JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	QBE INSURANCE (AUSTRALIA) LIMITED -v- BB [2022] WASCA 61
CORAM	**:**	BEECH JA ALLANSON J SMITH J
HEARD	**:**	5 MAY 2022
DELIVERED	**:**	8 JUNE 2022
FILE NO/S	**:**	CACV 47 of 2021
BETWEEN	**:**	QBE INSURANCE (AUSTRALIA) LIMITED Appellant AND BB First Respondent HELENA COLLEGE COUNCIL INC T/AS HELENA COLLEGE Second Respondent INSURANCE AUSTRALIA GROUP LIMITED Third Respondent BERKSHIRE HATHAWAY SPECIALTY INSURANCE COMPANY Fourth Respondent

ON APPEAL FROM:

Jurisdiction	**:**	DISTRICT COURT OF WESTERN AUSTRALIA
Coram	**:**	SHARP DCJ
File Number	**:**	CIV 1904 of 2020

Catchwords:

Appeals - Where members of College Council gave evidence at trial - Inferences by trial judge as to state of mind of College Council - Whether appeal against finding as to College Council's state of mind engages principles applicable to appellate challenges to findings of fact that are likely to have been affected by trial judge's assessment of witnesses' credibility and reliability

Insurance - Condition of policy requiring insured to take reasonable precautions to prevent bodily injury - Where having been sued by former student, College agreed to pay damages for historic child sexual abuse by teacher - Whether insurer liable to indemnify College - Whether judge erred by observing that it was inconceivable that College Council would knowingly expose students to risk of sexual abuse - Whether judge erred by inferring council members' states of mind from hypothetical evidence given by some members about how they would have acted had they thought teacher was or might be a sexual predator - Whether judge erred by finding that College Council did not know about risk of sexual abuse and did not know that their actions were inadequate

Legislation:

Nil

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	S Donaldson SC & C Coventry
First Respondent	:	No appearance
Second Respondent	:	G J Pynt
Third Respondent	:	G R Hancy
Fourth Respondent	:	No appearance

Solicitors:

Appellant	:	Thompson Cooper Lawyers Pty Ltd
First Respondent	:	Rightside Legal
Second Respondent	:	Jackson McDonald
Third Respondent	:	HWL Ebsworth Lawyers (Perth)
Fourth Respondent	:	Minter Ellison

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

Barrie Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd [2016] NSWCA 67; (2016) 75 MVR 108.
BB v Helena College Council Inc t/as Helena College [2021] WADC 42.
Binningup Nominees Pty Ltd v Mirvac (WA) Pty Ltd [2021] WASCA 130.
Child and Adolescent Health Service v Mabior [2019] WASCA 151; (2019) 55 WAR 208.
Devries v Australian National Railways Commission (1993) 177 CLR 472.
Fazio v Fazio [2012] WASCA 72.
Fox v Percy [2003] HCA 22; (2003) 214 CLR 118.
Fraser v BN Firman (Productions) Ltd; Miller Smith & Partners [1967] 1 WLR 898.
G v H (1994) 181 CLR 387.
Joyce v Anderson [2020] WASCA 48; (2020) 91 MVR 334.
Kodak (Australasia) Pty Ltd v Retail Traders Mutual Traders Indemnity Insurance Association (1942) 42 SR (NSW) 231.
Lee v Lee [2019] HCA 28; (2019) 266 CLR 129.
Legal and General Insurance Australia Ltd v Eather (1986) 6 NSWLR 390.
Le-Ta v State of Western Australia [2020] WASCA 14.
Martin v Osborne (1936) 55 CLR 367.
R v Hillier [2007] HCA 13; (2007) 228 CLR 618.

Robinson Helicopter Co Inc v McDermott [2016] HCA 22; (2016) 90 ALJR 679.

Smart v Power [2019] WASCA 106.

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

Wallaby Grip Ltd v QBE Insurance (Australia) Ltd [2010] HCA 9; (2010) 240 CLR 444.

JUDGMENT OF THE COURT:

Introduction

1 The appellant (**QBE**) appeals the primary judge's decision[1] holding it liable to indemnify the second respondent (**the College Council**) for its liability to a former student, the first respondent, BB. The College Council owned and operated Helena College Primary School (**the College**). BB was sexually abused in 1988 by Mr Ian Brown, who was her grade 5 teacher at the College. The liability arises under an insurance policy held by the College Council that covered its liability to pay compensation in respect of bodily injury.

2 In 2020, BB commenced proceedings against the College Council seeking damages for psychiatric injury resulting from the sexual abuse. Her claim against the College Council was settled by agreement. The trial proceeded as between the College Council and three insurers, one of which was QBE.

3 The policy governing QBE's liability to the College Council included condition 5, which provided, relevantly, that the College Council, as the insured, shall 'take all reasonable precautions to prevent bodily injury'. One of the central issues at trial, and the central issue on appeal, is whether the College Council had taken reasonable precautions to prevent bodily injury to students arising from sexual misconduct by Mr Brown.

4 The primary judge found that the steps taken by the College Council at the relevant time, namely in 1987 and 1988, were sufficient to satisfy its obligations under condition 5.

5 QBE appeals that decision on seven grounds. The grounds of appeal contend that the judge erred in law by allocating the onus of proof to QBE (ground 1), erred in fact by finding that the College Council had not failed to take all reasonable precautions on the basis that it was inconceivable that members of the council would expose students to the risk of sexual abuse (ground 2), erred in fact by drawing an inference that two members of the council did not recognise that Mr Brown posed a sexual threat to students (ground 3), and erred in mixed fact and law by failing to find that the College Council breached condition 5 in the insurance policy (grounds 4 to 7).

6 For the reasons that follow, we would dismiss the appeal.

[1] ***BB v Helena College Council Inc t/as Helena College*** [2021] WADC 42 (Primary decision).

7 In summary, on a proper construction of condition 5, the obligation to take reasonable precautions requires the person on whom the obligation is imposed to take such precautions to prevent personal injury as *that person* considers reasonable, having regard to the risks which *that person* recognises. As QBE recognises, to succeed on appeal it must demonstrate that the judge should have found that the College Council was *aware* that there was a material risk of injury to students and was *aware* that the steps that it took in response to the risk were not adequate to address it. The proper conclusion on the whole of the evidence is to the contrary and accords with the primary judge's conclusion. Ground 1 fails because it is immaterial. The specific errors asserted in grounds 2 and 3 have not been established.

Background

8 Mr Brown was employed as a teacher at the College by Mr Brian Hassell, the principal, in 1984. Mr Brown taught at the College from 1984 to late 1989.

9 On 27 March 2006, Mr Brown was found guilty, following a trial by a jury, of 17 counts of sexual offending against children, comprising indecent assault of a girl under 13 years and aggravated sexual penetration of a person under the age of 16. Six of those offences were committed against BB, who was in Mr Brown's grade 5 class in 1988 when he committed the offences against her.[2]

10 On 23 May 2020, BB commenced proceedings against the College Council, claiming damages for personal injuries resulting from the College Council's negligence and/or breach of statutory duty in relation to the child sexual abuse suffered by BB while at the College.[3]

11 BB settled her claim against the College Council on 1 December 2020. The College Council became liable to pay an agreed amount of damages to BB.[4]

12 At trial, the essential dispute concerned which, if any, of the College Council's three insurers were liable to indemnify it for its liability to BB.

13 QBE denied its liability on two bases. First, it contended that BB's psychiatric conditions had not been shown to be 'the result of an

[2] Primary decision [6] - [7].
[3] Primary decision [9].
[4] Primary decision [14] - [15].

accident' and therefore the claim did not fall within the insuring clause. Secondly, it contended that the College Council had failed to comply with the reasonable precautions obligation in condition 5, with the result that QBE was not liable under the policy. On appeal, it pursues the second contention, but not the first.

14 The other two insurers, namely the third respondent (**IAG**) and the fourth respondent (**Berkshire Hathaway**), were also each found liable to indemnify the College Council. They do not challenge the judgment against them. IAG has participated in the appeal as a respondent. Berkshire Hathaway gave notice that it did not intend to take part in the appeal.

The insurance policy

15 The insurance policy was issued by MLC Insurance Ltd (**MLC**). QBE subsequently acquired MLC and succeeded to its liability under the policy. The policy was active from 23 August 1987 until 23 August 1988.

16 The policy encompassed public liability and product liability to the extent specified in the insuring clause. That clause provided, so far as relevant, as follows:

> [The College Council] having made to [the insurer] a written Proposal and declaration and having paid or agreed to pay the premium then *subject to the terms, conditions, exceptions, provisions and memoranda contained herein*, endorsed hereon or attached hereto [the insurer] will indemnify [the College Council] as herein provided.
>
> Section 1 public liability
>
> [The insurer] will pay to or on behalf of [the College Council] all sums which [the College Council] shall become legally liable to pay for compensation in respect of (a) bodily injury… [and] (b) damage to property … occurring during the Period of Insurance as a result of an accident and happening in connection with The Business. (emphasis added)

17 A proviso to the insuring clause was in the following terms:

> Provided always that the *due observance and fulfilment by [the College Council]* of the terms, *conditions* and memoranda *contained herein*, endorsed hereon or attached hereto insofar as they relate to anything to be done or complied with by [the College Council] … *shall be conditions precedent* to any liability of [the insurer] to make any payment under the Policy. (emphasis added)

18 The policy contained eight conditions. Condition 5 was, relevantly, in the following terms:

> [The College Council] shall
>
> (a) exercise reasonable care that only competent employees are employed and take reasonable measures to maintain all premises, fittings and plant in sound condition
>
> (b) take all reasonable precautions to
>
> (i) prevent bodily Injury and damage to property and
>
> …

Evidence at trial

19 The judge gave a detailed outline of the evidence of each of the witnesses relevant to this appeal. With very few exceptions, QBE did not suggest that that outline was materially inaccurate or incomplete.

20 The following is drawn largely from the judge's outline.

Mr Brian Hassell's evidence

Mr Hassell employs Mr Brown

21 Mr Hassell was the principal of the College from 1983 to 1989.[5] Mr Hassell recruited Mr Brown as a teacher in 1984.[6]

22 Mr Hassell received very positive feedback about Mr Brown from Mr Brown's previous employer. Mr Hassell had known Mr Brown for thirty years and they were members of the same church congregation.[7] Mr Brown was very personable.[8] When Mr Brown commenced at the College, he was popular with children, staff, and most parents.[9]

Concerns emerge about Mr Brown

23 By 1987, concerns began to emerge about Mr Brown. Students were concerned because Mr Brown was making them uncomfortable by touching them. Mr Hassell was disappointed with Mr Brown's competence and preparation as a teacher. Mr Hassell said that there

[5] ts 97.
[6] Primary decision [38]; exhibits 2 and 18.
[7] ts 99.
[8] ts 99.
[9] Primary decision [46]; ts 99 - 100.

were rumours that Mr Brown had shared a sleeping bag with a female student on school camp.[10]

24 These concerns led to Mr Hassell interviewing a number of the girls to see if there was anything sinister about Mr Brown's conduct.[11]

25 Mr Hassell knew Mr Brown to be a touchy person who often greeted Mr Hassell and others with a hug. Mr Hassell thought that Mr Brown's actions were unwise, but did not think that they were sinister.[12]

26 Mr Hassell prepared handwritten notes[13] and a typewritten record.[14]

27 Mr Hassell presented his notes at a College Council meeting on 31 October 1987 (**31 October 1987 meeting**).[15]

28 Mr Hassell's notes refer to two interviews with Mr Brown: one on 19 October 1987 and the other on 28 October 1987. In the interviews, Mr Brown conceded that he cuddled or patted students on occasion but denied anything sinister and denied sharing a sleeping bag with a student on school camp.[16] At the second interview with Mr Hassell, Mr Brown agreed that his actions were unwise and resolved not to touch students in the future.[17]

29 Mr Hassell's notes and typed record state that a group of students approached another teacher, Ms Dedman, with their concerns that Mr Brown was touching them in ways that made them feel uncomfortable.[18] Mr Hassell interviewed several of the students, who reported that the touching included cuddles, with no touching of intimate areas except for occasional brushing of the breast area or upper buttocks. One student asserted that Mr Brown had twice shared a sleeping bag with another student at school camp.[19]

30 Mr Hassell interviewed a parent who was concerned about the gossip and her child's discomfort in class. The parent knew of no

[10] Primary decision [47] - [49]; ts 101, 106.
[11] Primary decision [49]; ts 101.
[12] Primary decision [48]; ts 106.
[13] Exhibit 3.
[14] Exhibit 4.
[15] Primary decision [51].
[16] Primary decision [52].
[17] Primary decision [63]; exhibits 3 and 4.
[18] Primary decision [53]; exhibits 3 and 4.
[19] Primary decision [55]; exhibit 4.

known touching of intimate areas.[20] Another parent told Mr Hassell that she was aware of the rumours and had discussed the matter fully with her daughter, and that she felt that Mr Brown was a very caring person who she supported in the situation. That parent told Mr Hassell that she felt that the prepubescent girls were overreacting.[21]

31 One student, referred to as S1, told another teacher, Ms Anne Fyffe, that Mr Brown touched her vaginal area for a few seconds while they were lying next to each other at school camp. The note recorded that the touching could have been accidental. The student said that they were not lying in the same sleeping bag, but rather Mr Brown was lying next to her, unzipped his sleeping bag and placed it over hers for additional warmth.

32 On 27 October 1987, Mr Hassell questioned S1 about the sleeping bag incident. She told Mr Hassell that she had not actually shared a sleeping bag with Mr Brown, but rather Mr Brown had unzipped both their sleeping bags and placed them over them like a doona. Mr Hassell agreed in his evidence that either S1 was not telling the truth or Mr Brown was not telling the truth. Mr Hassell said that, even if he had believed S1's allegations, while he would have considered Mr Brown's conduct unwise, he would not have considered it to be of a criminal nature.[22]

33 Mr Hassell said in evidence that he was anxious to determine if S1, or any other student, had been touched in a sexual way. S1 'informally' told him that she had not been touched in a sexual way, and there was never any accusation from S1 or any other student that Mr Brown had touched them in a sexual way. Mr Hassell's conclusion was that Mr Brown was too 'touchy-feely' with the students, but that his actions were not criminal.[23]

34 In the second interview with Mr Brown, on 28 October 1987, Mr Brown said that there was nothing sinister about his actions - he was motivated by care and concern. He agreed that his actions were unwise and he resolved not to touch the children in the future. Mr Hassell said that he would need to make further inquiries and

[20] Primary decision [55]; exhibit 4.
[21] Primary decision [56]; exhibits 3 and 4.
[22] Primary decision [59] - [61]; exhibits 3 and 4; ts 133 - 138.
[23] Primary decision [62]; ts 140.

consider further courses of action, including an attempt to overcome the concerns of the year 6 class as a whole.[24]

35 According to Mr Hassell's notes and the typed record, on 30 October 1987, Mr Hassell, in Mr Brown's presence, spoke to the year 6 class and told them that, because some students felt uncomfortable, Mr Brown would not touch any students in the future. Mr Brown then apologised to the children for making them feel uncomfortable.[25] However, Mr Hassell's oral testimony was that the College Council resolved at the 31 October 1987 meeting (held the day after 30 October 1987) that Mr Hassell and Mr Brown would address the year 6 class sometime after the 31 October 1987 meeting.[26]

36 On 31 October 1987, Mr Hassell spoke with another parent, who was one of the accompanying parents at two of the school camps. That parent told Mr Hassell that she thought that some of Mr Brown's actions were unwise, but that she had no reason to think that anything untoward had occurred at either school camp.[27]

37 Under 'Additional remarks' in Mr Hassell's typewritten record, Mr Hassell wrote that Mr Brown was a very caring person who touched people in displays of affection. Mr Hassell also wrote that he was concerned about the very definite assertions made by S1 regarding the sleeping bag incidents and Mr Brown's denial of those incidents, noting that he had never had any reason to doubt the honesty of either S1 or Mr Brown.[28]

The 31 October 1987 meeting

38 The College Council had a meeting on 31 October 1987, a Saturday, to discuss the concerns about Mr Brown. Mr Hassell conceded that it might have been unusual to have a meeting on a Saturday, however he denied that it was held at that time because it was a 'crisis' or because there were concerns that Mr Brown might have been a paedophile.[29]

39 The 31 October 1987 meeting was attended by Mr Hassell; Mr Lloyd Butcher, the then chairman; Ms Sally Herzfeld; Mr Michael Murray QC; Mr Kim Valenti, a lawyer; Ms Sheila Ball; and

[24] Primary decision [63]; exhibit 4.
[25] Primary decision [65]; exhibits 3 and 4.
[26] Primary decision [66]; ts 105.
[27] Primary decision [67]; exhibits 3 and 4.
[28] Primary decision [68]; exhibit 4.
[29] Primary decision [80] - [81]; ts 116 - 118.

Ms Maureen Farthing.[30] Mr Butcher and Mr Murray QC were both deceased at the time of the trial.

40 Mr Hassell testified that, by the time of the 31 October 1987 meeting, he wanted Mr Brown to be dismissed because of his poor teaching performance. Asked if he was concerned that there was a risk that Mr Brown was touching girls for his gratification, Mr Hassell said that he did not think that Mr Brown was touching students for his own sexual gratification.[31] He viewed it as a reflection of Mr Brown's 'modus operandi of touching people'. Mr Hassell thought that Mr Brown was very unwise to be touching students, which is why both Mr Hassell and Mr Brown promised that Mr Brown would discontinue touching students. Mr Hassell accepted that there was a possibility of a risk that Mr Brown acted with sexual intent, but testified that he 'would shy away from [the expression] "real risk" [of sexual intent]'.[32]

41 At the 31 October 1987 meeting, Mr Hassell provided the College Council with copies of all of his notes.[33]

42 Mr Hassell testified that Mr Murray QC advised the College Council that there was insufficient evidence to dismiss Mr Brown.[34] Mr Hassell said in evidence that the College Council resolved to speak to Mr Brown's class and tell them that Mr Brown would cease touching any of the children because he didn't want to make them uncomfortable, and to write to parents telling them what had happened and what the College Council had done.[35]

43 The minutes of the 31 October 1987 meeting, the contents of which his Honour did not specifically outline, may be summarised as follows.[36] The business of the meeting was described as 'community concerns regarding the behaviour of [Mr] Brown towards members of his year 6 class'. Mr Hassell read from his notes regarding interviews that he had held with individual children, staff members, Mr Brown, parents and other adults. It was resolved that:

(1) Mr Hassell would write private individual letters to those parents who were directly involved; and

[30] Primary decision [69] - [70]; exhibit 8.
[31] Primary decision [71]; ts 119, 128.
[32] Primary decision [73]; ts 130.
[33] Primary decision [74]; ts 104.
[34] Primary decision [75]; ts 104.
[35] Primary decision [75]; ts 105.
[36] Exhibit 8.

(2) Mr Hassell would speak to Mr Brown and discuss carefully with him the ramifications of his actions. Mr Hassell would point out to Mr Brown the difficulties the situation had created for the school and that any future action was in Mr Brown's hands.

Steps taken after the 31 October 1987 meeting

44 Mr Hassell's evidence was that, after the 31 October 1987 meeting, he addressed Mr Brown's year 6 class, in accordance with the College Council resolutions, and that Mr Brown apologised to the class and said he would discontinue touching students.[37]

45 Mr Hassell testified that he then wrote letters to several parents, as resolved by the College Council.[38] The letters stated that Mr Hassell was satisfied that nothing untoward had occurred, that Mr Brown agreed that his touching was unwise, and that Mr Brown agreed not to touch students again.[39] Some of the letters also included the following passages:[40]

> I am sure you will be relieved to know that … nothing has occurred which could in any way be construed as of a criminal nature. It certainly seems that some of [Mr Brown's] 'touching' of children under his charge has been unwise, although I feel that in the main it has been well meant.
>
> I have spoken to the Year 6 children as a whole to advise them that [Mr Brown] will not touch them in any way in the future. I have stressed with the children that this does not lessen the amount of affection that he has for them and I wanted their understanding of this to be quite clear. [Mr Brown] in his turn apologised to the class as a whole if some members had felt uncomfortable by his physically displayed affection for them. He pointed out that he was the kind of person who displayed affection through touching but, because some children felt uncomfortable, he would not touch children at all.

Mrs Alison (Sally) Herzfeld's evidence

46 Mrs Herzfeld co-founded the College, was the principal of the College from 1973 to 1982, and was a member of the College Council from 1973 to 2017.[41]

[37] Primary decision [76]; ts 105.
[38] Primary decision [77]; exhibit 5; ts 137.
[39] Primary decision [78] - [79]; exhibit 5.
[40] Primary decision [77]; exhibit 5.
[41] Primary decision [85]; ts 154, 155, 169.

47 Her evidence was that she did not remember anything about the 31 October 1987 meeting or Mr Hassell's investigation in October 1987.[42] When asked whether, in 1987, had she been told that Mr Brown had slept under a sleeping bag with one of the girls on two nights of the camp and had unzipped the girl's sleeping bag, she would have concluded that Mr Brown posed a serious risk to the welfare of young female students, she replied, 'I don't know. Depends - I mean, he would have answered all these things negatively wouldn't he or giving an explanation'.[43] Although not referred to by the judge, the witness added to this answer that, 'thinking afterwards, yes, yes, you would have been worried, but at the time I think I was probably handing over to the lawyer and the principal'.

48 Asked whether, at the time, unzipping a child's sleeping bag and sleeping with her for two nights was a matter that would have caused her grave concern if true, Mrs Herzfeld responded, '[y]es. But I didn't hear this for a long time. I didn't hear this till after '89, I don't think. Might have been at that meeting. I don't know. But I think I heard it from [another parent] actually'.[44]

49 When it was put to her that allegations of that sort, if true, would indicate to her that Mr Brown posed a very serious threat to young female students, she said:[45]

> I don't know at that time whether it would have been considered very serious. It would have been considered inappropriate. And shouldn't be done … At the time I don't think we would have thought it a serious risk until there was a - a great - I suppose after all of them came together, and this one at the end of '89. Yes, he has been warned. So he has got to go.

50 Mrs Herzfeld agreed that if the College Council had known these things were being done by Mr Brown on purpose, then there was a risk of emotional injury or psychiatric injury to the children.[46]

51 Mrs Herzfeld accepted that, even if it was unclear whether the allegations against Mr Brown were true, she would have appreciated that it was unacceptable to do nothing to prevent sexual misconduct by

[42] Primary decision [86]; ts 159 - 160.
[43] Primary decision [87]; ts 164.
[44] Primary decision [88]; ts 164.
[45] Primary decision [89]; ts 165.
[46] Primary decision [90]; ts 166 - 167.

Mr Brown, but added that she did not hear anything about the sleeping bag incident until years later.[47]

52 It was put to Mrs Herzfeld that, if Mr Brown had been warned at least three times about touching female students, the only safe solution would have been to terminate his contract. In response, she said, '[y]es, and that's what we did in '89'. Mrs Herzfeld remembered being told by female students in late 1989 that Mr Brown had pinched their bottoms. Mrs Herzfeld remembered that the College Council subsequently decided that Mr Brown 'should go'.[48]

Ms Sheila Ball's evidence

53 Mr Brown taught one of Ms Ball's children at the College in 1984 and 1985. Ms Ball was a member of the College Council in 1987.[49]

54 Ms Ball could not remember the 31 October 1987 meeting at all and questioned whether she attended.[50]

55 Ms Ball considered that she would have remembered a two-hour discussion about Mr Brown's conduct and allegations that he was in a female student's sleeping bag, had those discussions occurred. That was partly why she doubted whether she was present. Ms Ball's recollection was that the first time she heard about the sleeping bag incident, and any allegation of inappropriate conduct by Mr Brown, was at a College Council meeting in 1989.[51]

56 Ms Ball testified that the College Council voted unanimously to terminate Mr Brown's employment at the 1989 College Council meeting where Ms Ball learned about the allegations against Mr Brown. Ms Ball was struck by the comment of another College Council member that 'if it was my child that was being molested, I wouldn't want this man on our staff'.[52]

[47] Primary decision [91]; ts 167 - 168.
[48] Primary decision [92] - [93]; ts 156 - 157.
[49] Primary decision [94]; ts 174 - 176.
[50] Primary decision [95]; ts 177, 190 - 191.
[51] Primary decision [96].
[52] Primary decision [98]; ts 188 - 189.

Mr Kim Valenti's evidence

57 Mr Valenti's children attended the College. Mr Valenti accepted that he attended the 31 October 1987 meeting but testified that he had no recollection of it.[53]

58 Mr Valenti said in evidence that he would have recommended that Mr Brown be dismissed summarily and the matter be referred to the appropriate authorities, if he had thought that Mr Brown was or might pose a sexual threat to students.[54]

Ms Maureen Farthing's evidence

59 Ms Farthing's children attended the College and she was a member of the College Council in 1987.[55]

60 Ms Farthing recalled that the 31 October 1987 meeting was about a female student reporting that Mr Brown had touched her inappropriately at a school camp. She said that the College Council took the allegation seriously and discussed it to find out the truth.[56] Ms Farthing recalled that the outcome of the 31 October 1987 meeting was that the College Council resolved that Mr Hassell would speak to the student and Mr Brown to find out both sides of the story.[57]

61 Ms Farthing testified that, had she thought that Mr Brown might be sexually interfering with students at the College, she would have responded 'very differently'.[58]

Ms Elizabeth Douglas' evidence

62 Ms Elizabeth Douglas' child attended the College. Sometime in 1987, Ms Douglas spoke to Mr Hassell about her concerns that Mr Brown was flicking girls' bra straps. That conversation is not recorded in Mr Hassell's report. There were some differences between Mr Hassell's recollection of what Ms Douglas told him and Ms Douglas' recollection of what she told him.[59]

[53] Primary decision [99] - [100]; ts 235, 243.
[54] Primary decision [101]; ts 244.
[55] Primary decision [102]; ts 276 - 278.
[56] Primary decision [104]; ts 279.
[57] Primary decision [105]; ts 280, 282.
[58] Primary decision [106]; ts 282.
[59] Primary decision [108] - [112]; ts 127, 302 - 306.

Ms Anne Fyffe's evidence

63 Ms Fyffe was a grade 7 teacher at the College. Ms Fyffe testified that she would have spoken to Mr Hassell or to his successor as principal about her concerns regarding Mr Brown's touching of students, but that she could not recall what she told to which principal.[60]

64 Ms Fyffe recalled seeing a student sitting on Mr Brown's lap in a classroom. Ms Fyffe told Mr Hassell and/or his successor that she thought that Mr Brown's actions were things that a teacher should not do.[61]

65 Ms Fyffe confirmed that S1 had told her that Mr Brown laid next to her and unzipped his sleeping bag, putting it over the top of the two of them, but that she had not shared a sleeping bag with Mr Brown. S1 told Ms Fyffe that Mr Brown touched her from the breasts downwards, in a manner that was not accidental. Ms Fyffe could not recall telling Mr Hassell that S1 told her that Mr Brown touched her vaginal area.[62]

SW's evidence

66 SW was a student at the College from about 1979 to 1987.[63]

67 SW testified that she and other students approached Mr Hassell in 1985 regarding their concerns about Mr Brown touching students inappropriately and making them sit on his lap. The students made it clear to Mr Hassell that the touching was inappropriate, involving touching under skirts and on underwear.[64]

EA's evidence

68 EA was a student at the College between 1978 and 1986.

69 EA recalled taking a letter to Mr Hassell asking the College to dismiss Mr Brown because of his inappropriate behaviour to female students. Mr Hassell told her that she was being silly.[65]

[60] Primary decision [113]; ts 312.
[61] Primary decision [114] - [115]; ts 312 - 313.
[62] Primary decision [116] - [118]; ts 313 - 315.
[63] Primary decision [119]; ts 290.
[64] Primary decision [120] - [121]; ts 290 - 296.
[65] Primary decision [123] - [124]; ts 321.

Primary decision

70 In considering the College Council's claim against QBE, the judge began with the issue of whether BB's injuries were the result of an 'accident' within the meaning of the insuring clause. The judge determined that issue favourably to the College Council. QBE does not challenge the judge's resolution of that issue.

71 However, some of the judge's findings made in the context of that issue are relevant to the issue on appeal. Further, some of those findings are themselves the subject of challenge in this appeal.

72 The judge accepted the evidence of all of the witnesses, except that, where Mr Hassell's evidence contradicted the evidence of SW, EA or Ms Fyffe, the judge preferred Mr Hassell's evidence.[66]

73 The judge made the following findings:[67]

1. In 1987, inappropriate touching of students by Mr Brown was alleged and a detailed investigation was undertaken by Mr Hassell.

2. Mr Hassell considered that the behaviour of Mr Brown was a matter of serious concern, but did not consider that a sexual assault had occurred, nor did he identify any touching for sexual gratification.

3. Following the investigation, Mr Hassell counselled Mr Brown, who agreed not to touch children again and apologised to students.

4. At the meeting on 31 October 1987, the results of Mr Hassell's investigations were reported to and considered by the College Council.

5. At the 31 October 1987 meeting, the late Mr Murray QC, who was then a member of the College Council, expressed the view that there was not enough evidence to dismiss Mr Brown.

74 The judge evidently accepted the following evidence from others who attended the 31 October 1987 meeting:

[66] Primary decision [236] - [237].
[67] Primary decision [238] - [239].

1. Mrs Herzfeld gave evidence that if she had thought that Mr Brown posed a sexual threat, she would have asked him to go. The judge inferred from that statement that Mrs Herzfeld did not consider that Mr Brown posed a sexual threat and thus did not press for his dismissal.

2. Ms Ball said that no one expressed to her any concerns about Mr Brown.

3. Mr Valenti did not remember the meeting of 31 October 1987. He said that if he had thought that Mr Brown was or might pose a sexual threat to students, he would have recommended that Mr Brown be dismissed and that the matter be referred to the appropriate authorities. The judge inferred from this evidence that Mr Valenti did not, at that time, consider that Mr Brown posed a sexual threat to students.

4. Ms Farthing said that she was shocked by the allegations, but that they did not indicate to her that the children were not safe with Mr Brown.

75 The judge did not consider that there was sufficient evidence to support the conclusion that the College Council deliberately exposed students to, or was indifferent to, the risk of sexual assault by Mr Brown. The judge found that there was no evidence to indicate that the College Council perceived that there was a risk that Mr Brown would sexually assault students at the school and deliberately incurred that risk.[68]

76 The judge referred to, and evidently accepted, Mr Hassell's evidence that he remained unpersuaded that Mr Brown was a risk to students until 2006 when he attended Mr Brown's trial.[69]

77 The inferences drawn by the judge referred to in points 1 and 3 of [74] are challenged by ground 3.

78 As to condition 5, the judge began with the question of who bore the onus of proof. After referring to some authority, mostly from other jurisdictions, the judge concluded as follows. Because it was QBE who was alleging that condition 5 had not been complied with and was refusing to pay on that basis, it was QBE, and not the College Council,

[68] Primary decision [245].
[69] Primary decision [246].

who bore the onus of proving a breach of condition 5.[70] This conclusion is challenged by ground 1.

79 In considering whether the College Council had breached condition 5, the judge observed that the 31 October 1987 meeting lasted for about two hours, but that, beyond Mr Hassell's notes, it was not known what was discussed at the meeting.[71]

80 The judge found that Mr Hassell:[72]

(1) conducted an investigation as requested by some parents;

(2) investigated the matter thoroughly over a 12-day period ending on 31 October 1987;

(3) presented the College Council with a substantial amount of material for it to consider; and

(4) reached the conclusion that Mr Brown's touching of students was unwise, but not sexual, sinister or criminal, and not for sexual gratification.

81 The judge considered that it was clear from the resolutions passed at the conclusion of the meeting of 31 October 1987 that the College Council did not consider Mr Brown to be a sexual predator. The judge observed that it was inconceivable that any member of the College Council would knowingly expose students, including, in the case of some of the members, their own children, to that risk. The judge noted that that was the effect of the evidence given by the four surviving members of the College Council who were present at the meeting.[73]

82 While the judge found that, with the benefit of hindsight, the steps taken by the College Council in 1987 were self-evidently inadequate, those steps were commensurate with the College Council's knowledge at that time of the risk concerning Mr Brown.[74]

83 Various aspects of this reasoning are challenged by grounds 2, 5 and 6.

[70] Primary decision [253].
[71] Primary decision [261].
[72] Primary decision [262].
[73] Primary decision [264].
[74] Primary decision [265].

84 The judge noted that there was no evidence of complaints made about Mr Brown during 1988.

85 The judge concluded that the steps taken by the College Council in 1987 were sufficient to satisfy condition 5.[75]

86 This ultimate conclusion is challenged by grounds 4 and 7.

Grounds of appeal

87 QBE advances the following seven grounds of appeal:

(1) The trial judge erred in law in finding at [253] that QBE bore the onus of proving that the College Council breached a condition in the liability policy of insurance issued by MLC for the period of 23 August 1987 to 23 August 1988 requiring the College Council to take all reasonable precautions to prevent bodily injury.

(2) The trial judge erred in fact in finding at [264] that the College Council did not fail to take all reasonable precautions (within the meaning of condition 5) to protect students from the risk that they would be assaulted by its employee, Mr Brown, on the basis that it was inconceivable that members of the Council would knowingly expose students, including in some cases their own children, to that risk.

(3) The trial judge erred in fact in inferring at [241] and [243] that two members of the College Council did not recognise that Mr Brown posed a risk to students, in the absence of any evidence as to their state of mind at the time, and on the basis of their evidence that they would have taken appropriate action had they been aware of a risk.

(4) The trial judge erred in mixed fact and law in failing to find that:

(a) the College Council was aware, following its receipt of Mr Hassell's report of his investigation into Mr Brown's conduct in October 1987, that there was a material risk of injury to students consequent upon assaults by Mr Brown if adequate steps were not taken to address that risk;

[75] Primary decision [267].

(b) the College Council was aware that the steps taken in response to the risk were not adequate to address the risk; and consequently

(c) the College Council breached condition 5.

(5) The trial judge erred in fact in finding at [264] - [265] that the College Council was unaware as at 31 October 1987 that Mr Brown posed a risk of sexually abusing students and causing them psychological harm.

(6) The trial judge erred in fact in finding at [265] that the steps taken by the College Council in 1987 were commensurate with its knowledge of the risk posed by Mr Brown.

(7) The trial judge erred in mixed fact and law in finding at [267] that the College Council complied with condition 5.

88 We begin with ground 1.

Ground 1: Onus of proof

Appellant's submissions

89 QBE acknowledges that the allocation of onus is unlikely to be of significance in this appeal.[76]

90 The fact that QBE is relying on condition 5 as a basis for declining indemnity, and as a defence, has no bearing on the allocation of onus of proof. Similarly, the College Council's failure to plead that they complied with condition 5 does not shift the onus to QBE.[77]

91 QBE contends that the College Council bears the onus of proof if condition 5 is a condition precedent to liability.[78] QBE contends that condition 5 is a condition precedent to liability because the chapeau to the insuring clauses states that indemnity is 'subject to the terms, *conditions*, exceptions, provisions and memoranda endorsed hereon' (emphasis added), and the insurance policy expressly provides that 'the due observance and fulfilment by The Insured of the… conditions… insofar as they relate to anything to be done or complied with by The

[76] Appellant's submissions [12]; appeal ts 4.
[77] Appellant's submissions [13] - [14].
[78] Appellant's submissions [15]; appeal ts 6, citing ***Kodak (Australasia) Pty Ltd v Retail Traders Mutual Indemnity Insurance Association*** (1942) 42 SR (NSW) 231, 237; ***Wallaby Grip Ltd v QBE Insurance (Australia) Ltd*** [2010] HCA 9; (2010) 240 CLR 444, 456.

> Insured… shall be conditions precedent to any liability of The Company to make any payment under the Policy'. QBE submits that this language is materially analogous to the clause held to be a condition precedent in ***Kodak (Australasia) Pty Ltd v Retail Traders Mutual Indemnity Insurance Association***.[79]

Disposition

92 Ground 1 should be dismissed because the ground, and the finding it impugns, are immaterial. While the judge made a finding as to where the onus lay, the question of onus did not influence his Honour's reasoning. Having considered the evidence as a whole, the judge made a positive finding that the College Council took steps commensurate with its knowledge of the risks relating to Mr Brown,[80] and thus satisfied its obligations under condition 5.[81] It follows that the judge's decision would have been unchanged had his Honour come to a different conclusion on the onus question.

93 Further, as explained below, if we decide for ourselves the appropriate inference as to the College Council's state of mind, without regard to the judge's finding, we would likewise find that the College Council took steps commensurate with its knowledge of the risks relating to Mr Brown, and thus satisfied its obligations under condition 5. Consequently, the question of onus has no bearing on the outcome of the appeal.

94 Ground 1 should be dismissed accordingly.

95 Grounds 2 - 7 are all related. It is convenient to deal with them compendiously.

Grounds 2 - 7: Appellant's submissions

Ground 2: Judge's finding that it was inconceivable that members of the College Council would knowingly expose students to the risk of sexual abuse

96 The starting point of QBE's submissions is its contention that there was no direct evidence of the College Council's state of mind.[82] Consequently, the judge was required to approach the question of the College Council's state of mind by reference to the information that was

[79] Appellant's submissions [16] - [17], citing ***Kodak***.
[80] Primary decision [265].
[81] Primary decision [267].
[82] Appellant's submissions [20]; appeal ts 11 - 13.

before the College Council and the likely response of reasonable people to that information.[83]

97 The information available to the College Council in Mr Hassell's report comprised an alarming series of complaints.[84] Those complaints showed that Mr Brown had behaved in a way that would suggest, to reasonable people, that he had sought, and would continue to seek, sexual gratification through contact with female students.[85]

98 According to QBE, instead of drawing conclusions from the information available to the College Council, the judge's reasoning focussed on the steps taken by the College Council after reading Mr Hassell's report. The judge reasoned that the steps taken by the College Council showed that the College Council did not know that there was a risk of danger to students precisely because those steps were inadequate to address the risk of danger to students. The judge reasoned that the College Council did not know of the risk of danger because it was inconceivable that members of the College Council would knowingly expose students, who, for some members, were their own children, to the risk of danger.[86]

99 That approach was in error because:

(1) it adopted the circular logic that the College Council was not reckless because they did not act recklessly; further, and alternatively

(2) the premise underlying that logic was unsound because recent history shows that institutions have acted with reckless disregard for the safety of children in closely comparable situations; further, and alternatively

(3) it was not necessary that the College Council reach an affirmative conclusion that Mr Brown was a sexual predator. The College Council should have recognised a risk of danger to students because Mr Brown's conduct demonstrated a risk that he may assault female students.

100 QBE also points out that there was no evidence that the two members of the College Council with children at the College voted in

[83] Appellant's submissions [21]; appeal ts 11 - 12, 17 - 19, 37 - 38.
[84] Appellant's submissions [22].
[85] Appellant's submissions [27].
[86] Appellant's submissions [23].

favour of the resolutions passed by the council at the 31 October 1987 meeting.[87]

Ground 3: Judge's inference from the evidence of Mrs Herzfeld and Mr Valenti

101 The judge erred by inferring that Mrs Herzfeld and Mr Valenti did not think that Mr Brown posed a risk to students on the basis of their evidence that, had they recognised such a risk, they would have sought to have Mr Brown dismissed.[88]

102 This inference was in error because it relied on the same circular reasoning identified in [99](1) - namely, that Mrs Herzfeld and Mr Valenti were not reckless because they did not adopt a course of action that they identified as being necessary to avoid being reckless. Similarly, Mr Valenti and Mrs Herzfeld could not prove that they were not reckless by asserting that they would not have been reckless.[89]

103 QBE submits that the judge's inference in relation to Mrs Herzfeld was further in error because the judge overlooked the fact that Mrs Herzfeld was aware of the allegation that Mr Brown had shared a sleeping bag with a student at the time of the 31 October 1987 meeting because she had read Mr Hassell's report.[90]

104 QBE recognises that it is unclear whether the judge's inference from the testimonies of Mrs Herzfeld and Mr Valenti had any real significance because it related to only two of the six council members.[91]

Grounds 4 to 7: The finding that the College Council did not breach condition 5

105 QBE contends that none of the surviving College Council members had any reliable recollection of the 31 October 1987 meeting or of the council's consideration of Mr Hassell's report.[92] Accordingly, as outlined in [96] above, whether the College Council was reckless should be determined by inference from the facts recorded in Mr Hassell's report. This court is as well placed as the judge to decide the question of what inference should be drawn.[93]

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[87] Appellant's submissions [28].
[88] Appellant's submissions [29].
[89] Appellant's submissions [30] - [31].
[90] Appellant's submissions [32] - [33].
[91] Appellant's submissions [29].
[92] Appellant's submissions [34] - [35].
[93] Appellant's submissions [36]; appeal ts 20, 26.

106 QBE outlines what, based on Mr Hassell's report, the College Council likely knew. QBE's submissions give close attention to the contents of Mr Hassell's notes and typed record, including to some aspects of them not mentioned by the judge.[94] Among other things, the notes and typed record demonstrate that the College Council knew that students had reported being touched on the breasts, vaginal area, and buttocks by Mr Brown.[95] QBE contends that, given that knowledge, the risk posed by Mr Brown was obvious to the council, and that this remains true applying the prevailing attitudes of the 1980s.[96]

107 The College Council's response to this obvious risk was to write letters to parents and to speak with Mr Brown. The College Council knew that this action, which effectively amounted to no action, was inadequate to address the risk posed by Mr Brown because no reasonable person could believe that the action was adequate and because the action was premised on the College Council's reckless refusal to accept the obvious.[97] The College Council should have terminated Mr Brown's employment, restricted his duties, or ensured that he was not in the presence of students without supervision.[98]

108 As can be seen, QBE's submissions place considerable emphasis on what a reasonable person in the position of a member of the College Council would have done in response to the information provided at the meeting of 31 October 1987. While QBE acknowledges that the critical questions of the state of mind with which the College Council acted are to be evaluated subjectively, its submissions in substance seek to approach the question objectively, as we will explain. The reason that the question of state of mind is subjective arises from the proper construction of condition 5, which provides the framework for the issues on appeal. Consequently, we turn to that topic.

The proper construction of condition 5

109 In policies insuring against liability, the construction of a reasonable precautions condition, such as condition 5, is well established. It is important to appreciate that the notion of reasonable precautions applies between insurer and insured, not between the insured and the person to whom liability is said to arise. In the context of a liability insurance policy, were reasonable precautions to be

[94] Appellant's submissions [40](a) - (k); appeal ts 32 - 36.
[95] Appellant's submissions [38] - [40].
[96] Appellant's submissions [41] - [44].
[97] Appellant's submissions [45] - [52]; appeal ts 39 - 40.
[98] Appellant's submissions [53] - [54].

construed as requiring what is, in the eyes of the law, the exercise of reasonable care, the reasonable precautions condition would denude the insuring clause under the public liability limb of the policy of any content. That is so in this case, as the scope of the reasonable precautions clause - reasonable precautions to avoid personal injury and damage to property - precisely mirrors the scope of the insuring clause in respect of liability - for bodily injury and damage to property.

110 Understood in this context, the obligation to take reasonable precautions requires the person on whom the obligation is imposed to take such precautions to prevent personal injury as *that person* considers reasonable, having regard to the dangers which *that person* recognises. That is, the obligation of an insured to take reasonable precautions requires the insured, where it recognises a danger of personal injury, not to take measures which it *knows* to be an inadequate response to the recognised danger, or where it *does not care* whether its response is inadequate, and requires it not to *deliberately* fail to act when it *knows* that the taking of some measures is required.[99]

111 Thus, the insured person will not be in breach of such a condition if it shows either that it did not recognise that a danger existed or that, perceiving the existence of a danger, it took action that it considered to be adequate to avoid it and was not indifferent to whether the danger was averted.[100]

112 Consistently with this construction, in its defence to the College Council's statement of claim, QBE pleaded that the College Council *knew* that BB was at risk of injury and *knew* that it had taken no measures, or no adequate measures, to address that risk of injury.[101]

113 Again consistently with this construction, there is no ground asserting that the judge misconceived the test as outlined in [110] - [111]. Ground 4 asserts that the judge should have found that the College Council was *aware* that there was a material risk of injury to students and was *aware* that the steps that it took in response to the risk were not adequate to address it.

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[99] ***Fraser v BN Firman (Productions) Ltd; Miller Smith & Partners*** [1967] 1 WLR 898, 901; ***Legal and General Insurance Australia Ltd v Eather*** (1986) 6 NSWLR 390, 403, 407; ***Vero Insurance Ltd v Power Technologies Pty Ltd*** [2007] NSWCA 226 [44], [49], [60]; ***Barrie Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd*** [2016] NSWCA 67; (2016) 75 MVR 108 [51] - [52], [80].
[100] ***Legal and General Insurance v Eather*** (403); ***Vero Insurance*** [64].
[101] BAB 85.

114 Although not all of QBE's written submissions on appeal appear to be expressed in this framework, in oral argument QBE's case was framed in the terms expressed in ground 4 - that is, expressed consistently with the framework that a finding that the College Council knew the two matters set out in [113] above is required in order for QBE to succeed.[102]

Grounds 2 - 7: Disposition

115 In essence, QBE's case on appeal involves the following steps:

(1) none of the College Council's witnesses gave direct evidence as to their state of mind in 1987;

(2) consequently, the state of mind of the persons comprising the College Council should be inferred by reference to what a reasonable person in receipt of the information provided to council members would have known and appreciated;

(3) the contents of Mr Hassell's notes, which he reported to the College Council members, would lead a reasonable person: (i) to know that Mr Brown posed a real risk of sexually interfering with students at the school; and (ii) to know that the steps taken by the College Council - namely, requiring Mr Brown to tell a classroom of students that he would not touch any of them again - was an inadequate means of eliminating or reducing that risk; and

(4) it should thus be inferred that the council knew the matters referred to in [115](3).

116 In effect, QBE submits that the oral evidence of the witnesses called by the College Council can simply be put to one side - the critical questions of knowledge are to be inferred based on what a reasonable person would have thought, as explained in the second and third steps we have outlined at [115](2) and (3). Counsel explained the logic of QBE's position as follows. Once the conclusion that would have been drawn by a reasonable person is identified 'then, absent any evidence at all as to what [the College Council] actually concluded then, on the balance of probabilities, that is what they concluded'.[103]

[102] Appeal ts 9, 26.
[103] Appeal ts 38.

117 In our view there are several flaws in this position. In substance it seeks to give controlling effect to how a reasonable person in the position of the College Council members would have thought, when the critical issue is how, at the relevant time, particular individuals - the majority of whom gave evidence before the primary judge - in fact thought.

118 QBE's contentions have, as an element or premise, the contention that there is no evidence at all as to what the College Council in fact thought, so that the reasonable person's perspective is the sole basis for drawing the inference. But the position is otherwise. The contents of the information in Mr Hassell's report to the College Council, and the court's assessment of what a reasonable person would have thought in response to it, is part, but by no means the whole, of the material from which inferences as to the College Council's knowledge are to be drawn.

119 There is abundant other evidence bearing on what inferences are to be drawn as to the College Council's thinking.

120 **First**, while Mr Hassell's state of mind is not to be attributed to the College Council, the evidence and findings as to his thinking are relevant to the inferences to be drawn as to the council's state of mind because he expressed his views to the College Council at the 31 October 1987 meeting.

121 The judge found that, following the detailed investigation he undertook, Mr Hassell did not consider that a sexual assault had occurred, and did not consider that there was any touching for sexual gratification.[104] Mr Hassell reached the conclusion that Mr Brown's touching of students was unwise but not sexual, sinister or criminal, and not for sexual gratification.[105] Indeed, the judge found, Mr Hassell remained unpersuaded that Mr Brown was a risk to students until 2006 when he attended Mr Brown's trial.[106]

122 QBE submits that this is of no moment because there is no evidence and no finding that Mr Hassell communicated his view to the College Council.

123 We reject this submission. The judge found, based on Mr Hassell's typed record, that Mr Hassell reported to the College

[104] Primary decision [83], [238].
[105] Primary decision [262].
[106] Primary decision [246].

Council his view that Mr Brown was a touchy, feely person who often touched boys, girls and adults in displays of support, affection or concern.[107] Further, his Honour found that once Mr Hassell gave his 'full and frank account' of the results of his investigations and provided a written report to the College Council, Mr Hassell's knowledge became the knowledge of the College Council.[108] His Honour also found that, at the meeting on 31 October 1987, the results of Mr Hassell's investigations were reported to and considered by the College Council.[109] The judge thus found that Mr Hassell conveyed to the College Council his conclusion referred to in [121] above.

124 Moreover, we would draw the same inference. Mr Hassell was the principal. He had day-to-day dealings with Mr Brown. He had conducted an investigation and had interviewed a number of students. The members of the College Council had little means of obtaining information independently of Mr Hassell. The suggestion that, at a two-hour meeting specifically called to discuss concerns in relation to Mr Brown, Mr Hassell would not have expressed, and members of the council would not have sought, Mr Hassell's views strains credulity.

125 As explained below, in our view the proper inference is that the College Council adopted, and acted upon, Mr Hassell's view referred to in [121] above.

126 **Secondly**, the College Council's resolution at the meeting on 31 October 1987 is itself some evidence as to its thinking. To so reason is not to engage in circular reasoning. What a person does is always part of the circumstances from which the inference is drawn as to their state of mind at the time. In some cases, conduct will be a powerful indicator of state of mind. The weight to be attributed to it depends on all the circumstances of the case.

127 The minutes of the 31 October 1987 meeting record that it was resolved that:

(1) Mr Hassell would write private, individual letters to those parents who were directly involved; and

(2) Mr Hassell would speak to Mr Brown and discuss carefully with him the ramifications of his actions. Mr Hassell was to point out to Mr Brown the difficulties the situation had created

[107] Primary decision [68]; exhibit 4.
[108] Primary decision [234] - [235].
[109] Primary decision [239].

> for the school and that any future action was in Mr Brown's hands.

128 The judge accepted Mr Hassell's evidence that, at the 31 October 1987 meeting, the College Council resolved to speak to Mr Brown's class, tell them that Mr Brown would cease touching any of the children because he didn't want to make them uncomfortable, and write to parents telling them what had happened and what the College Council had done.[110]

129 In our view, the natural and probable inference is that, in resolving that Mr Hassell would write letters to parents, the College Council discussed and agreed the substance of the content of the letters to be sent.

130 The terms of the letters written by Mr Hassell are summarised in [45] above. The letters state that, while the touching was unwise, nothing untoward had occurred and nothing had occurred which could in any way be construed as of a criminal nature. They further state that Mr Brown had agreed that the touching was unwise and had agreed not to touch students again. Some of the letters also state that, as Mr Brown had explained to the year 6 class, he was the kind of person who displayed affection through touching.

131 The terms of the College Council's resolutions and the contents of the letters sent by Mr Hassell support an inference that the College Council accepted and adopted Mr Hassell's views of Mr Brown and of Mr Brown's conduct, as outlined in [121] above. That inference is reinforced by the third and fourth matters referred to below, namely the evidence of Mrs Herzfeld and Mr Valenti, and the objective probabilities based on common experience.

132 **Thirdly**, there was evidence from each of Mrs Herzfeld and Mr Valenti as to what they would have done had they thought that Mr Brown was or might be a sexual threat to students. The judge accepted that evidence. The judge did not err in doing so. Contrary to QBE's submission, to do so does not involve circular reasoning. A witness who has no recollection of the detail of what they thought and did at some past time can give evidence as to what they would have done had they had a particular state of mind at the time in question. The weight to be attributed to such evidence is a matter to be evaluated by the trial judge in the light of all the circumstances of the case.

[110] Primary decision [75]; ts 105.

Having regard to the evidence as a whole, we can see nothing that precluded the trial judge, who had seen and heard the witnesses, from accepting the evidence given by Mrs Herzfeld and Mr Valenti. Moreover, that evidence accorded with the judge's assessment of common experience and the objective probabilities.

133 Thus, ground 3 fails**.**

134 **Fourthly**, identification of the inference to be drawn as to the College Council's state of mind required attention to all of the known circumstances.[111] Those circumstances included what was known about the persons comprising the College Council.

135 Three members of the College Council were parents of children who attended the school.

136 Ms Ball had two children who attended the school, the older of whom had left by 1987. She was invited to join the College Council in about 1983. In 1987, Ms Ball was working full-time as a medical scientist in endocrinology at King Edward Hospital.[112]

137 Mr Valenti's three children attended the school. Having been president of the 'P and C' in 1985 and 1986, he was asked in 1987 to become a member of the College Council. He agreed to do so. Mr Valenti, who was a practising lawyer from 1978 until the time of trial,[113] thought that becoming a member of the College Council was a way of 'put[ting] a bit back into the community' as his legal skills would be of benefit to the College Council.[114] Among the interests identified on Mr Valenti's curriculum vitae was 'the welfare and pastoral care of and for young people in today's community'.[115]

138 Ms Farthing had two children, both of whom attended the school, commencing in the mid-1970s. She and her husband had a milk vendor business for many years, until they sold their interest in it. She involved herself in the school, including in the 'P and F'. In about 1980, Mrs Herzfeld asked Ms Farthing to join the College Council. She felt honoured to be asked to join, and did so.[116]

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[111] ***R v Hillier*** [2007] HCA 13; (2007) 228 CLR 618 [46] - [48].
[112] ts 174 - 177.
[113] Exhibit 28.
[114] ts 235 - 236.
[115] Exhibit 28.
[116] ts 275 - 278.

139 In 1987 Mr Murray QC was Crown Counsel, having been appointed in 1980, and had been a Queen's Counsel since 1984. Mr Murray QC became a member of the College Council because he was a friend of Mrs Herzfeld; Mrs Herzfeld had taught his younger brothers at primary school.[117]

140 Mrs Herzfeld had a very long-standing connection to the College. She co-founded the College, was its principal from 1973 to 1982, and was a member of the College Council from 1973 to 2017.[118]

141 Mr Butcher was chairman of the College Council in 1987. Mr Butcher did not have children at the College. He was, according to Mr Hassell's evidence, a member of the College Council because he was an executive with an airline, and so was an experienced businessperson who was good at running meetings.[119]

142 Drawing an inference involves making a deduction from primary facts.[120] The drawing of an inference has been described as 'an exercise of the ordinary powers of human reason in the light of human experience'.[121] The tribunal of fact has regard to its perception of 'the common course of human affairs' in determining what inferences to draw.[122]

143 That is how the judge approached the question of identifying the most probable inference concerning the College Council's state of mind at the time of, and following, the meeting of 31 October 1987. Ground 2 attacks the judge's observation that it is inconceivable that any member of the College Council would knowingly expose students, including, in the case of some of the members, their own children, to the risk of sexual predation by Mr Brown. No error is revealed by this observation. While expressed in strong language, it reflects ordinary human experience that, absent some apparent motive for doing so, it is inherently unlikely that a group of apparently intelligent and genuine adults, several of whom are parents, would knowingly expose schoolchildren to a person whom they thought was or might be a sexual predator.

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[117] ts 154 - 155.
[118] Primary decision [85]; ts 154, 155, 169.
[119] ts 108.
[120] ***Martin v Osborne*** (1936) 55 CLR 367, 375; ***Smart v Power*** [2019] WASCA 106 [108].
[121] ***G v H*** (1994) 181 CLR 387, 390; ***Fazio v Fazio*** [2012] WASCA 72 [46]; ***Le-Ta v State of Western Australia*** [2020] WASCA 14 [73].
[122] ***Martin v Osborne*** (375); ***Le-Ta v State of Western Australia*** [73].

144 QBE submits that this reasoning is unsound because recent experience demonstrates that 'institutions have acted with reckless disregard for the safety of young children in closely comparable situations with alarming frequency'.[123]

145 We do not accept this submission. The questions in this case did not involve the conduct of an institution such as a church or religious order. In cases of that kind, loyalty to an institution has, at times, lead to inexplicable and reckless failures to protect children. The present case concerned the state of mind and conduct of the six identified people who comprised the College Council. The primary connection of most members of the council to the College was their children. Only one of the members of the council, namely Mrs Herzfeld, had a broader and long-standing connection of a different kind. No evidence establishes a plausible basis to infer that Mr Hassell had a motive to protect Mr Brown in the knowledge that he posed a risk to the children at the College and at the expense of putting those children at risk. While he had a long-standing relationship with Mr Brown, by the time of the 31 October 1987 meeting, Mr Hassell would have liked to see Mr Brown dismissed because of his teaching performance.[124]

146 In the circumstances, it is difficult to conceive of why the six people comprising the College Council would have chosen the course they adopted while knowing that Mr Brown might be a sexual predator and knowing that what they were doing was inadequate to address the situation.

147 For the reasons in [142] - [146], ground 3 fails.

148 Relatedly, the fact that most members of the College Council had little memory of the 31 October 1987 meeting sits more comfortably with the inference drawn by the primary judge than with the inference invited by QBE. A decision to knowingly take inadequate steps to guard against a known risk that a teacher may sexually interfere with students might reasonably be expected to be memorable. By contrast, a decision based on a belief that a teacher was acting unwisely but that his conduct was not sexual, sinister or criminal, and without identifying a risk that it might be, might understandably have faded from memory after 30 years.

[123] Appellant's submissions [25].
[124] Primary decision [71]; ts 119.

149 In identifying the probable inference as to the College Council's state of mind, we have had careful regard to the contents of what was reported to the College Council by Mr Hassell on 31 October 1987, including the aspects highlighted in QBE's submissions.

150 We accept that, as QBE submits, having received the information reported to them by Mr Hassell, the College Council *should have* recognised that their conclusion concerning Mr Brown's conduct might be open to doubt such that a risk of sexual offending against students existed. However, there is otherwise no evidence that Mr Hassell or any member of the council held or expressed a concern that their conclusion concerning Mr Brown's conduct might be open to doubt such that a risk of sexual offending against students existed.

151 In our view, the features of the evidence to which we have referred comfortably sustain the inference that neither Mr Hassell nor the College Council considered that a real risk existed that Mr Brown might sexually interfere with a student. The inference we would draw upon the whole of the evidence is that the College Council took what it considered to be appropriate steps in light of what it knew or believed as to Mr Brown's past and future conduct.

152 Thus, assuming, favourably to QBE, that the question of the College Council's knowledge is to be approached afresh in this court, we would draw the same inference as the primary judge. Grounds 4 - 7 fail accordingly.

153 However, we consider the assumption in [152] above to be wrong, giving rise to a further reason why we would reject grounds 4 - 7. In our view, the grounds are framed on an incorrect conception of the applicable standard of appellate review.

154 We do not accept QBE's submission that the question of the inference to be drawn as to the College Council's knowledge is to be approached afresh in this court. The framework outlined in [110] - [112] above, directing attention to the subjective state of mind of the College Council, means that, on appeal, QBE must face the hurdles applicable to appellate challenges to findings of fact that are, in part at least, affected by the judge's assessment of witnesses' credibility or reliability.

155 The observations of Bell, Gageler, Nettle and Edelman JJ in ***Lee v Lee***[125] are in our view applicable to this appeal:[126]

> A court of appeal is bound to conduct a 'real review' of the evidence given at first instance and of the judge's reasons for judgment to determine whether the trial judge has erred in fact or law. Appellate restraint with respect to interference with a trial judge's findings unless they are 'glaringly improbable' or 'contrary to compelling inferences' is as to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence. It includes findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts. Thereafter, 'in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge'.

156 A finding of fact as to the state of mind of a witness is a paradigm example of a finding that is likely to be influenced by the judge's impression of a witness's credibility or reliability: ***Binningup Nominees Pty Ltd v Mirvac (WA) Pty Ltd***.[127] As ***Binningup*** illustrates, the same is true of a finding of fact as to the state of mind of a corporation, association, or other legal entity constituted by individuals who are witnesses in the trial. The judge's satisfaction that the College Council took steps that it considered commensurate with its knowledge at the time is likely to have been influenced by his Honour's impressions of the four council members who gave evidence in the trial.

157 Thus, this court would not interfere with a finding by the primary judge as to (i) what the College Council did and did not know, and (ii) the state of mind with which it acted at and following the meeting of 31 October 1987, unless the finding is demonstrated to be wrong:[128]

- by reference to incontrovertible facts or uncontested testimony;
- because the finding is glaringly improbable or contrary to compelling inferences; or

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[125] ***Lee v Lee*** [2019] HCA 28; (2019) 266 CLR 129.

[126] ***Lee*** [55]. See also ***Fox v Percy*** [2003] HCA 22; (2003) 214 CLR 118 [25]; ***Robinson Helicopter Co Inc v McDermott*** [2016] HCA 22; (2016) 90 ALJR 679 [43]; ***Smart v Power*** [100] - [106]; ***Child and Adolescent Health Service v Mabior*** [2019] WASCA 151; (2019) 55 WAR 208 [93]; ***Joyce v Anderson*** [2020] WASCA 48; (2020) 91 MVR 334 [105] - [106], [204] - [213].

[127] ***Binningup Nominees Pty Ltd v Mirvac (WA) Pty Ltd*** [2021] WASCA 130 [46] and cases there cited.

[128] ***Devries v Australian National Railways Commission*** (1993) 177 CLR 472, 479; ***Fox v Percy*** [28] - [29]; ***Robinson Helicopter Co Inc v McDermott*** [43]; ***Lee*** [55].

- because the trial judge failed to use, or has palpably misused, his or her advantage as trial judge.

158 QBE did not attempt to put its submissions on grounds 4 - 7 in this framework. Those grounds fail accordingly.

Conclusion

159 For the above reasons, the appeal must be dismissed.

160 We would hear from the parties as to costs, but, on the face of things, costs should follow the event.

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

AE
Associate to the Honourable Justice Beech

8 JUNE 2022