] above) should not be admitted into evidence. [80] In this respect the primary judge also held that AIG failed to cross-examine Mr Simpson about precisely what he had said to Mr Walling in the telephone conversation that occurred the morning after the fire.[81] These findings are challenged by appeal grounds 10 - 12. In the alternative, even if admitted, the primary judge was not satisfied that the evidence was sufficiently cogent or reliable to justify a finding that one of the painters put Loba Oil soaked rags in the dining room green rubbish bin on 15 January 2016. In addition to the absence of cross-examination, the primary judge referred to the fact that Mr Simpson left site at 2.30 pm on 15 January 2016 at which time the other painters (Mr Milton and Mr Roach) were still working.[82]

[80] Primary reasons [218]. See generally [219] - [254].
[81] Primary reasons [234], [251], [253] - [254].
[82] Primary reasons [252] - [253].

91. The primary judge made a number of findings about the experts called to give forensic fire investigation evidence:

1. Mr Bell's opinion as to the cause of the fire was given lesser weight as his investigation effectively ceased on the morning after the fire. The primary judge also found Mr Bell's evidence about the cause of the skip bin fire to be unreliable. [83]

2. Mr Manser was not an entirely reliable witness. [84] In particular, her Honour was not satisfied that experiments conducted by Mr Manser had 'probative usefulness' other than to show a propensity of Loba Oil soaked rags to selfheat. [85] However, Mr Manser did concede that the oily rags theory fell away if there was no admissible evidence that there were oily rags in the green rubbish bin in the dining room on the night in question. [86]

3. Mr Tong was the most impressive of the forensic fire investigators who gave evidence. [87] His findings were 'generally' credible and reliable. [88] Mr Tong's opinion was that the probable source of ignition and what caused the fire to start in the green rubbish bin could not be determined.[89] This was because Mr Tong was unable to obtain any evidence whatsoever about what was in the bin immediately prior to the fire. [90]

4. Mr Pollard's investigation was limited because the fire scene had been disturbed by others. [91] He opined that it was not possible to determine the cause of the fire due to the disturbance of the fire scene and the extent of the damage. [92] Mr Pollard was unable to eliminate the intruder theory. [93]

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[83] Primary reasons [245]. See also [202] - [203].
[84] Primary reasons [258]. See also [259] - [262].
[85] Primary reasons [261].
[86] Primary reasons [311].
[87] Primary reasons [318].
[88] Primary reasons [425].
[89] Primary reasons [325], [340].
[90] Primary reasons [325].
[91] Primary reasons [348].
[92] Primary reasons [350].
[93] Primary reasons [350].

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92. AIG was critical of Holgerssons' omission to call Mr Milton or Mr Roach to give evidence - they being said to be the persons best placed to shed light on whether oily rags were disposed of in the dining room green rubbish bin. AIG contended that their absence had not been explained in the way discussed in ***Jones v Dunkel*** . The primary judge was not satisfied that Mr Milton was in Holgerssons' camp or could give evidence to assist Holgerssons' case. In any event, adequate explanation had been given for the failure to call Mr Milton. [94] So too Mr Roach could not be regarded as being in Holgerssons' camp. [95] Accordingly, the primary judge was not satisfied that a ***Jones v Dunkel*** inference should be drawn in respect of the omission to call Mr Milton or Mr Roach.[96]

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[94] Primary reasons [369].
[95] Primary reasons [386].
[96] Primary reasons [370], [387].

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93. The primary judge also said that, if a ***Jones v Dunkel*** inference should be drawn, it was not open to draw an inference of the nature sought to be drawn by AIG. The primary judge explained:

> AIG seeks to draw an inference from their [ie Mr Milton's and Mr Roach's] absence, which, if drawn, would offend the rule in ***Jones v Dunkel*** . This is because AIG seeks that the court draw an inference, from their absence and from other circumstantial evidence, that the fire started in the green plastic rubbish bin in the dining room through selfheating and the auto ignition of Loba Oil soaked rags that had either been placed in the bin, or found their way into the bin through

inadvertence, inattention, or in circumstances that no witnesses could be expected readily to recall. Insofar as AIG seeks that this inference be drawn by the application of the rule in ***Jones v Dunkel*** , it is not an inference open to be drawn as to do so would be to correct a deficiency in the evidence, which inference cannot be drawn. [97]

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[97] Primary reasons [390].

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94. These findings are challenged by appeal ground 13.

95. The primary judge concluded that the intruder theory was open to be considered on the pleadings. [98] It was for AIG to establish that there was no conflicting or competing inference that was equally possible to the oily rags theory. [99] AIG had contended to the contrary. This is challenged by appeal ground 7. In the alternative the primary judge would have allowed Holgerssons leave to amend to plead the intruder theory. [100]

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[98] Primary reasons [394], [415]. See also [399] - [401].
[99] Primary reasons [415].
[100] Primary reasons [418].

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96. In summarising what AIG had to prove to make out its defence, the primary judge said that AIG had to prove as discrete steps (ie links in a chain rather than strands in a cable) that:[101]

    1. The green rubbish bin contained rags used by the painters on the day before the night of the fire to apply or remove Loba Oil.

    2. The rags selfheated leading to spontaneous combustion resulting in a fire that spread and destroyed the house.

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[101] Primary reasons [401], [406] - [407].

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97. The primary judge referred to some of the difficulties in drawing inferences from circumstantial evidence.[102] Among other things, her Honour stated, with respect correctly, that it was not enough if the circumstances give rise to conflicting inferences of equal degrees of probability so that the choice between them was a mere matter of conjecture. [103] Thus, while the onus was on AIG to prove the oily rags theory as a non-speculative possibility, there must also be no conflicting or competing inference that was equally possible.[104]

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[102] Primary reasons [402] - [412].
[103] Primary reasons [404].
[104] Primary reasons [413], [415].

98. The primary judge then turned to whether the cause of the fire could be determined. Her Honour made findings that:

    1. The point of origin of the fire was the green rubbish bin in the dining room. [105]

    2. There was no admissible direct evidence given by any witness that rags used by the painters to apply Loba Oil were placed in the green rubbish bin in the dining room. [106]

[105] Primary reasons [426].
[106] Primary reasons [427].

99. After reviewing the salient evidence, the primary judge then found that AIG had not proved that there were Loba Oil soaked rags in the green rubbish bin in the dining room at the time that the fire started. [107] This factual finding is challenged by appeal ground 9.

[107] Primary reasons [434].

100. The primary judge accepted that it was open to infer that it was *possible* that Loba Oil soaked rags were in the bin. An inference to this effect was open by reason that: (1) the painters were using rags to apply Loba Oil to a section of wood panelling on the afternoon before the night of the fire; (2) it was established that Loba Oil soaked rags have the capacity to selfheat; and (3) a fire occurred in the green rubbish bin on the night in question. [108] However, the primary judge rejected the contention that this possibility was sufficient to establish that AIG was entitled to rely on the contract works exclusion clause.[109] The primary judge gave two reasons for this conclusion.

[108] Primary reasons [435].
[109] Primary reasons [435] - [436].

101. First, the primary judge was not satisfied that AIG had proved its case as to selfcombustion. Her Honour stated:

> [T]he theory that the fire was caused by oil soaked painters' rags in the bin, as Mr Tong pointed out, depends upon a number of variables. Merely a propensity for Loba Oil to selfheat when infused into combustible materials, such as painters' cotton rags, on its own is only the first link in the chain to spontaneous combustion of the rags or other surrounding combustible material. Prior to spontaneous combustion thermal runaway must occur. In this matter, the experiments conducted by Mr Manser and Mr Tong establish that one of the variables affecting the likelihood of the fire being caused by spontaneous combustion of Loba Oil soaked painters' cotton rags would depend upon whether it is established on the facts that scrunched up (and not folded) Loba Oil soaked painters' cotton rags were inside the green rubbish bin in the dining room on the night of the fire.
>
> Organic vegetable oils can undergo a process of selfheating through exothermic reaction. However, this process does not always occur. Mr Tong made this clear. Also the experiments conducted by Mr Manser and Mr Tong made this clear. Mr Tong's evidence is that although fires are known to be caused by the selfheating of organic oils, it rarely occurs.
>
> Further, and importantly, beyond selfheating, *it has not been proved in this matter that, even if Loba Oil soaked rags were in the green rubbish bin on the night of the fire and they selfheated, they would have reached the point of achieving thermal runaway, then smouldering until finally producing open flame*. In any event, it appears that the conditions necessary for such a process to occur are not only variable but it appears that science has not yet got to the point where it can be conclusively proved that an organic vegetable oil is the cause of the ignition.[110] (emphasis added)

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[110] Primary reasons [437] - [439].

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102. Accordingly, despite finding that Loba Oil soaked rags had the capacity to selfheat, her Honour was not satisfied that AIG had proved that - if such rags were in the green rubbish bin and they selfheated - the Loba Oil soaked rags would have reached the point of achieving thermal runaway and selfcombusting.

103. This intermediate factual finding is one notionally within a raft of findings challenged by appeal ground 15 (the ground mentions the relevant paragraphs of the primary reasons). However, AIG's written submissions did not directly challenge this intermediate finding. [111] Nor is the finding specifically addressed in AIG's PD 7.4 schedule.[112] Conformably with these aspects of the written appellant's case, the finding was not the subject of oral submissions on the part of AIG. The furthest that AIG took matters was to point out that there was no notice of contention challenging the primary judge's finding that Loba Oil was capable of selfheating.[113] That is not to the point. There is a large difference between selfheating and selfcombustion. The passage reproduced at [101] above accepts the possibility of the former but finds that the latter was not proven.

[111] Compare AIG's submissions pars 103 - 105 WAB 32 - 33. These are AIG's contentions in support of grounds 14 and 15. There is no mention of the finding at primary reasons [439]. Nor, to the extent that AIG refers to other aspects of its written submissions, do those paragraphs of AIG's written submissions challenge the finding at primary reasons [439]. See AIG's submissions pars 18 - 21, 56 - 62 WAB 17 - 19, 25.
[112] AIG's PD 7.4 schedule item 4 WAB 47 - 51.
[113] Appeal ts 192. Senior counsel also referred to the findings that Loba Oil can self-heat: appeal ts 89.

104. In the absence of any relevant submissions - and all the more so in the absence of any challenge to the specific factual finding in the appellant's PD 7.4 schedule - there is no proper basis for this court to interfere with the primary judge's factual finding that it had not been proved that Loba Oil soaked rags in the green rubbish bin would have reached the point of achieving thermal runaway (assuming that such rags were in the dining room green rubbish bin). While, notionally, that factual finding is contained within what is said to be challenged by appeal ground 15, AIG did not present a case directed to this finding. Consequently, while referring to the evidence that the expert's experiments were unable to bring about selfignition,[114] the respondents did not seek to answer such a case on appeal. The respondents were entitled to do so given the way in which AIG confined its case on the appeal. Having regard to the way in which the appeal was argued we would not countenance any gainsaying of this aspect of the primary judge's fact-finding.

[114] Appeal ts 149, 154, 169, 174 - 175.

105. Second, AIG had to establish that there was no conflicting possibility that was equally possible. The only other possibility was the intruder theory. It was for AIG to establish that the oily rags theory had a greater degree of probability than the intruder theory.[115] In this respect the primary judge concluded:

[115] Primary reasons [442] - [443].

> Having considered all of the evidence, direct and circumstantial, and the inferences that can be drawn from the circumstantial evidence, I am not satisfied that the oily rags in the bin theory has a greater degree of probability than the intruder theory. When all of the relevant evidence is considered, both theories are simply possibilities, in respect of which to choose between them would be a matter of mere conjecture and thus, on this basis, the cause of the fire that destroyed the McMurrays' house on the morning of 16 January 2016 cannot be found.

The reasons I have made this finding that the intruder theory cannot be dismissed as merely speculative, are as follows.

(1) The evidence of Mr Tisdale is that the lock picking tool found on the ground outside the laundry door could be used not only to open the laundry door in about 30 seconds, but also easily be used to open the east gate.

(2) The evidence of Mr McMurray and the CCTV footage establishes that a person could enter the eastern side of the property through the eastern gate and walk around to the laundry door without being seen by the camera located across from the tennis court of the house next door. Mr McMurray estimated the journey from the east gate to the laundry door to be 30 to 40 seconds.

(3) The temporary security fencing at the front did not cross the whole of the front of the McMurrays' property, so that a person could enter the eastern gate without having to negotiate the security fence.

(4) The tennis court footage taken from the arrival of the McMurrays on the night of 15 January 2016 at about 10.37 pm identifies a person who may have entered the house. The tennis court footage shows Mr McMurray enter the property through the eastern gate at 10.37 pm and disappear from view, even though he was using his iPhone as a torch. A few seconds later the same thing happens with Mrs McMurray. On each occasion, they pause before entering the property. At 11.45 pm a male person is seen to walk in an easterly direction along the verge past the entry on the McMurrays' house side of Wellington Street and very close to the entry to the eastern gate of their property before going out of sight at about the same point that Mr and Mrs McMurray did when they walked along the path to the eastern gate. From the CCTV footage taken from the front of the McMurrays' house and the tennis court video, it can be inferred that this person had an opportunity to enter the McMurrays' house through the eastern gate and through the laundry door if that person had a lock picking device.

(5) The fire was first seen by neighbours at 1.02 am. As Mr Holgersson points out, there were many reasons why a person might enter a house of this kind, and in the course of entry either accidentally or intentionally light a fire. Such circumstances are not unknown to this court who until very recently had exclusive jurisdiction to deal with criminal proceedings for the offence of arson. It might be thought that nobody would be in the house since it was being renovated and it might be thought that something of value might have been placed in the house that could be stolen. As Mr Manser conceded, in his experience as a police officer and a forensic fire investigator, on rare occasions a fire is found to have been caused by someone who breaks into a house to steal something valuable.

(6) There is one piece of evidence that is consistent with someone having entered the house after Mr Thomas left and locked the house up at the end of the day, that is not consistent with the oily rags in the bin theory and is consistent with the intruder theory, and that is Mr Thomas' evidence that the green plastic rubbish bin was inside the dining room and one to one and a half metres away from the sliding doors. Mr Thomas not only marked the location of this bin on a plan when he was interviewed on 3 February 2016, but his evidence is that he threw a drill bit and an

empty water bottle into this bin when he left for the day, and that he was in the entryway about one and half metres away from the bin. The uncontradicted evidence of Mr Bell, Mr Tong, Mr Manser and Mr Pollard is that during the fire this bin was located almost in the middle of the entry to the dining room, close to and between the sliding doors. Mr Thomas' evidence on this point is cogent and consistent with the whole of his evidence. Importantly, it is particularly cogent because he marked the location of the bin on the plan 14 days after the fire.

Even if Mr Thomas' recollection is wrong, the intruder theory still remains a possibility for the cause of the fire, which possibility is no less than the possibility that the fire was caused by the selfheating of oily rags in the bin.[116]

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[116] Primary reasons [444] - [446].

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106. For these reasons the primary judge found that the cause of the fire could not be determined.[117] These findings are challenged by appeal grounds 8, 14 and 15.

Primary judge's findings as to the construction of the contract works exclusion clause

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[117] Primary reasons [10], [447].

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107. After dealing with the cause of the fire, the primary judge turned to the contract works exclusion clause. The primary judge first addressed relevant principles of construction of insurance contracts.[118] Her Honour then considered the effect of the contract works exclusion clause by inserting the relevant definitions into the defined terms. [119] The primary judge referred to the denial of liability under the home insurance policy - AIG's contention being that the fire in the green rubbish bin, irrespective of its cause, was damage connected with the Works or the Contract Work or Free Issue Materials. [120]

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[118] Primary reasons [448] - [455].
[119] Primary reasons [457].
[120] Primary reasons [460].

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108. AIG claimed that the objective intent of the contract works exclusion clause was to exclude coverage that came about from activities occurring in connection with the renovations to the house. AIG argued that the clause was engaged by both:

1. damage in connection with structures constructed or in the course of construction - identifying as relevant 'structures' the timber panelling, doors (including the frames for the sliding doors) and wood floors; and

2. damage in connection with any and all operations or activities undertaken in connection with any and all structures constructed or in the course of construction - identifying the Loba Oil staining as an activity in connection with the various structures.

109. By contrast, the plaintiffs (supported by the Bresland parties) argued that the contract works exclusion clause did not apply to the renovation works carried out by MBC on the ground that the clause only applies to the construction of a structure that is not part of the house. [121]

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[121] Primary reasons [462].

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110. The primary judge identified, as a threshold issue, whether the renovation work could be characterised as the construction of any and all *structures* which are incorporated into a permanent structure at the property within the meaning of the definition of 'Contract Work' in the contract works exclusion clause. [122] Reference was made to authorities which discussed the meaning of the term 'structure' in other contexts.[123] The primary judge considered these authorities did not provide a great deal of assistance. The authorities did, however, illustrate that the limits of the word 'structure' are to be found within its context, and where the context is used in the construction of a particular structure, such as a house and other structures, that unless the context requires otherwise, the term must mean something more than the component parts of a structure. [124]

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[122] Primary reasons [476].
[123] Primary reasons [477] - [480].
[124] Primary reasons [481].

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111. Ultimately, the primary judge adopted constructions of relevant terms in the contract works exclusion clause as follows:

> [T]the term 'structure' is construed in the clause as *a building or a substantial built form* that has a particular purpose, which can contain either built form of contents or is designed to contain contents once constructed, such as furniture in a granny flat, and not merely items installed or constructed in the course of, alteration, renovation or refurbishment work to the house …[125] (emphasis added)

> [T]he Free Issue Materials are the building and construction materials *supplied by [the plaintiffs]*, pursuant to the terms of the building contract with [MBC]. [126] (emphasis added)

[125] Primary reasons [489] - [490].
[126] Primary reasons [485].

112. The primary judge reached that construction of 'structure' after considering the home insurance policy terms and conditions. Alternatively, although accepting it is a principle of last resort, the primary judge applied the contra proferentem principle and construed the clause against AIG. In that respect the primary judge found that the terms of the home insurance policy as a whole, including the contract works exclusion clause, are ambiguous. [127]

[127] Primary reasons [490], [502]. See also [498] - [499].

113. By appeal ground 2 AIG challenges the conclusion that the terms of the policy are ambiguous so that the principle of contra proferentem applies. There is, however, no ground of appeal that refers to the relevant passages of the primary reasons in which her Honour adopts the primary constructions as reproduced at [111] above so as to directly challenge the construction of the terms 'structure' and 'Free Issue Materials' as adopted by the primary judge.

114. There are associated constructional findings that are challenged. In particular:

1. Having referred to the terms and capitalised definitions of the 'Policy Wording' applying to the home insurance policy, and noting that cl 2.I of section III expressly contemplates the restoration, repair, replacement or rebuilding of a 'structure', the primary judge opined that:

> these provisions do not contemplate that the timber panelling and doors pleaded as structures in [8(b)] of AIG's further amended defence are structures. [128]

2. Similarly, the primary judge stated that the provisions of the Policy Wording do not contemplate that doors or doorframes are 'structures'. In this respect, under the general terms of the home insurance policy (ie the 'Policy Wording') there were only two types of structures: the 'House' and 'Other Structures' (and the Other Structures had to be outside the House). [129]

3. The primary judge concluded that a 'structure', in the present context, must necessarily mean more than the component parts of a structure (ie more than floors, walls and doors, tiles or paint). [130] In this respect, the primary judge stated:

> what cannot be ignored in this particular matter is that the works that [MBC] carried out for [the plaintiffs] were refurbishment work. Put

> another way, it was[,] as contemplated by the general terms of the AIG policy[,] renovation work. It was not work to create a separate structure, such as a granny flat that did not form part of the House. The structure of the house itself substantially remained unchanged. What did change were the finishes on the walls, floors, fixtures and fittings. Yet, the Contract Works Exclusion clause makes no mention of renovation work to an existing structure. [131]

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[128] Primary reasons [495].
[129] Primary reasons [499].
[130] Primary reasons [500].
[131] Primary reasons [501].

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115. These findings are challenged by appeal ground 3. AIG asserts that the primary judge erred in fact and law in failing to find that the timber panelling, doors and wood floors were 'structures' that had been or were being constructed at the property for the purpose of the term 'Contract Work' as used in the contract works exclusion clause.

116. The primary judge held that none of the found contents of the green rubbish bin in the dining room (ie the drill bit, the water bottle and some sawdust), nor the bin itself, could be found to be Free Issue Materials. This is challenged by appeal grounds 4, 5 and 6.B.

117. Having found that the contract works exclusion clause did not apply to the renovation works carried out by MBC, the primary judge said that the cause of the fire was immaterial. [132] T here was, however, another reason why AIG's defence failed. The primary judge stated:

> [I]f I am wrong in the construction of the Contract Works Exclusion clause and the terms 'structure' and 'structures' in the meaning of the term Contract Work, includes the oak lined mirror fronted sliding doors and the wooden frames in which the sliding doors retracted, I would find that cl 1 of the Contract Works Exclusion clause is not engaged. This is because I have found that the cause of the fire in the green rubbish bin that was located at the time of the fire close to, and immediately adjacent to, the sliding doors and the door frame cannot be determined. It is simply not enough to find that the fire that destroyed the house started in the green rubbish bin to engage cl 1, as it cannot be found that the fire in the bin was damage in connection with the Contract Work or Works. In particular as to the Works, it cannot be found that the activity of applying Loba Oil to the panelling was an activity in connection with the Contract Works. On the facts that I have found, I am not satisfied that AIG has proved that there is any connection. [133]

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[132] Primary reasons [503].
[133] Primary reasons [504].

118. This conclusion is challenged by appeal ground 6.

Primary judge's interest determination

119. The plaintiffs claimed interest on the damages to be awarded. The primary judge found that the claim for interest could only arise under s 57 of the *Insurance Contracts Act 1984* (Cth) . [134] This relevantly provides that:

> (1) Where an insurer is liable to pay to a person an amount under a contract of insurance or under this Act in relation to a contract of insurance, the insurer is also liable to pay interest on the amount to that person in accordance with this section.
>
> (2) The period in respect of which interest is payable is the period *commencing* on the *day as from which it was unreasonable for the insurer to have withheld payment* of the amount and ending on whichever is the earlier of the following days:
>
> (a) the day on which the payment is made;
>
> (b) the day on which the payment is sent by post to the person to whom it is payable. (emphasis added)

[134] Primary reasons [621].

120. The plaintiffs sought interest from no later than 7 June 2016. The primary judge concluded that the plaintiffs were entitled to interest from the time when AIG received the claim and had a sufficient opportunity to consider it, including time to conduct reasonable investigations where these were thought to be necessary. This was because AIG was obliged to pay the plaintiffs' claim from the date by which a reasonable period for the investigation and consideration of the claim, having regard to its complexities, had passed. [135]

[135] Primary reasons [622].

121. The primary judge accepted that following Mr Tong delivering his third report, on 7 June 2016, AIG had been afforded a reasonable time to investigate the fire. [136] However, it did not mark the time at which interest commenced to run. The primary judge stated:

> However, because both AIG and Tokio Marine entered into contracts of insurance that applied to [the plaintiffs'] claims arising out of the fire that destroyed their house, this factor complicated the basis upon which their loss and damage should be assessed. I am of the opinion it was not until after Mr Cugley[137] had

delivered his final report on 2 June 2017, and after a further 14 days for AIG and Tokio Marine to consider that final report, that a reasonable amount of time for AIG and Tokio Marine to assess how much they should each pay for the claim had expired.

This is because by 16 June 2017 both AIG and Tokio Marine had for their consideration Mr Cugley's final report, which assessed the costs of the renovations separate from the costs of rebuilding the existing house with retained items.

For these reasons, I am of the opinion that interest is payable on [the plaintiffs'] loss and damage on and from 16 June 2017.[138]

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[136] Primary reasons [631].
[137] Mr Cugley was a quantity surveyor who gave expert evidence in the proceedings. The evidence included a retrospective assessment of the cost of the reconstruction of the house. The assessment was prepared on two bases, namely, either excluding or including the renovations carried out by MBC.
[138] Primary reasons [632] - [634].

The grounds of appeal

122. AIG's grounds of appeal extend over five pages. Accordingly, rather than reproducing them in full at this point, it is convenient to include the grounds of appeal as annexure 'A' to these reasons. It is, however, useful to summarise the nature of the grounds of appeal. As mentioned, the grounds of appeal fall into two categories. First, appeal grounds 1 - 6 concern the proper construction of the contract works exclusion clause. Second, appeal grounds 7 - 16 concern the cause of the fire.

123. The constructional grounds of appeal are as follows:

1. There are two grounds which challenge the primary judge's approach to the construction question. These are:

(a) Ground 1 - an allegation that the primary judge failed to take a matter of factual context into account, namely, that before receiving AIG's quote and proposed insurance terms the plaintiffs informed AIG that they were performing renovations at the property.

(b) Ground 2 - AIG challenges the primary judge's application of the contra proferentem principle in construing the contract works exclusion clause.

2. Ground 3 challenges the primary judge's failure to find that the timber panelling, doors and wood floors were 'structures' within the meaning and for the purpose of the term 'Contract Work' as used in the contract works exclusion clause.

3. Grounds 4 & 6.B and grounds 5 & 6.C challenge, respectively, the primary judge's failure to find that the green rubbish bin and its contents (ie sawdust, drill bit and water bottle) were 'Free Issue Materials' within the meaning and for the purpose of that term as used in the contract works exclusion clause.

4. Ground 6.A challenges the primary judge's failure to find that the contract works exclusion clause was engaged as the green rubbish bin (being the point of origin of the fire) was used in connection with the 'Contract Work', 'Free Issue Materials' or 'Works'.

124. The grounds as formulated fail to adopt the orthodox and proper approach to asserting an error of law in misconstruing a term of a contract. The grounds fail to state the relevant construction adopted by the primary judge and, in taking issue with that construction, the preferred construction contended for by AIG. In this respect the grounds are defective. There is, for example, no ground that - in terms - challenges the primary judge's construction of 'Free Issue Materials' (at primary reasons [485]) or 'structure' (at primary reasons [489] [490]). We will return to this in considering the merits of the construction grounds.

125. The grounds of appeal concerning the cause of the fire are as follows:

1. Ground 7 challenges the primary judge's conclusion that it was permissible to admit evidence as to and to consider the intruder theory. If appeal ground 7 succeeds it feeds into appeal grounds 14 and 15.

2. Ground 8 contends that the primary judge erred by failing to find that the intruder possibility did not rise above mere speculation and thus was to be discounted as a possible explanation for the fire. If upheld appeal ground 8 also feeds into appeal grounds 14 and 15.

3. Ground 12 contends that the primary judge erred in finding that AIG had not adequately put to Mr Simpson what was attributed to him in Mr Bell's notes as to the painters putting used rags in the green rubbish bin in the dining room. This is relevant to appeal ground 10.

4. Ground 10 and ground 11 contend that the relevant statement in Mr Bell's notes should have been admitted under s 79C(2a) of the *Evidence Act* or as part of the res gestae. This is relevant to appeal ground 9.

5. Ground 13 contends that the primary judge erred in failing to draw an adverse ***Jones v Dunkel*** inference by reason of the failure of Holgerssons to call Mr Milton and Mr Roach and thereby failing to find that the painters placed Loba Oil soaked rags into the green rubbish bin in the dining room. This is also relevant to appeal ground 9.

6. Ground 9 contends that the primary judge erred in fact in failing to find that the painters placed Loba Oil soaked rags into the green rubbish bin in the dining room. It should be considered with appeal ground 14 - the challenge to the primary judge's conclusion that the facts established by AIG did not establish the oily rags theory beyond a possibility, which possibility was an equally possible eventuality with the intruder theory.

7. Ground 15 contends that the primary judge erred in fact in failing to find that the fire was caused by the selfignition of Loba Oil soaked rags placed by the painters into the green rubbish bin in the dining room. It relies on AIG succeeding on appeal ground 9 and appeal ground 14.

126. Ground 16 has no independent operation - it relies on AIG establishing its appeal based on the other appeal grounds.

127. AIG's grounds of appeal are relatively confined in the extent to which they challenge intermediate or ultimate factual findings. AIG's PD 7.4 schedule[139] identifies that the findings of fact challenged are only that:

1. The intruder theory could not be dismissed as merely speculative (see appeal ground 8).

2. Senior counsel for AIG did not adequately put what Mr Simpson had told Mr Walling the morning after the fire (see appeal ground 12).

3. It was not open to draw a ***Jones v Dunkel*** inference against Holgerssons (see appeal ground 13).

4. The fire being caused by the presence of Loba Oil soaked rags in the green rubbish bin did not rise higher than a possibility; and there was another possibility - namely that an intruder entered the property and deliberately started the fire (the intruder theory being equally as possible as the oily rags theory meaning that making a choice between them was mere conjecture) (see appeal grounds 14 & 15).

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[139] WAB 38 - 51.

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128. The second and third of these matters are not relevantly findings of fact. To the contrary, they concern a question of legal characterisation (sub-par 2) and a question of law (sub-par 3). We accept, however, that the answers to those questions are fact sensitive.

129. The relationship between the constructional grounds of appeal (appeal grounds 1 - 6) and the cause of the fire grounds of appeal (appeal grounds 7 - 16) was explained by senior counsel for AIG at the appeal hearing.

130. Senior counsel for AIG said that, although the appeal was conveniently divided into two parts and in that sense there were two independent aspects to the appeal, AIG had to succeed on its construction of the term 'structure' (in relation to the concept of 'Contract Work') to succeed in the appeal. However, on AIG's case, if AIG succeeded on this aspect of its constructional argument, the appeal must succeed as the primary judge had found that the fire started in the green rubbish bin in the dining room. That, on AIG's case, provided a sufficient connection between the relevant 'Damage' and the 'Contract Work' in terms of par 1 of the contract works

exclusion clause.[140] In this respect AIG's contention, as pressed by appeal ground 6.A, was that as long as there was some 'structure' it was not necessary to establish any further connection for the contract works exclusion clause to operate.[141]

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[140] Appeal ts 3 - 5, 45 - 46, 48 - 55.
[141] Appeal ts 202 - 203.

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131. In those circumstances a question arose as to why AIG pressed the appeal grounds concerned with the cause of the fire.

132. Senior counsel for AIG accepted that, if there was no relevant 'structure' and thus no 'Contract Work', the contract works exclusion clause did not apply irrespective of the cause of the fire.[142] In that scenario the appeal could not succeed irrespective of success on appeal grounds 7 - 15 (appeal ground 16 would necessarily fail). However, AIG raised the cause of fire appeal grounds against the possibility that the court took a narrow view of what was required by the phrase 'in connection with' in par 1 of the contract works exclusion clause. If, contrary to AIG's primary case as summarised at [130] above, the court was to hold that the fact that the fire started in the bin was an insufficient nexus, AIG advanced the further case that the fire was caused by the selfignition of Loba Oil soaked rags that had been put in the green rubbish bin by the painters as part of (or 'in connection with') the works being carried out by MBC which constituted 'Contract Work' for the purpose of the contract works exclusion clause.[143]

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[142] Appeal ts 45, 49 - 50. This was because the term 'Contract Work' needed to be satisfied: appeal ts 14 16. See also appeal ts 123.
[143] Appeal ts 48 - 55.

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133. Accordingly, AIG's case on appeal was broadly consistent with the manner in which it invoked the contract works exclusion clause at trial (see [78] - [83] above).

Disposition of AIG's appeal: the construction appeal grounds

134. AIG initially relied on the appeal grounds which asserted error in the primary judge's construction of the contract works exclusion clause. This was because, on AIG's argument in relation to appeal grounds 1 6, there was no need to establish the cause of the fire. It was enough that the primary judge found that the fire started in the green rubbish bin in the dining room.

Principles of construction

135. Interpreting a commercial instrument requires attention to the language used by the parties, the commercial circumstances which the instrument addresses and the objects which it is intended to secure. [144] In that regard the general principles that apply in construing a commercial contract are well-established: [145]

1. The rights and liabilities of parties under a provision of a contract are determined objectively by reference to its text, context (the entire text of the contract) and purpose.

2. In determining the meaning of the terms of a commercial contract it is necessary to ask what a reasonable business person would have understood the terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purposes or objects to be secured by the contract.

3. The court approaches the task of giving a commercial contract an interpretation on the assumption that the parties intended to produce a commercial result - one which makes commercial sense. (This has been said to require that the construction to be placed on the relevant provision be consistent with the commercial object of the agreement.) [146] Thus a commercial contract should be construed so as to avoid it making commercial nonsense or working commercial inconvenience.

4. Ordinarily the process of construction is possible by reference to the contract alone.

5. However, sometimes recourse to external events, circumstances or things is necessary; for example, to identify the commercial purpose or objects of the contract (by reference to the genesis of the transaction, the background, the context and the market in which the parties are operating) or to determine the proper construction where there is a constructional choice due to ambiguity.

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[144] ***McCann v Switzerland Insurance Australia Ltd*** [2000] HCA 65; (2000) 203 CLR 579 [22]; ***Wilkie v Gordian Runoff Ltd*** [2005] HCA 17; (2005) 221 CLR 522 [15].
[145] ***Electricity Generation Corporation v Woodside Energy Ltd*** [2014] HCA 7; (2014) 251 CLR 640 [35]; ***Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*** [2015] HCA 37; (2015) 256 CLR 104 [46] [52].
[146] ***Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd*** [2017] HCA 12; (2017) 261 CLR 544 [17].

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136. The first of these principles illustrates the danger in construing a contractual provision selectively. An instrument must be construed as a whole. [147] A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation. [148] Preference will be given

to a construction supplying a congruent operation to the various components of the contract as a whole.[149]

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[147] ***Australian Broadcasting Commission v Australasian Performing Right Association Ltd*** [1973] HCA 36; (1973) 129 CLR 99, 109.
[148] ***Black Box Control Pty Ltd v TerraVision Pty Ltd*** [2016] WASCA 219 [42] (10).
[149] ***Wilkie v Gordian Runoff Ltd*** [16].

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137. Identification of the purposes or objects intended to be secured by a commercial contract will usually be inferred from the express or implied terms of the contractual instrument and any admissible evidence as to the surrounding circumstances. [150] Often it will be apparent from a consideration of the contractual provisions read as a whole. [151] In any case the purpose and object of a transaction is ascertained objectively by considering what a reasonable observer, in the situation of the parties, would conclude was the purpose and object. [152] Thus the purpose or object of contractual provisions is revealed by their text and structure. It should be derived from what the contract says and not from any assumption about the desired or desirable reach of the operation of the relevant provisions. However, extrinsic evidence may assist where the task is facilitated by an understanding of the genesis of the transaction, its background, the context and the market in which the parties are operating.[153]

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[150] ***Olympic Holdings Pty Ltd v Windslow Corporation Pty Ltd (in liq)*** [2008] WASCA 80; (2008) 36 WAR 342 [41].
[151] ***Black Box Control Pty Ltd v TerraVision Pty Ltd*** [42] (3).
[152] ***Ryledar Pty Ltd v Euphoric Pty Ltd*** [2007] NSWCA 65; (2007) 69 NSWLR 603 [2 64]. See also at [265].
[153] ***Electricity Generation Corporation v Woodside Energy Ltd*** [35].

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138. In acknowledging the accepted wisdom that a commercial contract must be construed so as to avoid it making commercial nonsense or working commercial inconvenience it must also be kept in mind that reasonable minds might differ on business common sense. [154] Nevertheles s it is accepted that:

> [I]f the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate' … [155]

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[154] ***Black Box Control Pty Ltd v TerraVision Pty Ltd*** [42] (9).
[155] ***Australian Broadcasting Commission v Australasian Performing Right Association Ltd*** (109).

139. Where a constructional choice is available it is important to consider what a reasonable businessperson reading the relevant clause or agreement would understand it to mean. [156] It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purposes and objects to be achieved by it.[157]

[156] ***Sino Iron Pty Ltd v Mineralogy Pty Ltd*** [2019] WASCA 80; (2019) 55 WAR 89 [298].
[157] ***Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*** [47]; ***Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd*** [16].

140. A contract should be construed practically so as to give better effect to its commercial purpose. The law seeks to uphold commercial contractual obligations and the expectations that derive from them. The court should not adopt a narrow or pedantic approach to construction, particularly in the case of commercial arrangements. [158]

[158] ***Mineralogy Pty Ltd v The State of Western Australia*** [2005] WASCA 69 [15].

141. These general principles are applicable to the construction of insurance contracts. In addition, specific principles apply to the construction of exclusion clauses. As was stated by Murphy JA (Martin CJ & Buss P agreeing) in ***WFI Insurance Ltd v Verini*** :

> An insurance contract should be given a businesslike interpretation. Attention must be given to the language used by the parties, the commercial circumstances addressed by the policy, and the objects it is intended to secure. With respect to an exclusion clause, the court must give effect to 'its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause contra proferentem in case of ambiguity'. [159] (citations omitted)

[159] ***WFI Insurance Ltd v Verini*** [2016] WASCA 143 [57] (referring to ***Darlington Futures Ltd v Delco Australia Pty Ltd*** [1986] HCA 82; (1986) 161 CLR 500, 510).

142. The contra proferentem principle is a rule of last resort. [160] The rule acknowledges that, in cases of ambiguity, a liberal approach may be adopted in the construction of an insurance

contract. However, it is preferable that the court should struggle with the words used as applied to the circumstances of the case to reach a conclusion by reference to the language and logic of the instrument rather than by using mechanical formulae. In any case, even when applying the contra proferentem rule, the court will not pervert the meaning of clear language of the insurance contract. [161]

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[160] ***Johnson v American Home Assurance Co*** [1998] HCA 14; (1998) 192 CLR 266 [19.4]; ***McCann v Switzerland Insurance Australia Ltd*** [74.4].
[161] ***Maxwell v Highway Hauliers Pty Ltd*** [2013] WASCA 115; (2013) 45 WAR 297 [105].

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143. It is also said that, in construing an exclusion clause where the language admits of more than one interpretation, the court may take into account the principle that it would not give an insurance contract an effective business operation if an exclusion clause 'inappropriately circumscribed' the cover provided by the insuring clauses. [162] That principle is consistent with the general principles that apply in construing a commercial contract - where there is a constructional choice the court will favour a construction that does not undermine the commercial purpose or object of the contract.

The parties' contentions in relation to the construction of the contract works exclusion clause

General observations

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[162] ***Transfield Services (Australia) Pty Ltd v Hall*** [2008] NSWCA 294 [191]. (The relevant passage is not included in the authorised report at (2008) 75 NSWLR 12 .)

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144. Appeal grounds 1 - 6 concern the proper construction of the contract works exclusion clause.

145. It is well-established that there can be only one true construction of a legal instrument. [163] Accordingly, the task for this court in an appeal concerning the construction of an instrument is to determine for itself the correct construction of the instrument. [164] This should inform how an appellant might best challenge an allegedly erroneous construction of a legal instrument. At least two things are required of the appellant. First, identification of the allegedly erroneous construction adopted by the primary court. Second, identification of the alternate construction contended for by the appellant. The appellate court may then consider for itself the competing constructions and determine the true construction of the legal instrument. [165]

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[163] ***Life Insurance Co of Australia Ltd v Phillips*** [1925] HCA 18; (1925) 36 CLR 60, 78 - 79 .
[164] ***Tokio Marine & Nichido Fire Insurance Co Ltd v Hans Bo Kristian Holgersson trading as Holgerssons Complete Home Service*** [2019] WASCA 114 [47] ; ***JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd [No 2]*** [2020] WASCA 112 [60] .
[165] Although, subject always to the requirements of procedural fairness, on some occasions the court may itself identify and uphold another construction: ***Pilbara Iron Ore Pty Ltd v Ammon*** [2020] WASCA 92 [162] (referring to ***Australian Communication Exchange Ltd v Deputy Federal Commissioner of Taxation*** [2003] HCA 55; (2003) 77 ALJR 1806 [7], [51], [101]).

146. There is no need, and it may distract, to raise allegations of specific error in the constructional approach by the primary judge.[166]

[166] ***JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd [No 2]*** [61].

147. AIG's initial complaints by appeal grounds 1 and 2 are, however, directed to the primary judge's approach to the constructional questions before her Honour. Those grounds go nowhere if the primary judge's construction of the contract works exclusion clause is correct. And, if the primary judge's construction is incorrect, the appeal must succeed to that extent irrespective of the outcome on appeal grounds 1 and 2. In the circumstances there is no need to give appeal grounds 1 and 2 individual attention. Rather, the constructional arguments that underpin appeal grounds 1 and 2 must be taken into account when considering and determining the proper construction of the contract works exclusion clause.

148. AIG then advanced, by appeal grounds 3 - 6, a miscellany of complaints as to what the primary judge failed to find when applying the contract works exclusion clause to the facts as found. Implicit in those assertions are complaints about the primary judge's construction of the word 'structure' and the defined term 'Free Issue Materials'. Yet at no point in its grounds of appeal does AIG challenge those conclusions directly. Nor does AIG advance, positively, the preferred constructions that it contends for. AIG simply asserts that the primary judge was in error in not accepting that the contract works exclusion clause was engaged on the facts as found.

AIG's case as in substance advanced on the appeal

149. In oral submissions, AIG contended that the primary judge took an erroneous unduly narrow interpretation of the contract works exclusion clause. AIG submitted that the word 'structure' meant a physical item of some significance[167] being any element that can be constructed and included in a permanent structure.[168] AIG contended that the term 'structure' included 'building materials' because building materials create structures.[169] On the basis of this construction, AIG contended that there were relevant structures including: (1) the wall as rebuilt - particularly insofar it encompassed wood panelling thereon in the form of timber

cladding and the installation of recessed sliding doors;[170] (2) doors or doorways;[171] and (3) the wood flooring.[172]

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[167] Appeal ts 17 - 18, 19, 22 - 24, 27, 29.
[168] Appeal ts 18, 28 - 29. See also AIG's submissions par 42 WAB 23.
[169] AIG's submissions par 41 WAB 22.
[170] Appeal ts 18 - 19, 21, 26, 201 - 203; AIG's submissions pars 42 - 43 WAB 23.
[171] Appeal ts 20; AIG's submissions par 43 WAB 23.
[172] Appeal ts 20.

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150. Among other things, AIG relied on the language of the definition of 'Contract Work' (specifically the reference to structures which are incorporated or are to be incorporated into a permanent structure) and the presumptive rule of land law that materials permanently affixed to walls of a house with an intention that they remain in situ are taken to become part of the house.[173]

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[173] AIG's submissions pars 38 - 40 WAB 22.

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151. AIG contended that the primary judge was in error in narrowly construing the concept of a 'structure' as a complete edifice or building.[174]

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[174] Appeal ts 27. See also AIG's submissions pars 35 - 36 WAB 21 - 22.

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152. AIG placed considerable reliance on the disclosure in the plaintiffs' request for insurance quotation to the effect that the plaintiffs intended to perform internal renovations to the property (see [20] above). [175] AIG said, in substance, that this aspect of the factual background demonstrated that, in imposing the endorsement, AIG was attempting to exclude any renovation work from coverage under the home insurance policy and the contract works exclusion clause should be construed conformably with such a presumed intention. In this respect AIG emphasised the additional risks that attended a property when subject to renovation; it posited that the contract works exclusion clause gave effect to a commercial intent to exclude additional risks associated with renovation works insofar as this introduced additional perils connected with renovation activities which could be seen as being outside the primary cover provided by the home insurance policy.[176]

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[175] Appeal ts 21 - 22, 55 - 65; AIG's submissions pars 28 - 32 WAB 20 - 21.

[176] Appeal ts 32 - 34, 44, 65; AIG's submissions pars 45, 54 WAB 23 - 24.

153. Finally, AIG went as far as to say that the construction it contended for was so obvious that there was no available constructional choice[177] (in this respect supporting appeal ground 2's challenge to the primary judge's application of the contra proferentem principle).

[177] Appeal ts 60; AIG's submissions pars 33 - 34 WAB 21.

154. AIG further submitted that the definition of 'Free Issue Materials' was expansive and captured at least all plant, tools and equipment that were used in the works. According to AIG, the word 'supplied' did not have the meaning found by the primary judge (ie supplied by the plaintiffs). It included all things provided for use in the works.[178]

[178] AIG's submissions pars 46 - 47 WAB 23 - 24.

155. It followed from AIG's construction of the term 'structure' that the staining of the wood panelling, doors and wood floors was an operation or activity undertaken in connection with the Contract Work and thus 'Works'.[179] Also, the green rubbish bin and its contents were used or produced in connection with the Contract Work or the Works - the bin and its contents were only in the dining room because of the Contract Work or the Works.[180] Alternatively, the green rubbish bin and its contents were either Free Issue Materials or items used or produced in connection with Contract Work, Free Issue Materials or Works.[181]

[179] AIG's submissions par 44 WAB 23.
[180] AIG's submissions pars 52 - 54 WAB 24.
[181] AIG's submissions par 49 WAB 24.

156. The items identified as relevant 'structures' by senior counsel for AIG in oral submissions were not limited to the wall and its timber panelling, the doors and the wood floors. There was also mention of other things such as the remodelling or rebuilding of a column[182] and (in reply submissions) various fireplaces[183] and the loggia (also referred to as an enclosed rear patio).[184] However, appeal ground 3 confined the primary judge's alleged error as being a failure to find that the 'timber panelling, doors and wood floors' were structures that had been or were being constructed at the property for the purpose of the term 'Contract

Work'. In contending that the primary judge failed to so find, AIG sought positive substitutive findings by this court to that effect. But nothing was raised as to the column, the fireplaces or the loggia.

[182] Appeal ts 20, 24.
[183] Appeal ts 196 - 197.
[184] Appeal ts 197 - 202.

157. This court considers whether there was error in the primary court by reference to grounds of appeal. The references in oral submissions to the column, the fireplaces and the loggia are an unnecessary distraction - all the more so as these items were not alleged to be structures in AIG's pleaded case (see [80] - [81] above). The appeal must be evaluated by reference to the contended for 'structures' as advanced in AIG's grounds of appeal. In any case, as to the loggia, senior counsel for AIG eventually informed the court that AIG did not seek to support a separate case that the building of the loggia somehow differently supported the operation of the contract works exclusion clause.[185]

The construction contended for by the plaintiffs and the Bresland parties

[185] Appeal ts 201.

158. The plaintiffs supported the construction adopted by the primary judge. On that construction the contract works exclusion clause did not apply irrespective of the cause of the fire. None of the items identified by AIG constituted a 'structure' within the meaning of the contract works exclusion clause.[186]

[186] Appeal ts 124 - 131.

159. The Bresland parties also submitted that the primary judge's construction was correct.[187]

The proper construction of the contract works exclusion clause

The text of the contract works exclusion clause

[187] Appeal ts 152.

160. The contract works exclusion clause has been reproduced at [27] above.

161. The key constructional issues arise in relation to the word 'structure' and the defined term 'Free Issue Materials'. The word 'structure' is itself found in the defined term 'Contract Work'. Definitions do not have substantive effect. A definition is not to be construed in isolation from the operative provisions in which the defined term is used. Rather, the operative provision is ordinarily to be read by inserting the definition into it. [188] We will resist the temptation to restate the contract works exclusion clause by a reproduction in full that incorporates the various defined terms where defined terms appear. That exercise was undertaken by the primary judge. [189] Her Honour's exposition suffices for the necessary textual analysis.

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[188] ***Black Box Control Pty Ltd v TerraVision Pty Ltd*** [42] (11).
[189] Primary reasons [457].

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162. Broadly speaking, the contract works exclusion clause precludes cover under the home insurance policy for loss of two kinds. First, by par 1, for 'Damage' (a defined term that includes loss or 'Property Damage') in connection with various subject matters as enumerated in the three sub-pars commencing with a dash. It will be necessary to return to those various subject matters (see [166] - [169] below). Second, by par 2, for certain 'Property Damage' (a term defined to mean 'physical damage to, destruction of, or loss of use of tangible property'). [190]

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[190] See [28] above.

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163. The Property Damage precluded from cover by par 2 of the contract works exclusion clause includes, among other things, Property Damage *to* 'Contract Work' or 'Free Issue Materials'. Implicit in this, and confirmed by the definitions themselves, is that both Contract Work and Free Issue Materials are physical things - they must be physical things because 'Property Damage' (as defined) can only be suffered by physical things. Thus, as senior counsel for AIG correctly accepted, Contract Work is a subject matter - it refers to a particular item and is used in the sense of a noun rather than as a verb.[191] In this respect the term 'Contract Work' (and 'Free Issue Materials') is readily distinguishable from the term 'Works' - the latter dealing with 'operations or activities undertaken'.

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[191] Appeal ts 20, 23 - 24.

164. The exclusion under par 1 is wider than the exclusion under par 2. Paragraph 2 is limited to Property Damage; par 1 extends to the wider concept of Damage (which, in any event, includes Property Damage). More significantly, par 2 is confined to Property Damage to one or more of the stipulated items being physical things - Contract Work, Temporary Work or Free Issue Materials. So, taking Contract Work as an example, the exclusion is to Property Damage to the structures constructed or in the course of construction. By contrast the Damage within par 1 may extend to loss or damage beyond those stipulated items (ie beyond the Contract Work, Temporary Work or the Free Issue Materials). It may, for example, extend to loss or damage to the House. But for par 1 to preclude cover one of the three sub-pars commencing with a dash must be engaged. This, in two of the three situations provided for under par 1, requires that the 'Damage' be 'in connection with' a relevant subject matter. There is no corresponding nexus requirement in par 2, it only being concerned with Property Damage to one or more of the Contract Work, Temporary Work or Free Issue Materials.

165. On appeal AIG's argument was presented by reference to par 1 rather than par 2. Nothing more needs to be said in relation to par 2.

166. Paragraph 1 excludes cover for Damage:

> - in connection with the Contract Work, Temporary Work, Free Issue Materials or Works;
>
> - in connection with any Maintenance or Defects Liability Period; or
>
> - which manifests, incurs or arises after any Maintenance or Defects Liability Period as a result of any activities or works undertaken during such Maintenance or Defects Liability Period;

167. There was no suggestion that either sub-par 2 or sub-par 3 were engaged. These deal with Damage in connection with the Maintenance or Defects Liability Period (sub-par 2) or arising as a result of activities or works undertaken during such a period (sub-par 3). Nor was it suggested that these aspects of the text of the contract works exclusion clause had any implications for the proper construction of the word 'structure' or the defined term 'Free Issue Materials'. The argument on appeal was concerned with sub-par 1 of par 1.

168. Clearly, in terms of sub-par 1, there must be a nexus between the 'Damage' that is precluded from cover under the home insurance policy and the 'Contract Work', 'Temporary Work', 'Free Issue Materials' or 'Works' - the nexus requirement arises from the use of the phrase 'in connection with'.

169. Each of 'Contract Work', 'Temporary Work', 'Free Issue Materials' and 'Works' is a defined term. 'Contract Work', 'Temporary Work', and 'Free Issue Materials' each involve a physical thing. By contrast, 'Works' involves an action - it is an operation or activity undertaken in connection with Contract Work or Temporary Work. Even putting that aside the 'Works' aspect of sub-par 1 is potentially wider than the other parts of sub-par 1 - there is a double 'in connection with' link to the part of sub-par 1 grounded in 'Works'.

170. Importantly, however, each of the defined terms 'Temporary Work', 'Free Issue Materials' and 'Works' rely, at least in part, on the defined term 'Contract Work'. 'Free Issue Materials' concern materials supplied or to be supplied in connection with, among other things, Contract

Work. 'Temporary Work' concern structures constructed or in the course of construction that are necessary for access or support to Contract Work (an indicator that, by its nature, 'Contract Work' may require access or support for its construction). 'Works' are any and all operations undertaken in connection with, among other things, Contract Work.

171. Accordingly, as senior counsel for AIG accepted, AIG had to establish that there was a 'structure' and that the other elements of 'Contract Work' were satisfied for the purpose and within the meaning of the contract works exclusion clause. In this limited respect it is worthwhile setting out the relevant effect of the relevant exclusion relied on. By sub-par 1 of par 1 of the contract works exclusion clause no cover is provided for loss or physical damage to tangible property in connection with any and all *structures* constructed or in the course of construction which are incorporated or are to be incorporated into a permanent *structure* at the property.[192]

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[192] This summation being derived as follows by reading the definitions into the terms of sub-par 1 of par 1: 'Damage [ie loss or physical damage to, destruction of, or loss of use of tangible property] in connection with the Contract Work [ie any and all structures constructed or in the course of construction … which are incorporated or are to be incorporated into a permanent structure at the property]'.

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172. There is a degree of circularity in the concept of 'Contract Work'. It is concerned with a 'structure' that has been or is to be incorporated into a 'permanent structure'. There is, in that respect, two relevant structures, the first of which is or is to be incorporated into a permanent structure. The first such structure, rather than the 'permanent structure', constitutes the Contract Work. This circularity was replicated in AIG's preferred construction of the term 'structure' - it being, according to AIG, some substantial element which could be constructed and included in a permanent structure.

173. Plainly, based on the text of the contract works exclusion clause, a 'structure' that is 'Contract Work' is something constructed or in the course of construction.

Context - the terms of the home insurance policy

174. The contract works exclusion clause must be understood and construed in the context of the home insurance policy as a whole. The starting point is the insuring clause. The policy covers your[193] 'House' and your 'Contents' against physical loss or Property Damage unless otherwise stated or where an exclusion applies.[194] The term 'House' means:

> the main dwelling, including service pipes, cables and underground tanks supplying the main dwelling at each location named in Your Policy Schedule.[195]

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[193] 'Your' is actually a defined term: Policy Wording (section II) GAB 48. However, for ease of exposition it is convenient to omit the 'Your' from these reasons.
[194] Policy Wording (section III cl 1) GAB 49.
[195] Policy Wording (section II) GAB 47.

175. The Policy Wording also contains a definition of the term 'Residence'.[196] This includes the House and Other Structures listed in the Policy Schedule.

[196] Policy Wording (section II) GAB 48.

176. Clause 2 of section III of the Policy Wording deals with payment of a loss. It informs the insured that the amount AIG will pay for each House at each insured location is shown in the Policy Schedule. The Policy Schedule also indicates the 'Payment Basis'. Two possible payment bases are identified in the Policy Wording: 'Additional Rebuilding Cost' or 'Rebuilding Cost'. The Home & Contents Insurance Schedule to the plaintiffs' home insurance policy adopts the Rebuilding Cost methodology.[197] It is not necessary to reproduce the text dealing with the alternate payment bases. For present purposes it suffices to observe that where the Payment Basis is Rebuilding Cost one of the relevant concepts is 'Reconstruction Cost' ('Reconstruction Cost' is also employed if the Additional Rebuilding Cost methodology is applied).

[197] GAB 79.

177. 'Reconstruction Cost' is defined to mean:

> the lesser of the amount at the time of the loss required to:
>
> a. restore or repair a *structure*; or
>
> b. replace or rebuild a *structure* at the same location;
>
> with materials and workmanship of like kind and quality and includes fees from architects, surveyors and consulting engineers. It does not include any amount required for the excavation, replacement or stabilisation of land under or around a *structure*.[198] (emphasis added)

[198] Policy Wording (section II) GAB 48.

178. Accordingly, the Policy Wording uses the term 'structure' in the context of the defined term 'Reconstruction Cost', which must be read into cl 2 of section III of the Policy Wording dealing with payment of a loss and cover for the Home. In this respect a *structure* is something that may be restored or repaired. It may also be replaced or rebuilt at the same location. The sort of works involved are evident from the final paragraph - the restoration, repair, replacement or rebuilding of a structure may involve architects, surveyors and consulting engineers. It may also involve the excavation, replacement or stabilisation of land under or around the structure, although such works are not covered as a Reconstruction Cost (as will be seen, they are covered as an additional cover).

179. Clause 2 goes on to provide (as part of cl 2.I):

> If at any time during the Policy Period;
>
> i You are undertaking alterations, additions or renovations to Your House or Other Structures that results in You living out of the House during any part of the building works; or
>
> ii You are undertaking alterations, additions or renovations to Your House or Other Structures that cost at least $200,000 or is more than 10% of the House Sum Insured, whichever is the lesser;
>
> and You do not advise Us of the construction, the most We will pay in settlement for a covered loss is the lesser of the Reconstruction Cost less Depreciation or the Sum Insured for Your House shown for that location in Your Policy Schedule.[199]

[199] Policy Wording (section III cl 2.I) GAB 49.

180. Later in the Policy Wording there is a further provision stipulating that it is a condition of the home insurance policy that the insured advise AIG of any alterations, additions or renovation to the Home or Other Structures that will cost over $200,000 or will cost more than 10% of the sum insured.[200]

[200] Policy Wording (section VII cl 1) GAB 72.

181. Accordingly, the insured has an obligation to inform AIG if undertaking certain alterations, additions or renovations to the Home or Other Structures. A failure to do so may result in a lesser payment under the policy. But, if notice is given, in the absence of some other exclusion there is still continuing cover against physical loss or Property Damage - a mere

alteration, addition or renovation does not preclude cover. Relevantly, as well, the language of 'alterations, additions or renovations' is used in contradistinction to 'House' or 'Other Structures'.

182. Two further things ought to be observed. First, these provisions use the phrase 'alterations, additions or renovations' in contrast to the use of 'Contract Work' in the contract works exclusion clause. This suggests that Contract Work is something other than a mere alteration, addition or renovation. Second, there is reference to the Home or 'Other Structures'. The inclusion of the phrase 'Other Structure' suggests that it - like the 'Home' - may be the subject of alterations, additions or renovations but, again, that an Other Structure is more than a mere alteration, addition or renovation.

183. 'Other Structures' is a defined term. It means:

> any outdoor *structure* You own that is situated within the grounds at a location listed in Your Policy Schedule that is:
>
> a. not attached to Your House; or
>
> b. any boundary walls attached to Your House.
>
> This includes, but is not limited to: swimming pools, cottages, garages, tennis courts and cabanas in such grounds. (emphasis added)

184. Again, as with the defined term 'Contract Work' and the defined term 'Reconstruction Cost', there is use of the undefined word 'structure'. Particular illustrations are given of what is included within the meaning of the phrase. This provides a significant contextual indicator of what is meant by the word 'structure' when used in the home insurance policy. An 'Other Structure' includes an outdoor structure being a swimming pool, cottage, garage, tennis court or cabana.

185. There is frequent use of the defined term 'Other Structures' throughout the Policy Wording.[201] This includes:

1. The additional automatic cover provided by the policy includes stabilisation of land under the House or Other Structures (up to 10% of the covered loss amount).[202]

2. The additional automatic cover provided by the policy includes Other Structures (up to 25% of the sum insured for the House).[203]

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[201] See eg Policy Wording: section II (definition of 'Residence'); section III cl 2.I(b) (Rebuilding Cost); section II cl 2.I (obligation to advise of alterations, additions or renovations); section III cl 6.VII (construction materials), section III cl 6.VIII (rebuilding for compliance); section III cl 7. XVII (trace and access to locate source of escape of water and oil); section III cl 8.VIII (exclusion for freezing water); section III cl 8.XX (exclusion for

temperature or dampness); section VII cl 1 (obligation to advise of alterations, additions or renovations); section VII cl 14 (sum insured adequacy).
[202] Part 1 cl 1.1 GAB 36; Policy Wording section III cl 4.I GAB 50.
[203] Part 1 cl 1.1 GAB 36; Policy Wording section III cl 4.II. GAB 50.

186. Also, there is an exclusion for any loss caused by settling, cracking, shrinking, bulging or expansion of any 'building or Other Structure'.[204]

[204] Policy Wording section III cl 8.XIX GAB 58.

187. There is one other mention of the word 'structure' in the Policy Wording. Section III cl 7.XV deals with extra cover for mould rectification costs. AIG pays up to $25,000 for the reasonable costs of 'Mould Rectification' for a covered loss involving water damage. The term 'Mould Rectification' includes testing the 'internal *structures* and Contents for Mould (including alterations and additions where applicable)' (emphasis added).[205]

Consideration and determination

[205] Policy Wording section III cl 7.XV GAB 55.

188. The primary judge identified a number of prior authorities that had considered the meaning of the word 'structure'. Her Honour referred to ***Darwin Fibreglass Pty Ltd v Kruhse Enterprises Pty Ltd*** [206] (a copyright case), ***R v Rose*** [207] (a criminal case) and ***City of Noarlunga v Fraser*** [208] (a planning case). Each involved the use of the word 'structure' in different legislation. These cases are of no real assistance to the present appeal. Each ascribes a meaning to the term 'structure' having regard to the purpose and statutory context in which it was used. The home insurance policy to which AIG and the plaintiffs are parties has its own text, context and purpose. The meaning of the word 'structure' in the contract works exclusion clause must be derived from the text, context and purpose of the home insurance policy rather than the adoption of a meaning found for the same word when used in another, somewhat different, context.

[206] ***Darwin Fibreglass Pty Ltd v Kruhse Enterprises Pty Ltd*** (1998) 146 FLR 37.
[207] ***R v Rose*** [1965] QWN 35.
[208] ***City of Noarlunga v Fraser*** (1986) 61 LGRA 324.

189. The ordinary and natural meaning of the word 'structure' appears from the *Macquarie Dictionary* definition:

> 1. mode of building, construction or organisation; arrangement of parts, elements or constituents.
>
> 2. something built or constructed; a building, bridge, dam, framework, etc.[209]

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[209] *Macquarie Dictionary* (online) 'structure' (def 1, 2).

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190. There are similar definitions in the *Oxford English Dictionary*:

> II.5.a A building, an edifice; *esp* (in early use) a large or imposing one.
>
> …
>
> II.6 Any framework or fabric of assembled material parts; a (typically large) man-made construction.[210]

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[210] *Oxford English Dictionary* (online) 'structure' (def II.5a, II.6).

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191. The primary judge's construction that a 'structure' is a building or a substantial built form (see [111] above) is consistent with these ordinary and natural meanings of the word. AIG's construction, by contrast, posits that the term requires only an item of some significance which is an element that can be constructed and included in a permanent structure (see [149] above). This extends beyond the ordinary and natural meaning of the word. AIG suggests that a *single* element, if a physical item of some significance, may be a structure. Ordinarily, however, a structure is comprised of an arrangement of parts, elements or constituents. It is a built form of assembled material parts rather than an individual component part.

192. We accept that AIG's construction is open as a matter of constructional choice. In particular, the circumstance that a 'structure' is something that is or is to be incorporated into a 'permanent structure' is consistent with a wider conception of the term (albeit that a structure is still something to be constructed or in the course of construction). But, so too the primary judge's construction is open as a matter of constructional choice. The primary judge's construction is, in our view, entirely consistent with the ordinary and natural usage of the word 'structure' and the sense of the word on an ordinary and natural reading of the text of the contract works exclusion clause when the definition of 'Contract Work' is read into sub-par 1 of par 1. So too the primary judge's construction is consistent with the usage of the word

'structure' elsewhere in the Policy Wording. We would, in this respect, reject AIG's contention that the construction it contends for is so obvious that there is no available constructional choice.

193. Identification of the commercial purpose or object of the contract works exclusion clause assists in construing the word 'structure' in the defined term 'Contract Work'.

194. Relevantly, ignoring another property and the contents aspect of the policy, the main commercial purpose or object of the home insurance policy was to insure the plaintiffs' House at 179 Wellington Street, Mosman Park for physical loss or damage up to the amount of $4.725 million. In consideration of the premium payable in respect of the policy AIG agreed to pay the plaintiffs a monetary benefit in the event of loss or damage to the House. AIG assumed, to the specified extent, the risk of loss or damage to the House. By payment of the premium the plaintiffs obtained protection against the economic impact of the risk of loss or damage to the House if it eventuated during the period of the policy.

195. The contract works exclusion clause adjusts who bears the risk of loss or damage of a particular kind. Loss or damage of the kind mentioned in the contract works exclusion clause is borne by the plaintiffs rather than AIG. In substance, the relevant effect of the contract works exclusion clause is that the risk of loss or damage of the kind described in the clause is retained by the plaintiffs.

196. Thus the word 'structure' in the defined term 'Contract Work' is employed to effect a particular result in the allocation of risk as between AIG, as insurer, and its insured. Where something is a 'structure', meaning that there is Contract Work, the plaintiffs retain risk for, among other things, loss or damage to the actual Contract Work (the effect of par 2) and, more broadly, any and all loss or damage in connection with the Contract Work or the Works (the effect of subpar 1 of par 1). The wider the meaning of 'structure' the greater the risk retained by the insured and the lesser the risk undertaken by AIG.

197. Logically there are two possible rationales for this aspect of the parties' bargain. First, the value of the Contract Work may not be priced into the risk AIG is prepared to undertake. Second, the physical construction inherent in any Contract Work and the associated operations or activities constituting Works may increase the likelihood of loss or damage to the House eventuating - this again not being priced into the risk AIG is prepared to undertake.

198. Each rationale provides some insight into the proper meaning of the term 'structure'. A structure within the contract works exclusion clause must be something of some substance - otherwise it would not impact in any material way on the risk that AIG is prepared to undertake.

199. This understanding of the term structure is confirmed by the general terms of the Policy Wording dealing with alterations, additions or renovations. There is, as has been seen (see [179] - [182] above), no general exclusion of cover for alterations, additions or renovations. Indeed, where the insured will continue to live in the House for the associated building works there is not even a need to inform AIG that alterations, additions or renovations are to be undertaken unless they cost at least $200,000 or 10% of the sum insured. In mentioning these quantitative aspects found in the Policy Wording we do not mean to suggest that there must be some monetary equivalence with those figures before an

item can be found to be a structure. It is simply that this aspect of the Policy Wording confirms our conclusion that unless an item is of some substance it will not impact in any material way on the risk that AIG is prepared to undertake and thus stands outside the conception of a structure for the purpose of the contract works exclusion clause.

200. Accordingly, a 'structure' within the contract works exclusion clause must be something of some substance. In this respect, characterisation of something as a 'structure' for the purpose of the contract works exclusion clause involves a question of fact and degree.

201. AIG, conformably with appeal ground 1, argued that the intention revealed by the contract works exclusion clause was that it was a response to the disclosure in the quotation request form submitted by Mr Bresland on behalf of the plaintiffs (see [22] above). The argument went that a reasonable businessperson reading the contract works exclusion clause in light of the quotation request would prefer a construction that the exclusion carved out all risks including fire which were connected with the renovation works being carried out by MBC (or which constituted loss or damage to those renovation works). AIG contended in this respect that the primary judge's preferred construction gave no weight to the circumstance that the contract works exclusion clause was inserted because of the particular circumstances of the risk that AIG was insuring.

202. We accept that the disclosure in the quotation request form is part of the background to the home insurance policy. It may, as a background fact known to both parties, be taken into account in construing the contract works exclusion clause. But the proper meaning of the term 'structure' and the defined term 'Contract Work' cannot be controlled by the presumptive application of a single background fact.

203. In agreeing the terms of the contract works exclusion clause the parties did not employ the language of 'renovations' as found in the quotation request. Rather, the exclusion to cover was directed to different and more limited concepts - relevantly, physical damage to Contract Work (ie structures constructed or in the course of construction) or loss or damage in connection with the Contract Work or Works. In construing the contract works exclusion clause attention must primarily be given to the language of the provision rather than a pre-contractual exchange which was not reflected in the eventual endorsement as proposed and accepted. The circumstance that the contract works exclusion clause followed the quotation request disclosure does not mean that the exclusion was intended to cover all risks associated with the planned renovations. At the most it may be accepted that the disclosure brought about the endorsement in the form of the contract works exclusion clause. That exclusion, in terms, was directed to particular risks as provided for in the endorsement rather than the planned renovations mentioned in the quotation request form submitted on behalf of the plaintiffs.

204. There is, in this respect, no merit in appeal ground 1. In any event it is apparent that the primary judge had regard to the background fact so heavily relied on by AIG.[211] There was no error in the primary judge's approach to the constructional task as is asserted by appeal ground 1.

[211] Primary reasons [474] (the primary judge refers to this aspect of the quotation request as a 'relevant background fact'), [483].

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205. AIG misstates the primary judge's construction in contending that her Honour erroneously adopted too narrow a construction in requiring that a structure comprise a complete edifice or building (see [151] above). The primary judge construed the term as comprising *either* a building *or* a substantial built form (see [111] above). This, as previously mentioned, is consistent with the ordinary and natural meaning of the word 'structure' - including the word 'structure' as it is used in the defined term 'Contract Work'.

206. We reject AIG's contention that, properly construed, the word 'structure' in the defined term 'Contract Work' includes building materials simpliciter (see [149] above). A structure must be constructed or be in the course of construction. Accordingly, a structure will be formed (ie constructed or in the course of construction) from building materials. But, in so acknowledging that essential nature of a structure, it necessarily follows that a structure is more than building materials alone. This, as has been seen, is consistent with the ordinary and natural meaning of the word structure. The ordinary and natural usage of the term refers to a built form of *assembled* material parts (see [189] - [191] above).

207. In any case there is, insofar as AIG contends that the word 'structure' includes building materials, a tension between AIG's preferred construction proffered as an alternate to the primary judge's construction and AIG's acceptance that a structure is something of some significance. Building materials, alone, will not ordinarily be characterised as 'something of significance', particularly when that is understood in the context of the purpose or object of the contract works exclusion clause as discussed at [193] - [200] above. Nor, as a matter of everyday language, are building materials alone ordinarily described as a 'structure'.

208. In the same way that we reject AIG's contention that the word 'structure' in the contract works exclusion clause includes building materials simpliciter, so too, for essentially similar reasons, we reject AIG's contention that the word 'structure' means any element that can be constructed and included in a permanent structure (see [149] above).

209. A 'structure' must be constructed or be in the course of construction. It is, in this respect, more than just an element; it must, in our opinion, be a building or a substantial built form in the sense found by the primary judge. The uncertainty brought about by the circularity of the language used in the definition of 'Contract Work' is, in our view, overcome by reading the text in context with due regard to the purpose or object of the contract works exclusion clause. We have already dealt with the purpose or object of the provision. This is consistent with a construction that, conformably with the ordinary and natural meaning of the word 'structure', requires a building or a substantial built form rather than a single element. The relevant context that compels our conclusion is twofold. First, the reference to a structure 'constructed or in the course of construction' as found in the definition of Contract Work itself. Second, the wider context - in particular to the use of the word 'structure' elsewhere in the Policy Wording and the contrasting usage of the language of 'alterations, additions or renovations'.

210. Where used elsewhere in the Policy Wording, the word 'structure' connotes something more than a mere element that can be constructed and incorporated into a permanent structure. See [176] - [187] above. The usage of the undefined term 'structure' throughout the Policy Wording is consistent with the ordinary and natural meaning of the word as, in substance, is accepted in the primary judge's preferred construction. Of particular significance in this respect are the listed examples of an 'Other Structure' (see [183] above). These are in the nature of a building or a substantial built form (ie assembled material parts comprised of an arrangement of parts, elements or constituents) rather than a single element (ie an individual component part). So too, in our opinion, a key contextual indicator is the difference in terminology between 'structure' and the language of 'alterations, additions or renovations'. See [179] - [182] above. The concept of a 'structure' (and the defined term 'Contract Work') means something more than a simple alteration, addition or renovation to the House. That, in our opinion, is incompatible with reading and construing the term 'structure' as requiring no more than a mere element that can be constructed and incorporated into a permanent structure.

211. For these reasons we reject AIG's preferred construction of the word 'structure' in the defined term 'Contract Work'. The concept is not satisfied by a physical item of some significance in the form of any element that can be constructed and included in a permanent structure. Nor do mere building materials suffice. Rather, conformably with the construction reached by the primary judge, the word means a building or a substantial built form - it is more than some item installed or constructed in the course of alteration, renovation or refurbishment work to the House.

212. In arriving at this construction it has not been necessary to apply the principle whereby an exclusion clause should not be construed so as to circumscribe inappropriately an insuring clause. Nor have we applied the contra proferentem principle. The non-application of the contra proferentem principle does not mean that appeal ground 2 succeeds. The primary judge only relied on the contra proferentem principle as a secondary and alternative approach to the construction of the contract works exclusion clause.[212] There is, in our view, nothing erroneous in the primary judge saying that if, contrary to her primary conclusion, the meaning of the word 'structure' cannot be determined based on the language and logic of the provision, there is an ambiguity which is appropriately resolved - as a last resort - by reference to the contra proferentem principle. Appeal ground 2 is without merit.

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[212] Primary reasons [490], [502].

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213. The construction we have reached of the word 'structure' is determinative of appeal ground 3. The primary judge was not in error in failing to find that the timber panelling, doors and wood floors were structures for the purpose and within the meaning of the term 'Contract Work' in the contract works exclusion clause. On the unchallenged findings of the primary judge as to the state of the refurbishment works (see [36] - [37] above) none of the items relied on in appeal ground 3 was a building or a substantial built form within the concept of the word 'structure' as used in the contract works exclusion clause - they were no more than an item installed in the course of refurbishment work to the House.

214. So too appeal grounds 4, 5 and 6 must fail.

215. As to appeal grounds 4, 5, 6.B and 6.C, we have reservations about the primary judge's conclusion that, properly construed, Free Issue Materials must be supplied by the insured (see [111] above). The basis for that qualification does not emerge from the language of the definition. Nor, logically, is it to be thought that the insured would be supplying items such as 'plant, tools and equipment' or 'temporary buildings and structures'. And, in this respect, the risk to AIG as insurer is no different depending on whether the building and construction materials (including debris) is supplied by the plaintiffs, a builder or some third-party.

216. It is, however, unnecessary to come to a final conclusion on this aspect of the primary judge's construction of the term 'Free Issue Materials'. For the green rubbish bin or its contents to constitute Free Issue Materials they must have been supplied in connection with the Contract Work (or Temporary Work or Works - these subject matters also requiring a connection with Contract Work). The necessary connection with Contract Work - in the form of a structure - is not established insofar as we have rejected AIG's preferred construction of the word 'structure' and appeal ground 3 has failed. In this respect, as senior counsel for AIG accepted, if there was no relevant structure (and thus no Contract Work) the contract works exclusion clause did not apply. The failure of AIG's construction of the word 'structure' leading to the dismissal of appeal ground 3 means that the primary judge was not in error in failing to find that the green rubbish bin or its contents constituted Free Issue Materials.

217. Appeal ground 6.A must be dismissed as, conformably with the dismissal of appeal ground 3, the primary judge was not in error in failing to find that the green rubbish bin was put in the dining room and used in connection with the Contract Work or the Works. Nor, conformably with the dismissal of appeal grounds 4, 5, 6.B and 6.C, was the primary judge in error in failing to find that the green rubbish bin was put in the dining room and used in connection with Free Issue Materials.

218. The dismissal of appeal grounds 1 - 6 means that the appeal must be dismissed. Success on one or more of appeal grounds 7 - 15 will not sustain the appeal (appeal ground 16 necessarily fails with the dismissal of appeal grounds 1- 6). We will, however, go on to consider appeal grounds 7 - 16 as they were the subject of full argument at the appeal hearing.

Disposition of AIG's appeal: the cause of the fire appeal grounds

219. As to its appeal grounds concerning the cause of the fire (ie appeal grounds 7 -16), AIG asserted that this court was in as good a position as the primary judge to determine that matter for itself. AIG pointed in particular to:

    1. The unchallenged finding that the fire started in the green rubbish bin in the dining room.

    2. The circumstance that the painters had been using rags to apply Loba Oil on the afternoon before the night of the fire, doing so in the vicinity of the dining room.

3. The evidence that Loba Oil soaked rags could selfheat and might selfignite if not disposed of properly.

220. AIG said that these facts, as a matter of logic and inference, established the ultimate inference that it asked the primary judge to draw, namely, that the fire in the green rubbish bin occurred in connection with 'Contract Work' because Loba Oil soaked rags were placed in there. There was, in AIG's submission, no other rational, logical or plausible explanation for the fire that had undoubtedly occurred. It had excluded all other possible causes of the fire. By a process of elimination, the oily rags theory was, in the circumstances, not conjecture - it was the only plausible and rational cause of the fire.[213]

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[213] Appeal ts 91 - 93; AIG's submissions pars 59 - 61 WAB 25.

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221. An immediate difficulty with AIG's case on appeal - one not confronted in AIG's written or oral submissions - is the primary judge's finding at [439] of the primary reasons that her Honour was not satisfied that AIG had proved that, if Loba Oil soaked rags were in the green rubbish bin in the dining room and they selfheated, the Loba Oil soaked rags would have reached the point of achieving thermal runaway and selfcombusting (see [101] - [102] above). For reasons we have explained that finding is not to be gainsaid in this appeal. At first blush this presents as an insurmountable obstacle to AIG's case on appeal that the oily rags theory is the only plausible and rational cause of the fire. AIG never sought to explain how this aspect of its appeal might succeed despite the factual finding at [439] of the primary reasons. We are not satisfied that it can given that (having established that the green rubbish bin contained Loba Oil soaked rags) it was still necessary for AIG to prove, on the balance of probabilities, that the rags selfheated leading to spontaneous combustion resulting in the fire that spread and destroyed the house.

222. This is, however, only one of the difficulties with this aspect of AIG's appeal. For the reasons that follow we would not uphold the cause of fire appeal grounds in any event.

Grounds 7 & 8: the availability of the intruder theory and whether it did not rise above 'mere speculation'

223. By appeal ground 7 AIG contends that the plaintiffs were unable to advance the intruder theory at trial, and says that no evidence going to that issue should have been admitted or considered, insofar as there was no pleading of a possible alternative cause for the fire.

224. The intruder theory was not pleaded. However, as has been seen at [80] above, AIG pleaded the oily rags theory as the cause of the fire. The plaintiffs joined issue with that allegation.[214] As the primary judge explained, the oily rags theory was also in issue as between the plaintiffs and the Bresland parties [215] as well as being in issue in the fourth-party

proceedings (between MBC and Holgerssons). [216] Similarly, although not mentioned by the primary judge, the oily rags theory was in issue in the third-party proceedings between AIG and MBC.[217]

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[214] Plaintiffs' reamended reply dated 19 June 2019 par 3 BAB 250.
[215] Primary reasons [396].
[216] Primary reasons [398].
[217] AIG's amended statement of claim against MBC and Tokio dated 26 February 2019 pars 17 - 19; MBC's amended defence to AIG's amended statement of claim dated 11 April 2019 par 9.

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225. AIG bore the onus of proving the application of the exclusion provided by the contract works exclusion clause. Accordingly, it bore the onus of proving the factual integers of the oily rags theory (those integers being summarised at [96] above). Those factual integers were in issue on the pleadings in the proceedings.

226. In part, as has been seen, AIG sought to prove its case as to the cause of the fire by inference. Indeed, that remains the case on appeal. In this respect, as the primary judge held, it is well established that, while a more probable inference may fall short of certainty, it must be more than an inference of equal degree of probability with other inferences. [218] As was said in ***Bradshaw v McEwans Pty Ltd*** :

> [W]here direct proof is not available it is enough [if] the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. [219] (citations omitted)

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[218] ***Lithgow City Council v Jackson*** [2011] HCA 36; (2011) 244 CLR 352 [94].
[219] ***Bradshaw v McEwans Pty Ltd*** (1951) 217 ALR 1, 5. See also: ***Luxton v Vines*** [1952] HCA 19; (1952) 85 CLR 352, 358 (see also 359 - 360); ***Jones v Dunkel*** (304 - 305), (309 - 310), (317); ***The Trustees of the Property of Cummins v Cummins*** [2006] HCA 6; (2006) 227 CLR 278 [34].

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227. AIG was well aware of its forensic onus given the circumstantial case it propounded. Before the primary judge AIG opened its case on the basis that it would submit that there was no conflicting inference or competing inference, referring to ***Luxton v Vines*** and ***Bradshaw v McEwans Pty Ltd*** .[220] In this respect, once the plaintiffs met their evidential onus in respect of the intruder theory (the term 'evidential onus' being used to differentiate the plaintiffs' obligation from the ultimate legal onus carried by AIG in making out its pleaded case), it became necessary for AIG to exclude the probability of the intruder theory if AIG was to establish its pleaded case as to the cause of the fire.

[220] AIG's opening submissions dated 20 March 2020 par 30.

228. There was no need for the plaintiffs to plead their reliance on the intruder theory. A party must plead material facts, not the existence of a competing inference of equal probability. [221] In some cases it may be necessary to plead such a matter as part of a pleading subsequent to a statement of claim where the matter is one that, without being specifically pleaded, might have taken the other party by surprise. [222] This was not such a case. The intruder theory was raised by the witness statement of Mr Tisdale[223] that was exchanged before trial. Moreover, Mr Tisdale's report dated 18 March 2016 (as referenced in his witness statement) was referred to in some of the forensic fire investigator reports tendered by AIG.[224] The plaintiffs raised the intruder theory in their written opening submissions (characterising both it and the oily rags theory as speculative).[225] The Bresland parties opened on the basis that it was for AIG to exclude the intruder theory.[226] In AIG's opening senior counsel for AIG acknowledged that the other parties sought to rely on the intruder theory (although contending, consistently with the position taken on the appeal, that the matter needed to be pleaded and there was 'not a jot of evidence' to support the intruder theory).[227]

[221] *Rules of the Supreme Court 1971* (WA) (RSC) O 20 r 8(1).
[222] RSC O 20 r 9(1)(b) .
[223] Exhibit 27 GAB 1059 - 1096.
[224] See: (1) as to Mr Tong - Third report dated 22 May 2016 par 2.4 GAB 212; (2) as to Mr Manser - Expert Report dated 28 May 2016 pars 7.28 - 7.29 GAB 233.
[225] Plaintiffs' opening submissions dated 20 March 2020 par 20.
[226] Bresland parties' opening submissions dated 20 March 2020 par 7(e).
[227] ts 603 - 605, 610 - 612.

229. The absence of surprise in the intruder theory is established by the primary judge's willingness, if it were necessary to do so, to permit an amendment to the pleadings to refer to the issue. [228] That finding is unchallenged on appeal.

[228] Primary reasons [418].

230. In support of appeal ground 7 AIG submitted that it was not for it to disprove all other speculative potential causes. This presupposes the success of appeal ground 8. As will be seen, appeal ground 8 is not made out. The plaintiffs met their evidential onus as to the intruder theory.

231. Appeal ground 8 alleges error in the primary judge failing to find that the intruder theory was 'not established on the balance of *possibilities*'. That is a curious contention. There is no commonly accepted civil standard of proof couched in terms of a party having to establish proof to the balance of *possibilities*. It may be accepted, however, that the intruder theory had to rise above mere speculation. This, in substance, was the way in which AIG presented its case in support of appeal ground 8 - AIG alleged that the intruder theory was mere speculation and thus was to be discounted as a possible explanation for the cause of the fire. In so doing AIG referred to particulars 8.A - 8.D as sub-findings that kept the intruder theory in contention.

232. In relation to particulars 8.A - 8.D:

1. Particular 8.A complains that the primary judge failed to take into account a finding that there was no evidence that the laundry door lock had actually been picked. It is plain, however, that the primary judge summarised the relevant evidence and in that respect had regard to the limited findings that could be made based on Mr Tisdale's evidence.[229] It was well open, on the basis of Mr Tisdale's evidence as recited by the primary judge, to conclude that the lock manipulation tool later found on the property could have been used to open the laundry door. This was the salient finding made by the primary judge.[230] AIG has not established error in this sub-finding.

2. Particular 8.B is not to the point. Whether the fire department had to use force to enter the property in responding to the fire is irrelevant to whether an intruder had earlier broken into the house. There was no suggestion that in responding to the fire the firefighters examined whether one or more entry points were open as access points.

3. Particular 8.C challenges the primary judge's reliance on Mr Thomas' recollection of where the green rubbish bin in the dining room was located when Mr Thomas left the property. It does so despite AIG elsewhere stating that the disagreement as to the precise location of the bin was immaterial to the appeal.[231] We deal with this below at [233] - [238].

4. Particular 8.D complains about the primary judge's use of the CCTV footage. It must be accepted that the primary judge erred in describing the location of two of the CCTV cameras.[232] The relevant cameras were on the adjoining property rather than the subject property. [233] However, the error was immaterial. The relevant finding - which is not impugned by her Honour's error - was that there were people in the vicinity of the property on the night of the fire and the available footage might not have detected an unlawful entry into the property.[234] In that respect, quite properly, senior counsel for AIG accepted at the appeal hearing that an intruder would not necessarily have been seen entering and exiting the plaintiffs' property given the limitations of the available CCTV footage.[235] Particular 8.D is no more than a distraction given that concession.

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[229] Primary reasons [185] - [186], [289] - [290].

[230] Primary reasons [445](1).
[231] AIG's submissions par 16 WAB 16.
[232] See particular 8.D(1) - (3) WAB 10 - 11; compare primary reasons [173] - [174].
[233] So too was the CCTV camera overlooking the tennis court. The primary judge correctly stated the location of this camera: primary reasons [168].
[234] Primary reasons [170] - [172], [175]. See also [445](2).
[235] Appeal ts 108.

233. The key finding that the primary judge relied on in determining that the intruder theory rose above mere speculation was the movement of the green rubbish bin in the dining room. The primary judge referred to this as evidence that was consistent with someone having entered the house after Mr Thomas left, ie evidence that was consistent with the intruder theory and inconsistent with the oily rags theory.[236]

[236] Primary reasons [445](6).

234. The finding relied on Mr Thomas' evidence. There was incontrovertible evidence of the location of the bin at the time of the fire. It was located almost in the middle of the entry to the dining room close to and between the sliding doors.[237] However, Mr Thomas' evidence was that the location of the bin as at the time of the fire was not where he had left the bin on the afternoon before the night of the fire. [238] In this respect Mr Thomas gave clear and compelling evidence that while just outside the doorway, in the entry area, he tossed a halfempty water bottle and drill bit into the bin some one to two metres away.[239] The area designated as the location of the bin at the time of the fire was not where Mr Thomas left the bin.[240]

[237] Primary reasons [275] - [276], [278], [445](6); primary reasons annexures F and I.
[238] Primary reasons [149].
[239] ts 995 - 997, 1037 - 1038.
[240] ts 1038.

235. The finding made - accepting Mr Thomas' evidence on this point - relied on Mr Thomas' credibility and reliability as a witness. The primary judge saw and heard Mr Thomas give evidence. This court does not have the same advantage. However, in challenging this aspect of the primary judge's reasoning AIG did not engage with the principles applying to challenges to factual findings based on credit and reliability. Rather, when asked to deal with this finding, senior counsel for AIG merely stated:

> I'm sorry. I did mean to deal with this and I didn't. Why would Mr Thomas be so certain about something which was so incidental is how I wish to start the submission. So witnesses, when they're asked about things, often give an answer that they believe is truthful but it's largely their recollection of their impression. So the weight to be given to this evidence, we respectfully submit, could not trump the evidence from the fire investigator with the bottom of the bin burnt onto the floor. So - but I need - I think, to answer what lies behind, your Honour, the presiding judge's question. Even if Mr Thomas had such an impression or recollection it doesn't lead anywhere because you would still - it doesn't help establish that there must have been an intruder …[241]

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[241] Appeal ts 110.

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236. There was, accordingly, no suggestion that the primary judge's factual finding based on Mr Thomas' evidence was demonstrably wrong by reference to incontrovertible facts or uncontested testimony. Nor was it the case that the finding was glaringly improbable or contrary to compelling inferences - or that the primary judge had failed to use, or palpably misused, her advantage as trial judge. Instead, seeking to characterise the evidence as impressionistic, AIG attacked the weight of Mr Thomas' evidence in comparison to the evidence of the forensic fire investigators. But that comparison was not to the point. The forensic fire investigators were giving evidence of where the green rubbish bin must have been at the time of the fire. Mr Thomas was giving evidence of where the bin was located at the time he left the property (more than nine hours earlier). As the two locations were not the same it followed, if Mr Thomas' evidence were accepted, that the bin must have been moved.

237. Contrary to AIG's submission, this apparent movement of the green rubbish bin in the dining room supported the intruder theory. There was no other suggested explanation in the evidence for the bin to be in its eventual location as at the time of the fire. Moreover, properly understood, Mr Thomas' evidence was not evidence of his impression. Rather it was cogent evidence of a specific recollection based on an action he took at the time - the action of throwing items into the green rubbish bin from a particular point. That recollection is selfevidently a memory that would enable Mr Thomas to locate the bin as at the time he left the property.

238. AIG has not sustained its challenge by particular 8.C.

239. The primary judge's reasons for concluding that the intruder theory was more than mere speculation are reproduced at [105] above. The most significant of the items relied on by the primary judge was the apparent movement of the green rubbish bin in the dining room. To exclude the intruder theory as no more than mere speculation it is, in our view, necessary for AIG to set aside the primary judge's factual finding based on the acceptance of Mr Thomas' evidence as to the location of the bin when Mr Thomas left the house. AIG has failed to do so. Accordingly, although AIG has demonstrated non-material error as to the primary judge's reliance on the CCTV footage, we are not satisfied that the intruder theory did not rise higher than mere speculation. To the contrary, while accepting that the primary judge has misstated

the effect of some of the evidence based on the CCTV footage, the plaintiffs met their evidential onus as to the intruder theory. The intruder theory could not be dismissed as being merely speculative.

240. Appeal grounds 7 and 8 fail.

Grounds 12, 10 & 11: the admissibility of the statement attributed to Mr Simpson in Mr Bell's file notes and report

241. Appeal grounds 10 - 12 should be considered together. These grounds concern the admissibility of a statement attributed to Mr Simpson in Mr Bell's file notes and report. Appeal ground 10 contended, in substance, that the statement should have been admitted under the business records exception in s 79C(2a) of the *Evidence Act* . Appeal ground 11 contended, in the alternative, that the statement was admissible as part of the res gestae. Appeal ground 12 was advanced in support of appeal ground 10. Appeal ground 12 challenged the primary judge's reasoning to the extent that the primary judge relied on s 79C (6) in rejecting the statement because, in the primary judge's view, AIG's cross-examination of Mr Simpson did not adequately deal with the statement.

242. It is convenient to deal first with appeal ground 12. As will be seen, success on appeal ground 10 is insufficient to succeed more generally unless AIG also succeeds on appeal ground 12.

243. As has been seen, AIG sought to adduce in evidence Mr Bell's note of a telephone conversation Mr Walling had with Mr Simpson on the morning after the fire. The note included a statement of what Mr Walling informed Mr Bell had been said to him (ie said to Mr Walling) by Mr Simpson. The note read:

> [Mr Walling] contacted the painters in my presence; they confirmed they gathered the rags they used to clean up the wood/timber staining & placed them in the bin in the front western room at approx. 3 pm on Friday 15/1/16.[242]

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[242] GAB 898.

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244. Mr Bell summarised the note in his fire investigation report (see [72] above).

245. Mr Walling telephoned Mr Simpson in Mr Bell's presence. Mr Bell only heard what was said by Mr Walling; Mr Bell recorded what he was told by Mr Walling as to what had been said by Mr Simpson. In this respect, as the primary judge observed, the note was hearsay on hearsay. [243] Nevertheless, if admissible as proof of the fact, the note comprised a statement that the painters had placed rags in the rubbish bin in the dining room (albeit based on a note recorded by Mr Bell of what Mr Simpson informed Mr Walling who in turn informed Mr Bell).

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[243] Primary reasons [223].

246. AIG contended that the hearsay material was admissible hearsay because it conformed with the requirements of s 79C(2a) and (3) of the *Evidence Act* . AIG also contended that Mr Simpson confirmed in cross-examination that he, Mr Simpson, was in no doubt that the bin being referred to was the green rubbish bin in the dining room. The primary judge rejected both contentions.

247. The primary judge's second contention is the subject of appeal ground 12. Consideration of appeal ground 12 requires some development of the evidence. This commences with senior counsel for AIG's examination-in-chief of Mr Walling. It was established that, at the request of Mr Bell, Mr Walling made a telephone call to Mr Simpson. The relevant exchange between senior counsel for AIG and Mr Walling was then:

> And what did you say to Mr Simpson?---I said to Mark Simpson, I said, 'Did you put any rags in the bin?'
>
> And what did he say?---He said, 'Yes', he did.
>
> That's the evidence-in-chief. If your Honour pleases.[244]

[244] ts 957.

248. There was no identification of which bin the painters put the rags in. Mr Walling's evidence was simply that he (Mr Walling) asked Mr Simpson whether he (Mr Simpson) had put any rags in the bin. Senior counsel for AIG did not ask whether, when Mr Walling spoke to Mr Simpson, the painters had put any rags in the green rubbish bin in the dining room. The omission was material. In cross-examination Mr Walling confirmed that, subsequently, Mr Simpson had said that when he (Mr Simpson) referred to the bin in the telephone conversation on the morning after the fire, he (Mr Simpson) meant the outside skip bin.[245]

[245] ts 968.

249. Mr Simpson gave evidence after Mr Walling. Mr Simpson was not asked about the second conversation (ie the one where Mr Simpson said he was referring to the outside skip bin) in examination-in-chief. Nor was this raised in cross-examination. [246] Given the contention made by appeal ground 12 it is useful to reproduce the material part of senior counsel for AIG's cross-examination of Mr Simpson:

[246] Primary reasons [232].

And you first came to learn that the fire had occurred when Mr Walling called you, didn't you?---Yes.

And when he called you, he told you that there had been a fire in the house?---Yes.

And he told you, did he, that he was present with the fire investigator from the fire department?---Yes.

And he told you, didn't he, that the fire investigator had told him that the fire had started in the bin *within the house*, correct?---He wasn't too sure but yes, he said it might have.

But he was referring to the bin *inside the house*, correct?---Yes.

You knew at that point, when he said that to you, I take it you knew which bin he was referring to?---Yes.

Because there was only one bin inside the house on that level, wasn't there?---No, there was probably two or three.

All right. And the - have you seen the photographs of the ground floor since this case commenced? Have you been shown the photographs?---Just on Friday, those photos.

And have you seen any bins in any of the photographs you're seeing, apart from perhaps the remnants of one bin?---I didn't even see the remnants of that bin.

All right. Now, *the bin inside* - I withdraw that. Now Mr Walling, when he spoke to you, this is on the morning of the fire, that is the fire had occurred and it was the same morning, correct?---Yes.

And you understood him to be ringing you to find out whether or not the painters had put rags in the bin so as to cause the fire, correct?---He just basically - - -[247] (emphasis added)

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[247] ts 1312.

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250. Senior counsel for Holgerssons then interjected. The interjection occurred before Mr Simpson had an opportunity to answer whether Mr Walling had telephoned Mr Simpson to find out whether or not the painters had put Loba Oil soaked rags in 'the bin'. Senior counsel for Holgerssons raised an issue about clarifying what was meant by 'the bin' - in substance seeking differentiation between the outside skip bin and the green rubbish bin in the dining room.[248] The cross-examination of Mr Simpson by senior counsel for AIG then continued:

Mr Simpson, having heard that exchange. You understood when I asked you the questions that I was asking you, I was asking you about the plastic bin inside the house, didn't you?---Yes.

> And there was a plastic bin inside the house, which was located in the front western room, wasn't there?---Yes.[249]

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[248] ts 1312 - 1313.
[249] ts 1313.

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251. Sometime later, senior counsel for AIG returned to the telephone call between Mr Simpson and Mr Walling on the morning after the fire:

> You had received a phone call from Mr Walling the day after or the day off [sic] the fire, because it spanned over the night, in which he asked you directly about rags with Loba Oil and the plastic bin. Is that correct?---Yes.
>
> Because he wouldn't have been asking about any other rags, would he?---No.[250]

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[250] ts 1323.

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252. The primary judge held that the contents of Mr Bell's field notes record were not put to Mr Simpson. In particular, it was not put to Mr Simpson that, in his telephone conversation with Mr Walling on the morning after the fire, Mr Simpson had told Mr Walling that the painters had put Loba Oil soaked rags in the bin - and when he (Mr Simpson) said that he (Mr Simpson) was referring to the green rubbish bin in the dining room. [251]

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[251] Primary reasons [234]. See also [251], [253] - [254], [432] - [433].

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253. This omission could not and did not affect the application of s 79C(2a) of the *Evidence Act* . But, as has been seen (see [90] above), the primary judge relied on lack of cross-examination in weighing the cogency and reliability of Mr Bell's note. In this regard the primary judge's view of Mr Simpson's cross-examination was relied on, in the alternative, in excluding the admission of the statement pursuant to s 79C(6) of the Act. The primary judge stated:

> If I am wrong on this point [ie about the admissibility of the relevant statement pursuant to s 79C (2a) of the *Evidence Act*], and the field note and the record of that note in the report made by Mr Bell about what he recorded that Mr Walling had told him meets the requirements of s 79C, I would not admit the evidence and reject it pursuant to s 79C(6) because I am of the opinion that the probative value of the statement is outweighed by the consideration that its admission would create undue prejudice to Mr Holgersson, as party to the fourth party proceedings, because the precise contents of the field note were not put to Mr Simpson or Mr Walling. [252]

[252] Primary reasons [245].

254. At the appeal hearing, senior counsel for AIG explained that appeal ground 12 was pursued to counter this alternate basis for rejecting the admissibility of Mr Bell's field note as a business record.[253] Senior counsel submitted that in cross-examination Mr Simpson confirmed that when he had the discussion with Mr Walling on the morning after the fire the discussion was about the bin inside the house.[254] It was said that Mr Simpson confirmed the evidence that Mr Walling gave and Mr Bell's field note recorded. AIG contended that the finding the primary judge should have made was that Mr Simpson confirmed that he had told Mr Walling that the painters had put the rags in the bin and the bin Mr Simpson was referring to was the green rubbish bin in the dining room.[255]

[253] Appeal ts 78 - 79.
[254] Appeal ts 80.
[255] AIG's submissions par 96 WAB 31.

255. We accept that, in the cross-examination of Mr Simpson reproduced at [249] above, the cross-examiner is referring to a bin inside the house rather than the outside skip bin. Moreover, Mr Simpson plainly understood this to be the case. The cross-examiner then asks - directly - about whether Mr Walling telephoned Mr Simpson to find out whether or not the painters had put rags in the bin. But at that point, critically, there is an interjection. Mr Simpson does not answer the question. Nor does the cross-examiner return to the question once the interjection is dealt with.

256. There is, on a fair reading of the cross-examination, no admission by Mr Simpson that he told Mr Walling that the painters put Loba Oil soaked rags in the green rubbish bin in the dining room.

257. Read fairly, as a whole, the cross-examination does not deal with the substance of what is attributed to Mr Simpson in Mr Bell's field note. The field note itself is not put to Mr Simpson. Nor, due to the interjection, does Mr Simpson ever answer whether - in terms of what is attributed to him in the field note - Mr Simpson stated to Mr Walling that the painters had put used rags in the bin (referring to the green rubbish bin in the dining room). Accordingly, the primary judge did not err in finding that it was not put to Mr Simpson that in the telephone call he had with Mr Walling on the morning after the fire he told Mr Walling that the painters had put Loba Oil soaked rags in the bin - and when Mr Simpson said that he was referring to the green rubbish bin in the dining room. [256]

[256] Primary reasons [234].

258. There is, moreover, no basis to conclude that Mr Simpson confirmed that he had told Mr Walling that the painters had put rags in the bin (whether soaked with Loba Oil or not) and the bin he was referring to was the green rubbish bin in the dining room. That was simply not raised with Mr Simpson. Nor was it volunteered by Mr Simpson. The submission made by AIG in support of appeal ground 12[257] simply overreaches as does appeal ground 12 itself.

[257] Compare AIG's submissions par 96 WAB 31.

259. Appeal ground 12 fails.

260. Appeal ground 10 challenges the primary judge's reasons for concluding that s 79C(2a) of the *Evidence Act* was inapplicable. The primary judge rejected the admission of Mr Bell's field note as a business record for three independent reasons:

1. First, because her Honour considered that, for the statement to be admissible under s 79C(2a) , Mr Walling had to be a 'qualified person' for the purposes of s 79C; and he was not such a qualified person. [258]

2. Second, because the statement was hearsay on hearsay - meaning that it was 'otherwise inadmissible' for the purpose of s 79C(3). [259]

3. Third, because, as we have recorded in relation to appeal ground 12, if the field note met the requirements of s 79C(2a) the primary judge would, in any case, have refused to admit the evidence and would have rejected it pursuant to s 79C(6) of the *Evidence Act* on the basis that the probative value of the statement was outweighed by the consideration that its admission would create undue prejudice to Holgerssons. [260]

[258] Primary reasons [244].
[259] Primary reasons [245].
[260] Primary reasons [245].

261. Separately, even if the field note of the telephone conversation were admissible, the primary judge considered that the evidence was not sufficiently cogent to be a reliable basis to find that the painters put Loba Oil soaked rags into the green rubbish bin in the dining room on the afternoon before the fire.[261]

[261] Primary reasons [252] - [253].

262. Appeal ground 10 addresses the first two reasons for rejecting the admissibility of Mr Bell's field notes. Appeal ground 12 addresses the third reason. In the latter respect AIG had to demonstrate discretionary error in accordance with ***House v The King*** [262] principles. That challenge has failed for the reasons given at [242] - [259] above. The failure of appeal ground 12 means that even if appeal ground 10 is upheld there is no material error in the primary judge concluding that the statement in Mr Bell's field note was not admissible pursuant to s 79 C(2a) - the statement would have been rejected in any event pursuant to s 79C(6) .

[262] ***House v The King*** [1936] HCA 40; (1936) 55 CLR 499, 504 - 505 .

263. In the circumstances it is not necessary to determine appeal ground 10. We decline to do so. All of appeal grounds 7 - 16 cannot affect the outcome of the appeal given the conclusion we have reached on appeal grounds 1 - 6. So too AIG has not demonstrated how success on appeal grounds 7 - 16 more generally can assist it given the lack of challenge to the primary judge's finding that it had not been proven that, if Loba Oil soaked rags were in the green rubbish bin in the dining room and they selfheated, the Loba Oil soaked rags would have reached the point of achieving thermal runaway and selfcombustion. In circumstances where the questions of statutory construction that inform appeal ground 10 are academic it is appropriate to decline to determine the ground.

264. Finally, by appeal ground 11, AIG challenged the primary judge's conclusion that the statement in Mr Bell's field notes about what Mr Simpson said to Mr Walling was not admissible as part of the res gestae.

265. The primary judge referred to the doctrine of res gestae by reproducing relevant parts of the reasons of Mazza JA (Martin CJ & Buss JA agreeing) in ***Poland v The State of Western Australia*** . [263] The primary judge concluded that, in the absence of cross-examination of Mr Simpson about precisely what he said to Mr Walling in the telephone conversation on the morning after the fire, the admission of the evidence was prejudicial to Holgerssons. [264]

[263] Primary reasons [248] (referring to ***Poland v The State of Western Australia*** [2015] WASCA 136 [219] [222]).
[264] Primary reasons [251].

266. In support of appeal ground 11 AIG submitted that the possibility of concoction or distortion could be disregarded insofar as Mr Simpson's utterance was an instinctive reaction to the fire and ought to be treated as a spontaneous statement giving no real opportunity for reasoned reflection.[265]

[265] AIG's submissions par 90 WAB 30.

267. A statement made spontaneously by an observer or participant during or immediately after an event may be admissible as part of the res gestae. [266] The rationale for the admissibility of such evidence lies in the virtual certainty that the statement is true. [267] In ***Walker v The State of Western Australia*** Buss P and Mazza JA explained that the justification for the res gestae exception to the hearsay rule is based on the spontaneity or contemporaneity of the out of court statement. This feature tends to exclude the possibility of concoction or distortion. However, the unlikelihood of concoction or distortion is not sufficient, of itself, to render an out of court statement admissible under the res gestae exception. [268]

[266] ***Armstrong v The State of Western Australia*** [2012] WASCA 42; (2012) 220 A Crim R 274 [46].
[267] ***Papakosmas v The Queen*** [1999] HCA 37; (1999) 196 CLR 297 [55].
[268] ***Walker v The State of Western Australia*** [2020] WASCA 85 [74] - [75] .

268. Nevertheless, in considering the admissibility of evidence under the res gestae doctrine, one consideration is the likelihood of deliberate concoction or distortion on the part of the maker of the statement. Also, there may be special features in a case that require a judge to consider whether the possibility of error can be excluded. [269]

[269] ***Poland v The State of Western Australia*** [222] .

269. We consider that the statement attributed to Mr Simpson in Mr Bell's field notes was not admissible as part of the res gestae. Relevantly:

1. The statement was not sufficiently contemporaneous with the fire let alone the alleged act of the used rags being gathered and placed in the bin (this being the relevant 'res'). It is well established that the concept of res gestae is concerned with an out of court statement that is so close in time to the acts being proved as to be inseparable from those acts. [270] Here the telephone call between Mr Walling and Mr Simpson occurred on the morning after the fire. There was no close contemporaneity as where a statement is made during or immediately after an event.

2. The statement was not spontaneous - it was in answer to an ambiguous question on the part of Mr Walling. The question was ambiguous insofar as, on the evidence elicited in Mr Walling's examination-in-chief, Mr Walling did not identify the bin he was referring to.

3. There are two special features of the case which make the statement attributed to Mr Simpson unreliable:

(a) First, Mr Simpson had no personal knowledge of the state of the green rubbish bin in the dining room as at 3 pm on 15 January 2016 (it being the purport of the statement that used rags were gathered up and placed into the bins at that time). The evidence was that Mr Simpson left the property at about 2.30 pm when Mr Milton and Mr Roach were still working. [271] In this respect it is the contemporaneous involvement of the speaker at the time the statement is made with the occurrence which is identified as the res which founds admissibility. [272]

(b) Second, the statement was hearsay on hearsay - at best Mr Bell's field note recorded what he was told of a conversation between Mr Walling and Mr Simpson.

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[270] ***Walker v The State of Western Australia*** [81] .
[271] Primary reasons [253]. See also ts 1285.
[272] ***Vocisano v Vocisano*** [1974] HCA 14; (1974) 130 CLR 267, 273.

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270. These matters, collectively, mean that it cannot be said with 'virtual certainty' that the statement attributed to Mr Simpson in Mr Bell's field note was in fact true. In the circumstances the primary judge was correct to reject the admissibility of the statement so far as AIG sought that it be admitted as part of the res gestae.

271. Appeal ground 11 fails.

Ground 13: the failure to draw a *Jones v Dunkel* inference in relation to Mr Milton and Mr Roach

272. By appeal ground 13 AIG challenges the primary judge's refusal to draw adverse ***Jones v Dunkel*** inferences in relation to the non-calling of Mr Milton and Mr Roach. The alleged error in failing to draw those inferences was said to have led to an erroneous failure to find that Loba Oil soaked rags had been placed in the green rubbish bin in the dining room by the painters.

273. The principle in ***Jones v Dunkel*** is that the unexplained failure by a party to call a witness *may* (not must) in appropriate circumstances: [273]

1. First, support an inference that the uncalled evidence would not have assisted the party's case, particularly where it is the party who is the uncalled witness.

2. Second, permit the court to draw, with greater confidence, any inference unfavourable to the party who failed to call the witness.

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[273] ***Jones v Dunkel*** (308), (312), (320 - 321). See also ***Kuhl v Zurich Financial Services Australia Ltd*** [2011] HCA 11; (2010) 243 CLR 361 [63] - [64]; ***Australian Securities and Investments Commission v Hellicar*** [2012] HCA 17; (2012) 247 CLR 345 [232]; ***Chong v CC Containers Pty Ltd*** [2015] VSCA 137; (2015) 49 VR 402 [207] - [208].

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274. In the latter case the inference must already be available on the evidence. [274] Also, the uncalled witness must be one who appears to be in a position to cast light on the facts relied on as the ground for the inference.[275] However, the rule in ***Jones v Dunkel*** does not permit an adverse inference that the uncalled evidence would have been positively damaging to the party.[276] The absence of the witness cannot be used to make up any deficiency of evidence. [277]

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[274] ***Morley v Australian Securities and Investments Commission*** [2010] NSWCA 331; (2010) 247 FLR 140 [634]; ***Chong v CC Containers Pty Ltd*** [208].
[275] ***Kuhl v Zurich Financial Services Australia Ltd*** [63]; ***Chong v CC Containers Pty Ltd*** [208].
[276] ***Kuhl v Zurich Financial Services Australia Ltd*** [64]; ***Australian Securities and Investments Commission v Hellicar*** [232].
[277] ***Jones v Dunkel*** (312). See also ***Chong v CC Containers Pty Ltd*** [208].

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275. In ***Police (SA) v Kyriacou*** ,[278] Gray J (Kourakis J agreeing) made these comments about the drawing of a ***Jones v Dunkel*** inference:

> A ***Jones v Dunkel*** inference is only available where all preconditions necessary to it operating as a logical conclusion to be drawn from the absence of the witness are met. That is, it must be within the power of the particular party to call the witness; it must be natural for the party to call the witness in that the witness would ordinarily be expected to shed light on the issue favourable to the party; the witness must be one whose evidence is not unimportant, cumulative or inferior to what has already been adduced; the witness must not be equally available to both parties; and there must not be an obvious or proved, and satisfactory, explanation for the failure to call the witness *(Wigmore on Evidence* (3rd ed) vol II paras 285 - 289; JD Heydon, *Cross on Evidence*

(6th ed) [1215] - [1219]; ***Spence v Demasi*** (1988) 48 SASR 536 at 547 548 ; ***Payne v Parker*** [1976] 1 NSWLR 191 at 201 - 202 per Glass JA) [16].

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[278] ***Police (SA) v Kyriacou*** [2009] SASC 66; (2009) 193 A Crim R 490.

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276. Appeal ground 13 directs attention to the failure of *Holgerssons* to call evidence from Mr Milton and Mr Roach, saying that this was not adequately explained. In the ground as drafted AIG did not suggest that the *plaintiffs* should have called Mr Milton and Mr Roach and that adverse ***Jones v Dunkel*** inferences should be drawn because the plaintiffs had not adequately explained the omission to call the two painters. AIG's position developed in the course of the appeal hearing. Senior counsel for AIG said that it was contending that employees or contractors of Holgerssons placed the Loba Oil soaked rags in the bin. Thus Holgerssons became the natural contradictor of the evidence for that issue.[279] But, when asked why this meant that the adverse ***Jones v Dunkel*** inferences should be drawn against the plaintiffs, senior counsel for AIG stated:

> Where there are a number of pieces of related litigation which are heard at the same time, with evidence in one being evidence in the other, it then emerges that any failure on the part of a party who has a similar interest in the issue with the plaintiff[s], that failure falls at the feet of the plaintiff[s].[280]

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[279] Appeal ts 190.
[280] Appeal ts 191.

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277. Accordingly, AIG sought to employ the principle in ***Jones v Dunkel*** to sustain the factual findings it sought as against the plaintiffs. AIG did so alleging failure on the part of Holgerssons (not the plaintiffs) to adequately explain the failure to call Mr Milton and Mr Roach as the painters working at the property on the afternoon of 15 January 2016.

278. The principle in ***Jones v Dunkel*** is a 'particular application'[281] of the maxim made famous by Lord Mansfield CJ in ***Blatch v Archer*** :

> [A]ll evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted. [282]

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[281] ***Chong v CC Containers Pty Ltd*** [207].
[282] ***Blatch v Archer*** (1774) 1 Cowp 63, 65; (1774) 98 ER 969, 970.

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279. Once this is appreciated, we cannot accept AIG's contention that the plaintiffs are to be visited with the consequences of any unexplained failure on the part of Holgerssons to call witnesses that Holgerssons may be expected to call. In drawing an adverse inference against the plaintiffs regard should be had to the proof that was within the power of the plaintiffs to produce rather than the proof that was within the power of Holgerssons to produce (assuming, in this respect, a failure by Holgerssons to adequately explain not calling the two painters). The contrary result would unjustly disadvantage the plaintiffs and bestow an unwarranted forensic benefit on AIG. There is no basis to do so where, as between the plaintiffs and AIG, the painters were equally available to both parties - neither party having a prior or ongoing relationship with the potential painter witnesses such that it could be said that it was natural for one of the plaintiffs or AIG (rather than the other) to have produced the witnesses. [283]

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[283] See ***Payne v Parker*** (1976) 1 NSWLR 191, 201 - 202 .

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280. The analysis is unaffected by AIG's suggestion that the plaintiffs and Holgerssons had a similar interest in an issue.

281. The plaintiffs and AIG were parties to one proceeding (the main action). MBC and Holgerssons were parties to another proceeding (the fourth-party proceedings). True it is that evidence in one proceeding was evidence in the other. Thus, had the painters been called to give evidence at the trial, the evidence would have been adduced in both proceedings. To the extent that the same or a similar issue arose in both proceedings that evidence would have borne on the common issue in the main action and the fourth-party proceedings. But, having regard to the rationale that underpins the maxim in ***Blatch v Archer*** and the rule in ***Jones v Dunkel*** , this provides no reason to draw an adverse inference against the plaintiffs.

282. In any event, AIG has not established that the primary judge should have drawn adverse ***Jones v Dunkel*** inferences by reason of Holgerssons not calling the painters. Relevantly:

1. Mr Milton had not been engaged by Holgerssons since January 2016 [284] - more than four years prior to the trial. There was unchallenged evidence that Mr Milton had resisted attempts on behalf of Holgerssons to serve him with a subpoena.[285]

2. Mr Roach only worked for Holgerssons and Mr Simpson for a few months. Prior to the trial four years had elapsed since Mr Roach had worked for either of them. The primary judge made an unchallenged finding that there was no ongoing relationship between Mr Roach and Holgerssons. [286]

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[284] Primary reasons [369].
[285] Primary reasons [365] - [366].
[286] Primary reasons [386].

283. The circumstance that a possible witness has ceased employment with a party does not always mean that the witness is no longer in the party's camp. Nor does it necessarily provide a reasonable explanation for the party not calling the witness. Where, however, the initial relationship between the party and the witness has been severed, and there is no apparent ongoing relationship, there may be no reason to conclude that the witness is in the party's camp. This, in our view, is such a case. There was no reason to suppose that Mr Milton or Mr Roach were more available to Holgerssons than they were to AIG. It cannot be concluded that Mr Milton and Mr Roach would be expected to be called by Holgerssons rather than AIG. [287]

[287] Compare ***Payne v Parker*** (201 - proposition 6(a)).

284. Finally, even if appeal ground 13 otherwise had merit, what AIG seeks to obtain by the application of ***Jones v Dunkel*** adverse inferences goes too far. The principle does not permit an inference to be drawn that the evidence which was not called would, in fact, have been damaging to the party who withheld it. The absence of a witness cannot be used to make up any deficiency of evidence. Appeal ground 13 does not observe these limits insofar as the ground, in terms, contends that the alleged error in failing to draw adverse ***Jones v Dunkel*** infe rences resulted in an erroneous failure to find that Loba Oil soaked rags had been placed in the green rubbish bin in the dining room by the painters. Success on appeal ground 13 could not, without more, result in a positive substituted finding of the kind provided for in the ground.

285. Appeal ground 13 must be dismissed.

Grounds 9, 14, 15 & 16: the failure of AIG's case on the cause of the fire

286. AIG's remaining appeal grounds are affected by the failure of the appeal grounds that have already been dealt with.

287. Appeal ground 9 alleges error in failing to find that the painters placed Loba Oil soaked rags in the dining room bin. The particulars to appeal ground 9 show that the ground relies on appeal grounds 10 - 12 rather than any more general contention that the finding was contrary to the evidence as a whole (in this respect the PD 7.4 schedule does not make any reference to this factual finding). AIG's approach to seeking to displace the primary judge's finding that AIG had not proved there were Loba Oil soaked rags in the green rubbish bin was necessarily directed to these arguments given that, as AIG accepted at the appeal hearing, but for the statement attributed to Mr Simpson as recorded in Mr Bell's field notes there was no direct evidence that used Loba Oil rags were left in the green rubbish bin in the dining room on the day before the night of the fire. Consistently with the particulars in support of appeal ground 9, AIG's submissions in support of the ground relied on the field notes statement and an adverse ***Jones v Dunkel*** inference to support the conclusion that the painters placed Loba Oil soaked rags in the bin in the dining room.[288]

[288] AIG's submissions pars 91 - 92 WAB 30.

288. The lack of direct admissible evidence on point limits the basis on which it could be concluded that the painters placed Loba Oil soaked rags in the dining room bin. It becomes necessary to reason backwards. It must first be concluded that the fire in the green rubbish bin started because of the selfignition of Loba Oil soaked rags in the bin. With that premise it would follow that there were Loba Oil soaked rags in the bin - and that the rags were put there by the painters as the persons who were applying the Loba Oil. There are, however, two obvious difficulties with this process of reasoning. First, it assumes the ultimate conclusion as to the cause of the fire. Second, it is inconsistent with the primary judge's unchallenged finding that AIG had not proved its case as to selfcombustion. These obvious difficulties explain why appeal ground 9 was not advanced in this manner but instead relied on the statement in Mr Bell's field notes.

289. The failure of appeal grounds 10 - 13 is thus determinative of appeal ground 9. Appeal ground 9 cannot succeed with the failure of appeal grounds 10 - 13. It must be dismissed.

290. Appeal grounds 14 and 15 are cumulative on AIG's preceding appeal grounds. Appeal ground 14 alleges error in finding that the oily rags theory did not rise higher than a possibility; and that the intruder theory was a possibility that was equally possible with the oily rags theory so that the choice between them was mere conjecture. Appeal ground 15 alleges error in failing to find that the fire was caused by the selfignition of Loba Oil infused rags placed in the dining room bin by the painters. Accordingly, appeal ground 15 relies on appeal ground 14. Appeal ground 14, in turn, depends on the success of one or more of the preceding appeal grounds (in particular appeal grounds 7, 8, 9 or 13 - appeal grounds 10 - 13 informing whether there was error in terms of appeal ground 9).

291. In support of appeal ground 14, AIG submitted that the selfignition of Loba Oil soaked rags was the only probable cause of the fire.[289] AIG said that:[290]

1. There was no evidence that an intruder tried to enter or in fact entered the house (saying that the CCTV footage and the lock manipulation tool went nowhere and were of no weight).

2. The intruder theory should have been dismissed as mere conjecture.

[289] AIG's submissions par 103 WAB 32.
[290] AIG's submissions pars 104 - 105 WAB 32 - 33.

292. Accordingly, as presented, appeal ground 14 relied on appeal ground 8. For reasons already given appeal ground 8 has failed. The intruder theory is not to be discounted as mere speculation. Beyond this AIG's appellant's case in support of appeal ground 14 is relatively

sparse. Indeed, AIG's PD 7.4 schedule in support of its contest to this aspect of the primary judge's factual findings did not even summarise the findings and evidence that supported the finding.

293. AIG refers to the following as evidence that is against the primary judge's finding that the oily rags theory and the intruder theory were equally possible:[291]

1. The fire started in the green rubbish bin in the dining room - this, in our view, is of no assistance in preferring one or other of the oily rags theory or the intruder theory. Both theories posit that the fire started in the bin (the point of origin of the fire being a given which was not in dispute on appeal).

2. Loba Oil was being used with rags in the vicinity of the green rubbish bin in the dining room on the day preceding the fire - this is of no moment unless it is established that the painters left used rags soaked with Loba Oil in the bin before leaving for the day. The primary judge held to the contrary. [292] The challenge on appeal to that finding has not been sustained.

3. Mr Simpson gave evidence to the effect that he knew oily rags had a tendency to selfheat and selfignite if not disposed of properly.[293] So too there was expert evidence as to the accepted processes of selfheating and selfignition of vegetable oils generally and that Loba Oil itself had a 'capacity' or a 'high propensity' for selfheating[294] - again, this is of no moment where it has not been established that the painters left used rags soaked with Loba Oil in the bin before leaving for the day. Also, it does not take account of the primary judge's unchallenged finding that AIG had not proved that, if Loba Oil soaked rags were in the green rubbish bin and they selfheated, the rags would have reached the point of achieving thermal runaway and selfcombustion.

4. Electrical faults, cigarette butts and residual ignitable liquids were excluded as potential causes of the fire or being used in the fire - this is of no assistance in preferring one or other of the oily rags theory or the intruder theory. For example, AIG did not seek to establish that an intruder could not have started the fire without using an ignitable liquid.

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[291] AIG's PD 7.4 schedule item 4 WAB 48 - 51.
[292] Primary reasons [434].
[293] AIG referred to primary reasons [128], [134] and ts 1316 - 1317.
[294] AIG referred to primary reasons [187] - [189], [288], [340].

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294. AIG also repeats the evidentiary references that it relied on in support of the factual challenges made by appeal grounds 8, 12 and 13. It is not necessary to refer to this material. We have, in dismissing appeal ground 8, concluded that there was no material error in the primary judge's conclusion that the intruder theory cannot be dismissed as merely speculative. The evidentiary references AIG relied on in support of appeal grounds 12 and 13 are irrelevant to the factual challenge made by appeal ground 14.

295. Accordingly, properly considered, the evidence AIG points to as being against the primary judge's finding that the oily rags theory and the intruder theory were equally possible does not sustain the challenge to the finding.

296. There is, in addition, considerable evidence - not referred to by AIG - that supports the finding challenged by appeal ground 14. Chief among this evidence are the matters referred to in rejecting appeal ground 8. In this respect, as has been seen, there is the key finding of the primary judge as to the apparent movement of the green rubbish bin in the dining room. This provided considerable support for the intruder theory. Also significant was that two of the forensic fire investigators gave evidence that they considered the cause of the fire to be undetermined. Mr Tong, who was engaged and called by AIG, was considered to be the most impressive of the experts. [295] In substance Mr Tong said that he was unable to determine the probable ignition source or cause of the fire.[296] Mr Pollard also considered that the cause of the fire was undetermined.[297]

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[295] Primary reasons [318].
[296] Primary reasons [325]; ts 1211, 1232.
[297] Primary reasons [350]; ts 1185.

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297. Senior counsel for AIG emphasised that this aspect of the appeal attracted the principles applicable to appellate review of a factual finding as discussed in authorities like ***Warren v Coombes*** . [298] We accept this submission. Appeal ground 14 turns on the proper inference to be drawn from facts otherwise established in the context of the evidence as a whole. In deciding what is the proper inference to be drawn this court should give weight and respect to the conclusion of the primary judge. That is all the more so in a long and complex trial such as the present case. The primary judge had a distinct advantage over this court insofar as her Honour saw and heard the evidence emerge, thereby gaining a better understanding of all of the evidence as it was adduced. That said, the duty of an appellate court in an appeal by way of rehearing is to decide the case for itself (both on the facts and the law). This court 'once having reached its own conclusion, will not shrink from giving effect to it'. [299]

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[298] ***Warren v Coombes*** [1979] HCA 9; (1979) 142 CLR 531, 551 - 553 .
[299] ***Warren v Coombes*** (551).

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298. It remains necessary for an appellant to demonstrate error even where the appeal concerns inferences to be drawn from established facts. [300]

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[300] ***Proudlove v Burridge*** [2017] WASCA 6; (2017) 79 MVR 257 [127].

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299. We are not satisfied that the primary judge's conclusion as challenged by appeal ground 14 is erroneous. This is not, strictly speaking, a situation in which the primary judge has made a choice between competing inferences. Rather, her Honour concluded, in substance and effect, that the oily rags theory and the intruder theory were equally possible causes of the fire - and, as such, the cause of the fire could not be determined. If appeal ground 14 is to be upheld it is necessary to conclude that the primary judge was wrong on this point because her Honour should have drawn the inference that the fire was caused by the selfcombustion of Loba Oil soaked rags left by the painters in the bin in the dining room. It is necessary to exclude, as an equally probable inference, the possibility of an intruder lighting the fire. We are not satisfied that this can be done where (1) it has not been established that the painters left Loba Oil soaked rags in the bin or that such rags would have reached the point of achieving thermal runaway and selfcombusting; and (2) the intruder theory is supported by the apparent movement of the bin in the dining room and Mr Tisdale's evidence as to the lock manipulation tool. In reaching the conclusion that error has not been demonstrated we also take into account the expert evidence of Mr Tong and Mr Pollard that they were unable to determine the cause of the fire.

300. Appeal ground 14 must be dismissed.

301. Appeal ground 15 fails conformably with appeal ground 14. It cannot be found that the primary judge erred in fact in failing to find that the fire was caused by the selfignition of Loba Oil soaked rags in circumstances where AIG has been unable to displace the primary judge's finding that the oily rags theory and the intruder theory were both simply possibilities and choosing between them would be a matter of mere conjecture. AIG has not satisfied its onus as explained at [226] - [227] above.

302. Appeal ground 16 was included as a catch-all. By appeal ground 16 AIG asserted that once it was determined that Loba Oil soaked rags were the cause of the fire it could readily be seen that the contract works exclusion clause was objectively intended to exclude the event. Appeal ground 16 fails for two reasons. First, it depends on AIG succeeding in its constructional grounds. AIG has not done so. Second, it depends on AIG establishing on appeal that the fire was caused by Loba Oil soaked rags that selfignited in the green rubbish bin in the dining room. Again, AIG has not done so. Appeal ground 16 must also be dismissed.

The crossappeal and the notices of contention

The remaining issue for determination

303. AIG's appeal must be dismissed. Consequently, the first aspect of the plaintiffs' crossappeal falls away. So too does the Bresland parties' notice of contention. The only issue remaining for determination is the second aspect of the plaintiffs' crossappeal. This concerns the plaintiffs' challenge to the primary judge's interest award pursuant to s 57 of the *Insurance Contracts Act* .

304. It will be recalled that the primary judge provided for AIG to pay interest from 16 June 2017. The plaintiffs seek interest from 7 June 2016, ie some 12 months earlier - or from approximately five months after the fire. The primary judge's reasoning for holding that

interest should run from 16 June 2017 is reproduced at [121] above. The primary judge found that by 7 June 2016 AIG had been afforded a reasonable time to investigate the fire. However, in the primary judge's view, the circumstance that there were two insurance policies that applied to the plaintiffs' claim complicated the basis on which the plaintiffs' loss and damage should be assessed. The primary judge allowed additional time for AIG and Tokio to assess 'how much they should each pay' following provision of an expert report by a quantity surveyor.

305. The plaintiffs' ground of crossappeal relevantly provides:

> Her Honour erred in fact in failing to hold that:
>
> 2.1 the period from the date of the fire [ie from 16 January 2016] to 7 June 2016 was more than sufficient to allow AIG to investigate and make a decision on liability to pay any quantum of the McMurrays' claim under the insurance contract;
>
> 2.2 it was unreasonable for AIG to have withheld payment, and interest should be payable from that date;

306. AIG's notice of contention, seeking to uphold the primary judge's decision on another basis, provides:

> If the trial judge erred in placing weight on the fact of the McMurrays' house being insured by two insurers complicated the basis upon which AIG and Tokio Marine needed to calculate their individual liability, then the trial judge's decision should be upheld on the ground that the McMurray's [sic] with the assistance of their legal advisers only properly calculated the McMurray's [sic] loss and therefore the proper amount claimed by them against AIG and Tokio Marine when Mr Cugley's final report was finalised on 2 June 2017 and provided to AIG and Tokio Marine on that date.

307. It will be recalled that Mr Cugley was a quantity surveyor who gave expert evidence in the proceedings.

The parties' contentions

308. The plaintiffs submitted that:[301]

1. The decided cases suggest that two months at the most is a reasonable period for an insurer to make a decision on a fire claim. [302]

2. The primary judge held that pre-judgment interest only began to accrue from 16 June 2017 - a date some one and a half years after the fire. On the facts this was well beyond a reasonable period for investigation and consideration of the claim.

3. AIG knew of the fire by no later than 17 January 2016 (ie the day after the fire) and denied liability in less than 5 months (ie on 7 June 2016).

4. The period to 7 June 2016 was more than a reasonable period of time for AIG to make payment of the plaintiffs' claim.

[301] Plaintiffs' submissions pars 41 - 45 WAB 156 - 157.
[302] The plaintiffs referred to: ***Symeou v NRMA Insurance Ltd*** (1988) 5 ANZ Insurance Cases 60851; ***V L Credits Pty Ltd v Switzerland General Insurance Co Ltd (No 2)*** [1991] 2 VR 311; ***Settlement Wine Co Pty Ltd v National General Insurance Co Ltd*** (1994) 62 SASR 40.

309. In its answer to the crossappeal, AIG argued that the determination of the date from which it was 'unreasonable' for it to have withheld payment involved a discretionary determination. That was not pressed at the appeal hearing.[303] AIG was correct, with respect, not to insist that the determination under s 57 of the *Insurance Contracts Act* was discretionary. Rather, while evaluative, the question of unreasonableness involves a factual determination to which the correctness standard of appellate review is applicable.

[303] Appeal ts 227.

310. AIG said that the enquiry under s 57 was not limited to the point at which the insurer should have made a decision as to liability. It also encompassed a reasonable time to make a decision as to the quantum the insurer was required to pay. Both issues were fact specific. Accordingly, the earlier decisions relied on by the plaintiffs were said to be of no assistance - fire claims could not be adjudicated in a standard way.[304]

[304] AIG's submissions pars 9 - 10 WAB 169; appeal ts 227.

311. AIG said that the plaintiffs' case on appeal did not engage with the relevant constructional issues, including the potential overlap between AIG's home insurance policy and the Tokio policy.[305] AIG otherwise developed the chronology as to the provision of the quantity surveyor expert reports in the proceedings.[306] In support of the notice of contention AIG submitted that it only became unreasonable for AIG to withhold payment after 16 June 2017 because, until that time, the plaintiffs had not provided AIG with the information AIG needed to calculate the proper amount AIG would be liable for under the AIG home insurance policy.[307]

[305] AIG's submissions par 10 WAB 169.
[306] AIG's submissions pars 11 - 14 WAB 169 - 170.
[307] AIG's submissions par 17 WAB 170.

312. In response to AIG's submissions, the plaintiffs disputed that AIG was permitted to delay its decision on indemnity or withhold indemnity on the ground that there might be the same or overlapping cover with Tokio. The plaintiffs said that AIG was bound by the terms of its contract with them.[308] As to quantum, the plaintiffs submitted that AIG did not need five months to make inquiries and come to a decision as to the value of the claim. AIG did not require or rely on Mr Cugley's report. In any event AIG was capable of making its own enquiries and obtaining its own report from a quantity surveyor without regard to Mr Cugley's report.[309]

Consideration and determination

[308] Plaintiffs' reply submissions par 8 WAB 201.
[309] Plaintiffs' reply submissions pars 10, 12 WAB 201.

313. An obligation to pay interest arises under s 57(1) of the *Insurance Contracts Act* where an insurer unreasonably fails to make payment under a contract of insurance. The obligation to pay interest on the amount to be paid runs from the date that it became unreasonable for the insurer to have withheld payment.

314. Section 57(2) of the Act requires the court to make an evaluative factual determination. Relevantly, the court must determine the point 'from which it was unreasonable for the insurer to have withheld payment' of an amount it was liable to pay to a person under a contract of insurance. The provision is premised on the insurer being allowed a reasonable time to investigate and determine a claim that the insurer is liable to pay an insured an amount under an insurance contract. Where, however, it becomes unreasonable for the insurer to withhold payment - because a reasonable time to investigate and determine the claim has passed - the insurer becomes liable to pay interest to compensate the insured for having been kept out of the money that the insurer is liable to pay.

315. The key inquiry is one of objective fact - the court must determine the day from which it was unreasonable for the insurer to have withheld payment.

316. So understood, each case will turn on its particular facts and circumstances. Accordingly, no assistance is derived from considering the outcome in other cases. It is not to the point that the plaintiffs identified a number of cases in which two to three months were considered to be a reasonable period for an insurer to make a decision on a fire claim. The court's conclusion as to the day from which it was unreasonable for the insurer to have withheld payment is informed by the objective facts of the claim that the insurer had to investigate and determine.

317. In the present case, as counsel for AIG confirmed, there were only two issues which required time for investigation and determination: whether the contract works exclusion clause operated; and, if not, the amount payable pursuant to the AIG home insurance policy.[310]

[310] Appeal ts 227 - 229, 233 - 234.

318. In determining that the applicable date for the purpose of s 57 of the *Insurance Contracts Act* was 16 June 2017 the primary judge took into account what was a reasonable period of time for AIG and Tokio to assess how much they should *each* pay for the claim. [311] That, in terms, contemplated the two insurers conferring and working out what each of them should individually pay in respect of the plaintiffs' loss. In this respect the primary judge held that the overlapping insurance policies was a factor which complicated the basis on which the loss and damage should be assessed. [312] This, in our respectful opinion, was an error in approach. Section 57 is directed to liability to pay under a contract of insurance as between insurer and insured rather than possible rights of contribution as between insurers where there is overlapping insurance. The material consideration was AIG's liability to pay an amount under the home insurance policy. The so-called complicating factor of the overlapping insurance was not a relevant consideration.[313]

[311] Primary reasons [632].
[312] Primary reasons [632].
[313] Counsel for AIG accepted as much: appeal ts 228 - 229, 234.

319. This error in approach led to her Honour accepting that the point of unreasonableness did not arise until AIG and Tokio had been afforded the opportunity to consider Mr Cugley's final report dated 2 June 2017.

320. The primary judge accepted that by 7 June 2016 AIG had been afforded a reasonable time to investigate the fire. [314] By that time Mr Tong had delivered his third report. [315] It is also when AIG formally denied that it was liable to indemnify the plaintiffs under the home insurance policy. [316] This, in our view, establishes what was a reasonable time to investigate and determine whether the contract works exclusion clause operated. The additional issue is whether *further* time ought reasonably be provided for investigating and determining the quantum AIG was required to pay.

[314] Primary reasons [631].
[315] Primary reasons [627].
[316] Primary reasons [458].

321. AIG contended that there should be an allowance to investigate and determine quantum. Plainly, insofar as s 57 is concerned with the point from which it was unreasonable for the insurer to withhold payment, one material consideration is the period reasonably required to

investigate and determine quantum. The real question is whether that enquiry ought to proceed in tandem with the investigation and determination of liability; or whether, acting reasonably in the circumstances, AIG as insurer might have deferred its investigation and determination of quantum until it reached a determination on the operation of the contract works exclusion clause. If the former is the position, there is real force in the plaintiffs' position that interest should be payable from 7 June 2016. If, however, further time ought reasonably be provided for investigating and determining quantum, interest will be payable from a date subsequent to 7 June 2016.

322. This court was not directed to any evidence about the sequencing steps that would be undertaken by a reasonable insurer in the position of AIG. Nor was the court directed to any evidence as to the likely (or actual) costs involved in investigating and determining quantum. Such evidence might have assisted in determining the question of unreasonableness.

323. The plaintiffs bore the relevant onus to establish the date that it became unreasonable for the insurer to have withheld payment. In the absence of evidence on the point we are not satisfied to the requisite standard that AIG, acting reasonably, should have completed its investigation and determination as to quantum while investigating the fire and resolving the questions concerning the operation of the contract works exclusion clause. In the circumstances, some further time ought reasonably be provided for investigating and determining the quantum AIG was required to pay. We are, however, unable to accept that this required another 12 months - the primary judge having determined that as and from 16 June 2017 it became unreasonable for the insurer to have withheld payment.

324. Indeed, AIG itself did not advance the proposition that the quantum exercise required a further 12 months.[317]

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[317] Appeal ts 231.

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325. AIG did contend, by its notice of contention, that the primary judge's determination should be upheld on the basis that the plaintiffs only properly calculated their loss when Mr Cugley's final report was finalised on 2 June 2017. There are two difficulties with that contention. First, it was not suggested that AIG sought information from the plaintiffs and the plaintiffs did not provide that information in a timely way.[318] Accordingly, the timing of Mr Cugley's final report is simply not to the point. Second, as the plaintiffs submitted, AIG was capable of conducting its own investigation and making its own determination as to quantum. AIG, acting reasonably in the circumstances, should have done so. So understood, AIG's focus on the timing of Mr Cugley's final report was no more than a distraction. That is all the more so when the timing of the report was a function of the programming steps taken in the litigation.

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[318] Appeal ts 233.

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326. AIG's notice of contention should be dismissed.

327. In their PD 7.4 schedule the plaintiffs submitted that AIG could have obtained a quantity surveyor report in a month. Quantity surveyor reports were obtained in the context of the primary proceedings. AIG, by its solicitors, engaged a Stephen Warne of RBB Construction Cost Consultants. Mr Warne was engaged on 13 December 2017.[319] His report is dated 5 February 2018.[320] Accordingly, in the context of the litigation, AIG was able to obtain the necessary report in a little under two months (in fact in 54 days). This, in our view, establishes the outer limits of the further time that is reasonably to be allowed for AIG's investigation and determination of quantum - all the more so since Mr Warne's report was compiled over the Christmas period.

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[319] GAB 874.
[320] GAB 866.

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328. We would, in the circumstances, assess the day as from which it was unreasonable for AIG to have withheld payment under the home insurance policy to be 8 August 2016 (that being the first working day after two months after 7 June 2016).

329. We appreciate that this only allows a limited time to prepare the brief to the quantity surveyor and for AIG to consider the quantity surveyor's report before notionally making payment. However, in addition to the unchallenged finding as to the time for investigation of the fire and the operation of the contract work exclusion clause, we have allowed two additional months to investigate and determine quantum. The additional two months is based on the time in fact taken by AIG's expert to prepare a quantity surveyor's report on the cost to reconstruct the house. Part of that two months occurred over the Christmas break. Also, it is to be expected that the preparation of a report for the purpose of litigation is more onerous than the usual report that might be required for the purpose of claim determination. In the circumstances we are satisfied that the two months contains a sufficient buffer to provide adequately for seeking and considering the report as to quantum.

330. The plaintiffs have established error in the primary judge's interest determination. Her Honour was, in our respectful view, in error in concluding that 16 June 2017 was the day as from which it was unreasonable for AIG to have withheld payment of the amount it was liable to pay to the plaintiffs under the home insurance policy. For the reasons we have given the requisite unreasonableness for the purpose of s 57 of the *Insurance Contracts Act* existed as and from 8 August 2016. The primary judge should have held accordingly. It follows that the crossappeal must be allowed in part.

331. The interest payable pursuant to s 57 of the *Insurance Contracts Act* should be recalculated by the parties conformably with these reasons, and agreed, so that on publication of these reasons the court may make substituted orders fixing the amount for which judgment ought to have been entered by the primary judge.

Conclusion and orders

332. For these reasons AIG's appeal should be dismissed. The plaintiffs' crossappeal should be allowed in part. Subject to hearing from the parties on the precise terms, we would make orders to the following effect:

1. The appeal is dismissed.

2. The crossappeal is allowed in part.

3. Paragraph 1 of the order of the court made 10 September 2021 in action CIV /2962/2016 is set aside and in lieu thereof it is ordered that:

'*1. The first defendant pay the plaintiffs the sum of [amount to be calculated in accordance with these reasons].*'

333. The parties should be heard on the costs of the appeal and the crossappeal.

Annexure 'A': grounds of appeal

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

EM

Associate to the Honourable Justice Vaughan

20 OCTOBER 2023