Supreme Court
New South Wales

Medium Neutral Citation:	**Murphy Mcarthy & Associates Pty Limited (Administrator Appointed) v Zurich Australia Limited [2024] NSWSC 1203**
Hearing dates:	30, 31 January; 1 February; 19 and 27 March 2024
Decision date:	25 September 2024
Jurisdiction:	Equity
Before:	Kunc J
Decision:	Proceedings dismissed
Catchwords:	INSURANCE — Life insurance — Accident and sickness — Definitions — Whether life insured "Own Occupation TPD" — "occupation"
Cases Cited:	*Cook v Financial Insurance Co Ltd* [1998] 1 WLR 1765 *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544; [2017] HCA 12 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 306 ALR 25; [2014] HCA 7 *Jagatramka v Wollongong Coal Limited* [2021] NSWCA 61 *J&P Marlow (No 2) Pty Ltd v Hayes* (2023) 112 NSWLR 29; [2023] NSWCA 117 *McArthur v Mercantile Mutual Life Insurance Co Ltd* [2002] 2 Qd R 197; [2001] QCA 317 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579; [2000] HCA 65 *Minister for Immigration & Multicultural Affairs v Hu* (1997) 79 FCR 309 *Morais v Minister of Immigration, Local Government and Ethnic Affairs* (1995) 54 FCR 498 *Standley v OnePath Life Ltd* [2020] NSWSC 848 *TAL life Ltd v Sheutrim* (2016) 91 NSWLR 439; [2016] NSWCA 68 *Ward v Metlife Insurance Limited* [2014] WASCA 119 *X v The Commonwealth* (1999) 200 CLR 177; [1999] HCA 63

Texts Cited:	JD Heydon, *Heydon on Contract* (Thomson Reuters, 2019)
Category:	Principal judgment
Parties:	Murphy Mcarthy & Associates Pty Limited (Administrator Appointed) (Plaintiff) Zurich Australia Limited (Defendant)
Representation:	Counsel: M Gollan (Plaintiff) D Lloyd SC /J Harrison (Defendant) Solicitors: Firths (Plaintiff) HWL Ebsworth Lawyers (Defendant)
File Number(s):	2022/313588

JUDGMENT

Summary

1 **Mr** Francis **Heron** is an engaging and industrious man who was born in Ireland. He worked in New Zealand for over two decades before coming to Australia in 2001. He has a lifetime's experience in the construction industry. He was 66 years old at the time of the hearing.

2 In November 2021, he underwent a total left hip replacement (**surgery**). Both to the untrained eye, and by reference to the expert medical evidence, the surgery was very successful and he has made an excellent recovery. He clearly enjoys working and is currently engaged as a supervisor of construction work associated with Sydney's third airport at Badgerys Creek. He often leaves home before first light to drive to work and, as evidenced by surveillance **videos** shown to the Court, cuts a vigorous figure as he moves about the work site performing his duties.

3 Against this background of a successful surgical outcome and a return to full employment, the central issue in this case is whether Mr Heron satisfies the definition of 'Own Occupation Total and Permanent Disability' (**TPD**) under an insurance policy. If he does, then the plaintiff, Murphy McCarthy & Associates Pty Limited (Administrator Appointed) (**MMA)** is entitled to the payment of a benefit of $2,954,908.00 from the defendant, **Zurich** Australia Limited, pursuant to a **OnePath** Life Ltd insurance **policy** taken out by MMA commencing on 16 July 2013 under which Mr Heron was the life insured.

4 On 1 August 2022, the life insurance business of OnePath was transferred to Zurich by novation. These proceedings were commenced by MMA (then described as trading as MMA Civil Contractors) by a statement of claim filed on 20 October 2022. MMA went into voluntary administration on 6 January 2023 and is now subject to a deed of

company arrangement executed on 5 May 2023. The proceedings were ultimately conducted by reference to a further amended statement of claim filed on 22 September 2023.

5 The resolution of this dispute required the determination of these questions in relation to clause 1b of the policy:

(1) What is the proper construction of "occupation" in the definition of "Own Occupation"?

(2) As a matter of fact, what was Mr Heron's "most recent occupation"?

(3) What was Mr Heron's disability as a result of his illness or injury?

(4) As at 12 February 2022, was the extent of Mr Heron's disability such that he was unlikely ever again to be able to engage in his "Own Occupation"?

6 In summary, and for the reasons which follow, the Court has concluded in relation to these questions (and following the same numbering):

(1) That employment, trade or business in which that person is habitually engaged and by which that person earns a livelihood or receives some form of remuneration.

(2) Construction Manager/Project Supervisor with the duties set out at [66] below.

(3) Mr Heron's disability is that the post-surgical condition of Mr Heron's hip does not permit him to undertake safely certain activities in a trench which include walking along a concrete pipe in a trench and undertaking work in a confined space in a trench that might put his hip into an "awkward" position.

(4) No. Even Mr Heron accepted that not every job he supervised and managed at MMA required him to undertake activity in trenches of the kind he cannot now safely perform. In other words, the ability to undertake that activity is not essential for him to be able to engage in his "Own Occupation".

7 Mr M Gollan of Counsel appeared for MMA. Mr D Lloyd of Senior Counsel appeared with Mr J Harrison of Counsel for Zurich.

Some background facts and Mr Heron's evidence

8 In 2002, not long after he arrived in Australia, Mr Herron incorporated **FREMS** Contractors Pty Limited, a company which provides sub-contracted civil construction services. Mr Heron was a director of FREMS and its employee. In that same year, after a brief association with another company, FREMS commenced exclusively subcontracting to MMA in an arrangement whereby FREMS provided the services of Mr Heron to MMA. Mr Heron had no role in MMA (for example as a director) and his only formal connection was providing his services to MMA through FREMS.

9 In assessing Mr Heron's evidence, I have kept in mind that there is no suggestion that Mr Heron has a personal interest in the outcome of the proceedings, although I did form the impression that, not unsurprisingly after nearly twenty years of working together, Mr

Heron displayed a degree of loyalty to MMA and its principal, Mr Shane McCarthy. No criticism of Mr Heron is intended by that observation. Mr McCarthy did not give evidence.

10 At the time of the commencement of the policy in 2013, Mr Heron had no obvious health issues. In mid-2021, Mr Heron saw his general practitioner, **Dr** Peter **Hay**, to complain of hip pain. Dr Hay referred Mr Heron to **Dr** Michael **O'Sullivan**, a very experienced orthopaedic surgeon. On 7 July 2021, Dr O'Sullivan reported to Dr Hay that Mr Heron had 'arthritic change affecting the left hip' and that Mr Heron had agreed to undergo left hip surgery. On or around 12 November 2021, Mr Heron ceased working with MMA. On 19 November 2021, Mr Heron underwent the surgery.

11 An initial claim form for a TPD claim in respect of Mr Heron was completed on 20 May 2022 by an unknown author. On 8 June 2022, Dr O'Sullivan filled out a Treating Doctors Statement. These documents, along with various other documents, were provided to Zurich by MMA's solicitors on 26 May 2022 to make a claim for TPD insurance on behalf of MMA. The statement concluded that Mr Heron had a restricted ability to carry out daily activities and a reduced work capacity. On 8 July 2022, Dr Hay signed a 'Permanent Incapacity Medical Certificate' which stated:

> "I confirm that after my consultations with Francis Heron, I have observed no clinical signs or symptomology that cause me to conclude he has any real chance of being able to engage in his own occupation on a regular basis, to age 65, and has been so incapacitated since on or about 12 November 2021".

12 After the initial claim was made, Zurich expressed concerns that the evidence Mr Heron provided in the initial claim portrayed Mr Heron's role with MMA as being significantly more physical in nature than had been declared in the original 2013 application for cover. As a result, on 13 July 2022, Zurich requested MMA to complete an occupational questionnaire to address what it described in correspondence as discrepancies. MMA's solicitors indicated that their client would not complete the questionnaire. Zurich followed up on its request on 11 August 2022 and MMA's solicitors maintained by a reply on 17 August 2022 that the questionnaire would not be completed. As I have already recorded, MMA commenced the proceedings in October 2022.

13 On 3 August 2023, the proceedings were fixed for hearing before me commencing on 30 January 2024 for three days. On 4 August 2023, I heard a motion in the proceedings sitting as Applications List Judge. However, a significant development occurred on or around 16 October 2023, when FREMS entered into a sub-contract arrangement with **Jonishan** Pty Ltd for Mr Heron to work as a Project Supervisor at the Badgerys Creek Airport construction **site**.

14 During late December 2023 and early January 2024, Zurich obtained the videos of Mr Heron going to and from the site from his home, and working on the site. Zurich sought to rely on those videos at the hearing. As a result, the proceedings were unable to be

completed in the three days originally fixed in order to accommodate the time taken to show the videos, together with additional medical evidence arising from the videos and further submissions.

15 Mr Heron was MMA's only lay witness. He was extensively cross-examined, including being shown extracts from the videos. Mr Lloyd SC did not ultimately submit that Mr Heron was a deliberately untruthful witness. Nor was that my assessment of Mr Heron. However, I accept Mr Lloyd SC's submission, which reflected my own observation of Mr Heron giving his evidence, that he had a tendency to exaggerate.

16 I immediately add that I do not conclude that the exaggeration was intended to deceive. It struck me as being more a personality trait of Mr Heron's and a means of emphasis. It was consistent with an enthusiasm that Mr Heron communicated for his work which struck me as entirely genuine, telling me more than once that his instinct was that when he saw something in the course of his duties that needed to be done, he would muck in and help. One issue in this case is what were Mr Heron's actual duties as opposed to the tasks that he undertook because he wanted to help to get something done.

17 Nevertheless, because of his tendency to exaggerate, I am unable to accept Mr Heron's uncorroborated evidence on critical issues at face value. For example, in an early affidavit in the proceedings affirmed on 7 February 2023, he deposed:

> "There has not been a time since my surgery that I could have returned to my own occupation. I have to be very careful in performing simple tasks, such as walking up and down stairs, walking over uneven ground, or ascending, and descending slopes. I have feel that my balance has deteriorated, and I [am] conscious and protective of my left hip."

18 That does not describe the man I observed on the videos. I did not see signs of Mr Heron having any difficulty walking over uneven ground, or ascending and descending slopes, or being someone whose balance was poor or who was protective of his left hip.

19 Similarly, when shown some of the videos, Mr Heron invited me to observe how careful he was being or that he was exhibiting some difficulty. With the greatest of respect to Mr Heron, that was not my impression of how he appeared in the videos. My impression was, and I find, that he was spritely (including jogging short distances on relatively flat ground) but appropriately careful, that is to say, exhibiting the reasonable care that a prudent, able-bodied person of his age would use when, for example, walking down a dirt slope or over uneven ground.

The policy – an overview

20 The first question to be determined is an issue of construction as to what qualifies as 'Own Occupation TPD' under clause 1b of the definition in the policy? As I develop below, the issue of what strictly might be called construction was ultimately not particularly controversial. It was the application of the facts to the definition that was really in contest.

21 The provision in question is located at page 34 of the policy:

> **Own Occupation TPD:**

> ‘Own Occupation’ relates to the most recent occupation in which the life insured was engaged before the date of disability.
>
> Own Occupation TPD means that as a result of **illness** or **injury**, the life insured:
>
> (1) a) has been absent from, and unable to engage in, their ‘Own Occupation’ for three consecutive months; and
>
> b) is disabled at the end of the period of three consecutive months to such extent that they are unlikely ever again to be able to engage in their ‘Own Occupation’.

22 The practical purpose of this definition is that it informs when the insurer is required to fulfil the insuring promise to pay when the definition of “Own Occupation TPD” is satisfied as one of the “TPD definitions”:

> **When we pay:**
>
> We pay the TPD Benefit if the life insured meets a TPD definition for which they are covered, while their TPD Cover is in force.

23 The date of disablement is defined in the policy as:

> **The date of disablement is the date the TPD definition is first satisfied**
>
> The date of disablement of a life insured is the date the life insured first satisfies every element of the TPD definition.

24 It was not in dispute that if Mr Heron was “Own Occupation TPD” his date of disablement was 12 February 2022 (three months after he had ceased employment with MMA). Nor was there any dispute that he had an “illness” (osteoarthritis of the hip requiring surgery) or, perhaps more apposite, an “injury”, which the “glossary of special terms” defined to include “elective surgery a life insured undergoes that a medical practitioner advises is medically necessary for the life insured.”

25 Clause 1.8 of the policy originally entered into between the parties provided for how the terms of the policy may be updated on each 12-month anniversary of the policy:

> **1.8 Continuing Cover**
>
> You may continue the policy each year upon payment of the premium, regardless of changes to the health, occupation or pastimes of each life insured.
>
> The first policy anniversary date is 12 months after the policy start date (which is shown on the Policy Schedule). In advance of each policy anniversary date, we will send you an updated Policy Schedule which shows any variation to the cover(s) provided for each life insured, the amount(s) insured for each cover and the premium for the next 12 months.

26 Mr Lloyd SC submitted, and the Court accepts, that the effect of clause 1.8 is that the latest version of the policy, which came into effect on 1 April 2020, is the version of the policy with current contractual force. Even though the parties entered into the policy in July 2013, Mr Heron’s date of disablement being February 2022 means the 2020 version of the policy is the version with contractual force in this case.

27 This updated policy may be significant to the extent that contracts are objectively construed in light of the parties’ circumstances at the time of entering into the contract. However, the effect of the updated policy is that the contract in issue is the policy as at 2020. This may mean that some surrounding circumstances as at the commencement of the policy may be irrelevant if there were significant changes made to the policy when the policy was amended. Nevertheless, Mr Lloyd SC noted that there was no change to the clauses affecting the payment of TPD (the clause in issue in this case) in

April 2020, therefore to the extent any surrounding circumstances are relevant in this case (which, in any event, the Court concludes at [53] below they are not) the Court could have regard to the circumstances present in 2013 when the parties first entered into the policy.

28 The issue of construction in dispute between the parties regarding this aspect of the policy is what is the proper construction of "occupation" in the definition of "Own Occupation"? "Occupation" is not defined in the policy.

29 Both parties agreed that the Court should find that Mr Heron's occupation at the date of disablement (which was treated as synonymous with "date of disability" in the definition of "Own Occupation") was "Construction Manager/Project Supervisor." But while there was agreement as to description of the occupation, there was no agreement as to its content.

30 The applicable principles of construction for insurance contracts were also common ground. The starting point is the seminal statement of Gleeson CJ in *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, 578 at [22]; [2000] HCA 65:

> [22] A policy of insurance, even one required by statute, is a commercial contract and should be given a businesslike interpretation. Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure.

31 The principles regarding the interpretation of commercial contracts are set out in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 306 ALR 25, 33 [35]; [2014] HCA 7 (French CJ, Hayne, Crennan and Kiefel JJ):

> [35] …The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating".

32 How the Court determines 'what a reasonable businessperson would have understood those terms to mean' was further elucidated in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544, 551 [16]-[17] (Kiefel CJ, Bell and Gordon JJ); [2017] HCA 12:

> [16] It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it.
>
> [17] Clause 4 is to be construed by reference to the commercial purpose sought to be achieved by the terms of the lease. It follows, as was pointed out in the joint judgment *in Electricity Generation Corporation v Woodside Energy Ltd*, that the court is entitled to approach the task of construction of the clause on the basis that the parties intended to produce a commercial result, one which makes commercial sense. It goes without saying that this requires that the construction placed upon cl 4 be consistent with the commercial object of the agreement.

33 Notwithstanding the significance of surrounding circumstances, the starting point of construction is the words themselves. While the Court may depart from the ordinary meaning of the words to ensure a construction which is consistent with the commercial

object of the agreement, the Court cannot adopt an interpretation of a contract which cannot be supported by the text of the agreement itself (see *J&P Marlow (No 2) Pty Ltd v Hayes* (2023) 112 NSWLR 29; [2023] NSWCA 117, [89]-[91] (Meagher and Kirk JJA)).

34 Dictionary definitions are not to be used as an exhaustive means of determining what is the ordinary meaning of the words used in an agreement but may be used as an instrument in aid of such inquiry (JD Heydon, *Heydon on Contract* (2019, Thomson Reuters) at [8.37]). The term 'occupation' is defined as 'one's habitual employment; business, trade or calling' (*Macquarie Dictionary*, online ed, September 2024).

35 This dictionary definition is consistent with several authorities which have considered the meaning of the term "occupation". For example, the Full Court of the Federal Court of Australia in *Minister for Immigration & Multicultural Affairs v **Hu*** (1997) 79 FCR 309, 322 cited a judgment of Kiefel J (as her Honour then was) in *Morais v Minister of Immigration, Local Government and Ethnic Affairs* (1995) 54 FCR 498, 500 where her Honour said:

> A person's occupation would, I consider, ordinarily be understood to refer to that employment, trade or business in which that person is habitually engaged and by which that person earns a livelihood or receives some form of remuneration …

36 The authorities and dictionary definition support a construction that the term "occupation" in the definition of "Own Occupation", viewed objectively from the position of a "reasonable businessperson", means the employment, trade or business in which the life insured was habitually engaged and by which that person earned a livelihood or received some form of remuneration. The Court finds accordingly.

37 As noted at [29] above, the parties accepted that immediately prior to the date of disablement Mr Heron's occupation was 'Construction Manager/Project Supervisor'. However, this is not the end of the matter. The policy inevitably required determination as a matter of fact what it was that Mr Heron did while engaged in that "occupation" to ascertain whether he was "unlikely ever again to be able to engage in their 'Own Occupation'".

38 Both parties accepted that looking merely to his job title to determine what he was required to do as part of his "occupation" was insufficient. However, the parties differed on how the Court should determine what Mr Heron's "occupation" was as a matter of fact.

Mr Heron's occupation – MMA's submissions

39 Mr Gollan submitted that the Court needed to begin by recognising that the object of insurance is to protect an interest that "would have been reasonably understood by him [the insured] as the consumer: *Cook v Financial Insurance Co Ltd* [1998] 1 WLR 1765,

1768 (Lloyd, Steyn and Hope LJ). In this case, it was contended that the principal purpose of the insurance was the protection of MMA's interests by providing payment in circumstances where a "key person" at MMA was unable to perform their duty.

40 Mr Gollan also emphasised that the definition's reference to "most recent occupation" means that any consideration of the content of Mr Heron's "occupation" must be made in the context of what Mr Heron was doing immediately prior to the date of the alleged disablement. Therefore, any consideration of what "occupation" meant for the purpose of the policy and the content of the insured's occupation cannot turn on general considerations of what constitutes an "occupation" or what one might consider ordinarily forms part of an "occupation". It was submitted that this case specific approach to construing what was Mr Heron's "occupation" was consistent with the requirement for the Court to take into account MMA's expectations when entering the insurance contract (see [39] above).

41 Support for this approach was sought to be drawn from the judgment of McLure P (with whom Buss JA agreed) in ***Ward*** *v Metlife Insurance Limited* [2014] WASCA 119 at [59], [66] and [67]:

> [59] The focus of attention is on the meaning of the word 'Occupation'. The appellant contended that it meant his employment with PWC. The respondent contended that it is not confined to his employment with PWC but is to be ascertained by reference to a general (or generic) description of the work undertaken which is something broader than his actual position with PWC.
>
> ….
>
> [66] Notwithstanding use of the word 'is' in the definition of Occupation, continuing employment by the same Employer, in this case PWC, is not mandated. What is meant is employment with any employer that corresponds with and is equivalent to the employment or activity in which the appellant was principally employed by PWC at the time of the disability in mid 2009. There is no correspondence and equivalence between the appellant's Occupation and that of an independent tax consultant, just as there is no equivalence between a salaried partner in a large law firm and a sole practitioner. Although they are in the same profession, their respective roles, duties and income would be different, as is their Occupation.
>
> [67] The unambiguous language in which cl 12.1(b) is expressed is also consistent with the commercial purpose of the Policy and good commercial sense. The intent and purpose of that provision is to reduce the size of the benefit if the Covered Person could reasonably be expected to work in their Occupation on a part time basis or, if a person is Partially Disabled and already working part time in their Occupation, could reasonably be expected to work longer hours in that Occupation. This construction would cover the person who could work in their Occupation but chose not to.

42 MMA submitted that *Ward* demonstrates that parallels could not be drawn between what Mr Heron was required to do with his role at MMA and what other 'construction managers/supervisors' may do in their roles as these may not have any 'correspondence or equivalence' to each other. However, without doubting its correctness, *Ward* is only of limited assistance in this case because the policy in *Ward* contained a definition of "Occupation" and used both "Occupation" (the subject of the judgment) and in other places the undefined "occupation". The definition of "Occupation" was "the employment or activity in which the Covered Person is

principally Employed by the Employer" which, in my view bespoke a closer connection with the actual activity undertaken for the employer, hence the Court's emphasis on the correspondence with and equivalence to the previous employment.

43 Relying on *Ward*, it was contended that evidence which objectively recorded what Mr Heron's role was while he undertook work for MMA, including the application form (see [64] below) and the resume (see [66] below) was not the most useful evidence for the Court to consider when determining what was his "occupation". Instead, the Court should look to evidence which demonstrated what Mr Heron was actually doing immediately prior to the date of disablement. The approach also reflected the reality that the nature of the work which someone may perform can evolve over time.

44 MMA resisted any attempt to rely on previous authorities to determine what the content of "occupation" should be. It was submitted during final submissions that decisions in this area are context specific and to apply them would be to ignore the policy's requirement to look at the most "recent occupation" of the insured to determine their occupation.

Mr Heron's occupation – Zurich's submissions

45 Zurich submitted that that the surrounding circumstances of why MMA entered into the policy were of no assistance. This is because no such evidence was available and therefore could not have any bearing on the construction of "own occupation". It was submitted that the Court can draw no positive inferences in MMA's favour as to why it took out the policy. Instead, the Court should only consider the circumstances contemplated by the policy on its face, namely whether any benefit would enure for the benefit of MMA.

46 Zurich drew the Court's attention to authorities where the term "own occupation" had been considered in other contexts. In ***Standley*** *v OnePath Life Ltd* [2020] NSWSC 848, Rein J said at [49]:

> [49] …It should be noted that, in considering work as a CEM [that is, a Customer Experience Manager, being the most recent occupation in which Mr Standley had engaged prior to the date of disability], it is not necessary to restrict consideration only to the role at DHL [being his employer prior to the date of disability].

47 Zurich also relied on paragraph [66] of McLure P's judgment in *Ward* (see [41] above). While I agree with Zurich's submission on this point, I repeat the reservation I have expressed in [42] above about *Ward*. Zurich submitted that the approaches taken in *Standley* and *Ward* define what is an 'occupation' consistently with the ordinary meaning of that term. Those authorities were also said to support the proposition that the Court should focus on the concept of an 'occupation', in this case 'construction manager/supervisor', rather than the specific duties of a particular job that are being performed by the life insured when determining what someone is required to do as part

of their occupation. It was submitted that this approach requires the Court to consider the duties which are essential for a person to perform if he or she is to be regarded as performing the relevant occupation.

48 Zurich also disputed the extent to which MMA contended that the purpose of the policy, in this case to protect a "key person", can be relied upon to determine how the definition of "Own Occupation" should be understood. In particular, it submitted that there is no evidence from Mr Heron himself, or Mr McCarthy as the controlling mind of MMA, which explains any surrounding circumstances known to both parties that may be relevant to why MMA entered into the policy.

Mr Heron's occupation – consideration

49 The parties addressed this issue in a binary way. On Zurich's approach, the Court should determine what the life insured's occupation was, and the contents of that occupation, without specific reference to the particular features of the role which the life insured was performing immediately before the date of disablement. On MMA's approach, the determination of occupation for the purposes of the policy required a completely fact specific, it could be said granular, examination of the most recent job that Mr Heron was performing for MMA immediately before the date of disablement.

50 In my respectful opinion, the approach which gives effect to a businesslike interpretation of the policy is a middle ground between those contended for by the parties for the following reasons.

51 First, the Court accepts Mr Gollan's submissions that the inclusion of the words "most recent occupation" in the definition of "Own Occupation" draws attention to the work that the life insured was doing immediately before the date of disablement. Those words focus attention on what was being done at a particular period of time. To this I would add the recognition in the continuing cover provision (see [25] above) that "You may continue the policy each year upon payment of the premium, regardless of changes to the …. occupation of each life insured". The focus on the "most recent occupation" allows for the possibility that the occupation may have changed. If it has not, then information provided to the insurer at the time the policy was taken out may nevertheless still be relevant insofar as it can shed light on the "most recent occupation".

52 Mr Lloyd SC also accepted that determination of Mr Heron's occupation requires the Court to consider the most recent circumstances of Mr Heron's work, in particular MMA's history of working on water drainage, sewerage and industrial plumbing projects. To the extent that Zurich otherwise submitted that the Court should not look at

what Mr Heron was doing to determine his occupation, the Court does not accept such an unqualified submission. What he was most recently doing is a relevant circumstance which assists the Court to determine the scope of Mr Heron's occupation.

53 Second, even if it can be assumed that MMA entered into the policy to protect its interest in what it considered to be a "key person" in its business, I accept the submission by Mr Lloyd SC that there is insufficient evidence which outlines the communicated expectations of MMA when it entered into the policy. While the purpose of the insurance is a relevant surrounding circumstance to be considered when construing insurance contracts, there is insufficient evidence about the expectations of MMA or the commercial or social purpose for which the policy was written known to both parties to enable the Court to infer that, viewed objectively, the parties intended that "occupation" should be assessed based on a completely subjective, detailed review of what Mr Heron was doing immediately before the date of disablement.

54 Third, an approach which requires a granular examination of what Mr Heron was doing prior to the date of disablement is inconsistent with what constitutes an "occupation" in accordance with the natural and ordinary meaning of that term. While the analysis of a life insured's "Own Occupation" needs to be considered carefully in the context of what that person was doing immediately before the date of disablement, it is not limited to an examination of the specific tasks that person was doing at that time. I develop below the distinction between an occupation and a job. At the same time, the Court cannot rely on general assumptions about the nature of someone's work to determine their occupation untethered from the evidence of what they were in fact doing.

55 During the hearing, I drew to the parties' attention the Full Federal Court's consideration in ***Hu*** of how to determine what forms part of someone's "occupation". The Full Court was considering this question in the context of a migration officer needing to decide for the purposes of the Migration Regulations 1992 (Cth) the occupation of an applicant for a Class 126 visa. The Court said (at 322-323):

> …A person's usual occupation is not to be determined solely by reference to a catalogue of duties performed for a particular employer within the period referred to in the definition, a comparison then being made between that catalogue and a description of duties for a particular occupation specified in ASCO.
>
> Of course, in any given case, the significance of a person's qualifications and employment history to the question of classification is likely to depend on such factors as the relationship between his or her training and work experience and the work performed during the relevant period, and the recency of work undertaken with other employers. In this case, it was not suggested that the applicant's training and his work with his previous employers was so remote from his professional activities during the two-year period identified in the definition that they should be ignored for the purpose of classifying his "usual occupation".
>
> The point we are making can be illustrated this way. Two people may be performing substantially the same duties on behalf of the same employer, yet their qualifications and employment history may lead to the conclusions that they each have a different "usual occupation". For example, two people may be employed by a hospital to provide counselling to dysfunctional families, and indeed may work together. One is trained as a psychologist and has worked throughout his or her professional life as a psychologist; the other is trained as a social worker and has always been employed in positions designated for social workers. The usual occupation of the first is that of psychologist, while the usual occupation of the second is that of social worker. The examples could be multiplied.

> There is another factor which points to the same conclusion. The delegate appears to have read the word "occupation" in the definition of "usual occupation" as referring, in the case of an employed person, to a position or job held with a particular employer (in this case the position with Da Tong). But the word "occupation" does not have the same meaning as "job" or "position". A person can engage in an occupation for gain or reward for a continuous period of six months with two or more employers. This suggests that the inquiry is to be broader than one that simply focuses on the task performed by the applicant in a particular job or position in which he or she has worked for a period of more than six months.

56 I do not accept Mr Gollan's submission that *Hu* is of little assistance because it is an immigration case. It is appellate consideration of how to determine someone's "occupation" in a linguistic context which, in my respectful opinion, is much closer to the present case than, for example, *Ward*. In making this observation I do not overlook that while there is similarity, the present context is nevertheless still different to *Hu* and the Court must construe "occupation" in the context of the policy. In *Hu*, the Court was construing the expression "usual occupation", which was defined in the relevant regulation as "an occupation that the applicant has engaged in for gain or reward for a continuous period of at least six months during the period of two years immediately preceding the relevant application for a visa or entry permit". As in the present case, "occupation" in that definition was not itself defined.

57 I consider that the observations set out in [55] above from *Hu* do assist the Court in resolving the difference between the parties' approaches in this case – Zurich pointing to the high level and MMA pointing to the more specific or granular. The insight of the Full Court is that particular duties may be common to more than one occupation, such that it is necessary to draw a distinction between duties or tasks, and occupation. While the former are certainly relevant, they cannot be the sole source of information by reference to which occupation can be determined by some process of inductive reasoning. Specific duties or tasks (when considered in isolation) may in fact be

unhelpful, or even misleading, in determining occupation. To take up the Full Court's example, broader questions such as training, experience and even job title ("Psychologist" or "Social Worker") are all potentially relevant.

58 While a universally applicable taxonomy is impossible because circumstances are infinitely various, I will also follow the Full Court by offering an example to illustrate the distinctions that I consider need to be borne in mind to resolve the case at bar:

(1) Ms Smith graduates from university with a Masters Degree in Biology and a Diploma in Education.

(2) Ms Smith obtains employment at Blackacre School to teach biology. The school also requires staff to assist with extracurricular activities. Ms Smith agrees to be in charge of the school's Orienteering Club. The school insures her on the terms of the policy.

(3) Ms Smith's "occupation" is "teacher" (while not of present relevance, this example also illustrates that "occupation" and "profession" can overlap but are not co-extensive).

(4) Ms Smith's "job", being how she specifically engages in her "occupation", is "biology teacher", but in her case her duties or tasks involve not only those connected with teaching biology, but also devising, accompanying and supervising students on wilderness adventures.

(5) On one of these adventures, Ms Smith suffers a catastrophic accident. Her injury is a severed spinal cord which leaves her a complete paraplegic from the waist down.

(6) To use the language of the policy, there is no doubt that as a result of the injury she is disabled. However, to determine whether, as a result of her injury, she is disabled to such an extent that she is unlikely ever again to engage in her "own occupation" it is necessary to determine:

    (a) What is her disability, i.e. what is the ability that she has lost (or, not presently relevant, the deficit she has acquired)?

    (b) What is the extent of that disability?

    One way to determine the issue is to ask if the ability is essential for her to be able to engage in her "Own Occupation" at all.

(7) The ability which she has lost is walking. With no disrespect intended to the achievements of disabled athletes, it is unlikely that she will ever again be able to return to being in charge of the Orienteering Club, with all that entailed.

However, it is not necessary for her to be able to walk to engage in her occupation of teaching, or to supervise another extracurricular activity such as the chess club.

59 The Court therefore concludes that to determine Mr Herron's "Own Occupation" it is necessary to consider what specific tasks and duties he was in fact performing for MMA immediately before the date of disablement. However, the sum of those tasks and duties is not his "Own Occupation": it is rather the specific job he was doing. To identify his "occupation", it is also necessary to take into account matters such as his qualifications, experience, and job description or title to arrive at what will necessarily be a more generic descriptor. To use a biological metaphor, in my respectful view "occupation" is comparable to a genus, whereas a particular job with its unique duties and tasks is a species of that genus.

The evidence of Mr Heron's qualifications, work history and duties

60 The only evidence of Mr Heron's early career was affidavit evidence to the effect that he was born in Ireland, resided in England from 1978 to 1980 and then emigrated to New Zealand. In New Zealand from 1980 to 2001, he had his own company "performing the same type of work that I performed for MMA".

61 The initial application for the policy was in evidence. It was in two parts: a "**product illustration**" and an **application form**.

62 The product illustration was prepared by an insurance broker and signed by Mr Heron on 12 June 2023. It described Mr Heron's "Principal Occupation" as "Project manager – not meeting the requirements of E or P". No evidence was adduced as to what the "requirements of 'E or P'" referred.

63 The application form, also signed by Mr Heron on 12 June 2013, refers to a "packaging discount" by reference to Mr McCarthy as another life insured and described the relationship between Mr Heron and Mr McCarthy as business partners. The application form also required the person filling in the document to state the purpose of cover. The

box ‘key person’ was crossed. However, there is no definition of what constitutes a ‘key person’ under the policy. It was accepted between the parties that this box being ticked has no relevance to the determination of what Mr Heron was required to do in his role.

64 The application form recorded Mr Heron’s occupation as ‘Director/General Manager’. There was no dispute that this referred to Mr Heron’s position at FREMS and not his role at MMA. However, the application form required Mr Heron to provide information as to his “present duties” if applying for TPD cover. This was filled out as:

(1) Sedentary administration (e.g filing, computer work, answering telephone, reception duties) 20% of the time.

(2) Manual work – light (e.g driving, warehousing, surveying, lifting under 5kg) 5% of the time.

(3) Site visits/inspections (e.g real estate sales, building industry inspector, contractor, underground) 75% of the time. [This must be read with the fact that earlier in the form the answer “no” had been given in response to a question as to whether the insured conducted work underground]

65 During the course of cross-examination, Mr Heron accepted that division broadly applied throughout his time at MMA (see Tcpt, 31 January 2024, 208(40)-(44)).

66 The evidence next included a **resume** created by MMA at some time no earlier than 2019 (see [70] below) which outlines Mr Heron had five ‘Position Responsibilities’ further described as “Site Specific Responsibilities”:

(1) Interpret plans and estimate costs and quantities of materials needed.

(2) Plan construction methods and procedures.

(3) Coordinate the supply of labour and materials.

(4) Supervise construction sites and direct site managers and subcontractors to make sure standards of building performance, quality, cost schedules and safety are maintained.

(5) Make sure that construction regulations, standards and by-laws are enforced in building operations.

67 Mr Heron accepted in cross-examination (and the Court finds) that these five matters were a fair summary of his main responsibilities at MMA as at November 2021 (Tcpt, 30 January 2024, p.57(3-5)).

68 The document set out his “Key Skills” as leadership, dispute resolution, communication, time management, budgeting/cost management, teamwork, knowledge of legislation/policies and enforcement of safety requirements.

69 The resume also set out 11 different qualifications Mr Heron had obtained (for example, “butt and electro fusion weld polyethylene pipes”, “first aid” and “training in the prevention and detection of workplace bullying and harassment”) and 14 different qualifications under the heading “Sydney Water Training” to do with pipes and

sewerage.

70 The resume noted that Mr Heron had the position of “Construction Manager/Supervisor” and had been employed with MMA for 20 years. The resume also contained a history of the projects Mr Heron had worked on for MMA:

- 2019 – John Holland Batemans Bay Bridge – 630mm & 400mm poly watermain upgrade - $1m
- 2019 – Ward Civil RMS Road Widening Hoxton Park stormwater & watermain – DN250 DICL $500k.
- 2019 – John Holland Sydney Airport East Sydney Water Watermain – DN500 SCl - $2.1m
- 2018 – NT Rouse Hill Sydney Metro – CSR, sewer & watermain – DN660 SCL - $2.4 mil
- 2018 – EnviroPacific Storm Water & Sydney Water Watermain Installation DN300 DICL - $1mil
- 2018 – Sydney Metro Barangaroo Watermain and electrical – DN300 DICL & SCL $2.2 mil
- 2018 – Acciona Light Rail Stormwater - $2.4 mil
- 2018 – West Connex M4 Stormwater - $1.2m
- 2018 – Yass Council Watermain – DN300 PVC-M, OD345 - $1.1 mil
- 2013 – Ballina Shire Council – Recycled Water distribution and storage system – Ballina - $9m
- 2011 – Hawkesbury City Council – Pump Station South Windsor - $5 mil
- 2011 – Hawkesbury City Council – South Windsor Water Recycling Scheme - $2.2 mil

71 The next relevant document is Mr Heron’s Total and Permanent Disablement **claim form** dated 20 May 2022. Other than his signature, the handwriting on the claim form is not Mr Heron’s but he agreed the information on the form came from him. Mr Heron speculated that the handwriting was Dr O’Sullivan’s (which I do not accept to be the

case given that Dr O'Sullivan's handwriting is in evidence and they are clearly not the same). The claim form describes Mr Heron's "job title/position" as "construction manager/supervisor".

72 In answer to a question on the claim form about his duties "immediately prior" to the onset of his illness, the answer is "Refer to **position description** provided which includes supervision duties and manual handling elements".

73 Mr Heron was unaware of the author or date of creation of the position description, although he said he believed that it was created by Mr Shane McCarthy, the controlling mind of MMA.

74 The position description provided the following information about Mr Heron's role at MMA:

> **Job Title:** Construction Manager/Supervisor
>
> **Reporting to:** Shane McCarthy – Director
>
> **Hours:** 50 hours per week or as required
>
> **Location:** Various projects around NSW
>
> **Purpose of the position**
>
> This position assists in the coordination, management and running of the projects. It is primarily a hands-on position and essential for accurate installation of the pipelines and assets MMA generally construct.

75 The position description went on:

> **Responsibilities and duties**
>
> **Responsibility 1** (Manual elements of the position) - The primary responsibility of this position will be to assist with the installation and commissioning of pipelines and assets that MMA construct such as sewer, watermain, stormwater, electrical and concrete structures.
>
> — Working with the site engineers / project manager to assist in the following important site-based tasks;
>
> ● Site preparation
>
> • Excavation works to prepare the trench for pipe installation.
>
> • Assemble shoring boxes and set up the trench for safe access. Access would generally be from a ladder.
>
> • Setting up dewatering systems if required to keep the groundwater out from the trench.
>
> ● Preparation of materials;
>
> • Prepare pits and pipes for installation.
>
> • This may include cutting concrete stormwater pipes to the required length.
>
> • Breaking out and cutting the inlet and outlets on the concrete reinforced pits to allow the pipes to pass through.
>
> • Using a con saw to chamfer the end of the pipe to allow it to fit into the next pipe. This is manual task done with a con saw.
>
> • Lifting, positioning and bolting up watermain fittings.
>
> ● Installation of pipes into the prepared trench.
>
> • Sling up pipes and guide excavator to position the pipe in the trench
>
> • Enter the trench and use timbers and crow bars to fine tune the positioning of the pipe to get it into the exact position its required.
>
> • Repeat the process pushing the pipes manually into each other until the line is laid.

- Commence backfilling *of* the trench
- This is generally a task done in collaboration with the excavator.
- Excavator to drop in the soil to backfill the trench.
- Material will then be manually compacted in small layers by hand using compaction equipment.
- This position would be responsible for operating plant, small hand tools and completing the manual labour to accomplish the steps above.

Work experience and skills

Essential skills held

- Site knowledge (names of materials, methods of construction, terminologies, problem solving etc etc)
- Physical presence in the trench carrying out the pipe install [sic] personally.
- Be thorough and pay attention to detail.
- Able to work well with others.
- Able to use your initiative.

Experience

- Over 40 years experience in the civil industry
- Senior Pipelaying supervisor for MMA for 20 years+ (primary role)
- Excavator operator (secondary role)
- Highly informed and educated on all methods for pipeline installation gained through years of practical hands-on experience.

Tickets/ Qualifications held

- Confined space entry
- Excavator operator ticket
- Roller ticket
- Dumper ticket
- LR Truck Licence
- Poly welding
- Civil Supervisors Ticket
- Rail training (RIW)
- Dogman (DG)
- Demo Saw (Verification of Competency)
- Install & Repair Water Services
- Construct Waste Water assets.
- Asbestos awareness.

76 During cross-examination, Mr Heron accepted that the position responsibilities articulate a fair summary of the main duties he performed for MMA. However, given he acknowledged it was not his document, he was unsure why the future tense was used for a document which was apparently intended to outline what Mr Heron had been

doing for MMA. Mr Heron was also unclear why the document refers to a 'Responsibility 1' and a 'Responsibility 2' but there is no detail of any responsibilities under the heading 'Responsibility 2'.

77 Annexed to the claim form was an "Education, Training and Experience Questionnaire". This document was also signed by Mr Heron on 20 May 2022 but was otherwise not in his handwriting. In relation to work history, it recorded that Mr Heron had trained and supervised staff, handled payments or invoices, and performed customer service tasks by "liaising with construction client".

78 It included a question which required the respondent to "please advise which industries you have been engaged in, how long and what duties did you perform". This table in response to the question was answered as follows.

Type of Industry	**Lenth of Time**	**Duties performed**
e.g General Labour	**5 years**	**Digging, lifting and carrying equipment etc.**
Construction/Site Supervisor	20 years	Supervision and some manual work.

79 Considerable attention was paid in cross-examination to the nature and extent Mr Heron's work with MMA involved him getting into, inspecting and doing other tasks in trenches. During cross-examination, Mr Heron suggested that a considerable portion of his work of supervision at MMA was conducted "underground" (which I took to mean in an open trench below ground level), requiring physical exertion to enter and inspect the trench. His evidence was not always consistent on this and exemplified his tendency to exaggerate. So much is apparent when some of his evidence is compared to an answer he gave (which I accept as truthful, not least because of the spontaneous way it was given) when taken to his affidavit evidence of his current condition:

> Q. The effect of what you're saying so far in this paragraph is that your symptoms and disabilities as at the time of this affidavit, February 2023, meant that you, in your view, could not perform the task of inspecting trenches. Correct?
>
> A. Inspecting trenches, not a problem. It's the - all the other - the - all the manual work that's involved with it. (Tcpt, 31 January 2024, p. 210(1)-(6)).

80 While he acknowledged that the level of physical exertion required varied from site to site, Mr Heron stated that a lot of his work at MMA required him to enter trenches. Further evidence was adduced as to the sorts of concrete storm water pipes and the

size of the pipes that were cut in some of the projects in which MMA had been involved. Mr Heron provided evidence that the pipes they would cut would be various sizes 375mm up to 1 metre (Tcpt, 31 January 2024, 201(32)).

81 When pressed on what sorts of manual work he did for MMA, Mr Heron accepted that a lot of the digging work in trenches was done by excavators, but he would sometimes use a shovel a 'little bit' (Tcpt, 30 January 2024, 60(45)-61(5)). He also provided evidence that some of the other incidental manual work he did included 'erecting barriers', typically cyclone fencing weighing a maximum of three or four kilos (Tcpt, 30 January 2024, 61(10)-(25)). Mr Heron also accepted that even though his duties may have varied project to project it was 'mostly supervision and looking after guys and organising stuff' (Tcpt ,30 January 2024, 62(38)-(40)).

82 It also became apparent that what he described as work in trenches was done on the "odd site" and reflected his desire to "help out" (Tcpt, 31 January 2024, p.202(29)-p.203(19)).

> Q. Then, "While I also performed supervisory work, I was still required to perform physical tasks and ensure that the employee tasks were completed". Do you see that?
>
> A. Yes, I do, yep.
>
> Q. "That meant I was required to inspect trenches and the laying of pipe". Do you see that?
>
> A. Yes, I do, yep.
>
> Q. That is different to what you said in this dash in the one on page 321; "physical presence in the trench carrying out the pipe install personally", isn't it? Do you agree it's different?
>
> A. Yep, well. Yes, but from site to site, it could be - that's the difference. Every site is different. I - I - I wouldn't have to do it in all sites. I might have to do it on the one - the odd site.
>
> Q. Do you agree it's different, what you've said in this sentence in paragraph 5, to what is said in the second dash on page 321?
>
> A. No, I don't.
>
> Q. Sir, I want to suggest to you, in paragraph 5, what you're saying in terms of trenches is you were required, and I suggest to you, only some of the time, to inspect trenches rather than perform physical work inside them. That's true, isn't it?
>
> A. It's not true. I had to do physical work as well.
>
> HIS HONOUR
>
> Q. What physical work do you say you had to do?
>
> A. Sometimes I might have to be down and give them a hand to do - install something. Depends on where it was.
>
> Q. But when you say, "sometimes", that didn't happen - but how often did that happen as a proportion of your day?
>
> A. Yeah, it could be, you know, half an hour here, an hour there, whatever.
>
> Q. Is that another example of what you told me was the helping out that you did as the supervisor?
>
> A. Working with MMA, yes.
>
> Q. Yes, working with MMA? Yes, thank you.

83 The following exchange took place during cross-examination as to the nature of Mr Heron's work in trenches (Tcpt, 30 January 2024, p.62(22)-p.63(24)):

Q. Can I ask you this, throughout your time at MMA, allowing for the differences that you've told his Honour about from site to site, broadly the nature of the responsibilities you had at MMA was the same throughout that entire 20-year period?

A. Sometimes. But as I just said to you before, it depends on the project. Is it - you - all different types of projects, depends on the conditions you are working in? Depends where you worked.

Q. There was no particular time in that 20-year period when there was a major shift in the kind of things that you were doing; is that fair?

A. Sometimes it did, as it all - it all depends. It all - as I said before, depends on the project.

Q. The variation you're talking about is from project to project?

A. Project to project, yes.

Q. Is it right to say that whatever the project, even the ones that involve more manual work than others, your main job was supervision?

A. It was supervision and looking after guys and organising stuff.

Q. That supervision work did from time to time itself involve a degree of manual or physical work; is that right?

A. Yes.

Q. For example, you've made reference in your affidavits to during your period with MMA, "physically getting into the trenches"?

A. Yes.

Q. So, you'd be getting "into the trenches" not to physically cut pipes or dig, but as part of the supervision activities. Is that--

A. As part of the supervision you had to make sure everything was installed property.

Q. That exercise you've identified of getting "into trenches" for that purpose, it's only part of your responsibilities?

A. Yes.

Q. There were a whole range of other things that you did in the nature of supervision which didn't involve that. Is that fair?

A. Just repeat that.

Q. I'll withdraw it and put it more clearly. There was a whole range of other supervision activities that you did on sites for MMA that didn't involve getting into trenches?

A. Yes.

Q. The majority of your supervision activities didn't involve you being in trenches?

A. Not quite. It all - as I said to you before, it all depends on the project.

Q. Certainly, for some projects, the majority of your supervision activities didn't involve you getting into trenches?

A. No - not really. Sometimes I mightn't have had to get into trenches.

84 During re-examination Mr Heron was asked to outline the sorts of manual work that he had to conduct for MMA in trenches. I inquired of Mr Heron to elucidate on what he was required to do in the trenches (Tcpt, 1 February 2024, 245(47)-246(38)):

Q. So what is the manual work that you were referring to that is involved with inspecting trenches?

A. Well, at the beginning you have to excavate for the trench and you have to install trench boxes, and then I have to set up – it depends on the depth. It could be from a metre and a half to five or six metres, and then we have to set up harnesses and ladders to be able to get down and check the trench, and it depends on the conditions down below. On the last few jobs I was on, we worked in sand a lot, so we were dealing a lot with very wet material down below. And you have to – you have to then inspect and get levels and all that. You have to go down into the trench to check all the levels.

Q. But going down into the trench isn't manual work, as I would understand it. I mean, manual work to me – I just want to make sure I understand your answer, sir. Manual work to me is digging the trench or – with a shovel, or--

A. And that – that would – no, cleaning up down below with the slop and all that. But as I said before, I could be going down six metres down ladders with a harness on and a rope for safety.

Q. But that's not manual work. That's part of – that's what you're telling me is part of inspecting a trench, having to climb down a ladder.

A. Yes. Yes, and that--

Q. Is that what you're referring to?

A. And that is a problem for me, getting down that ladder.

Q. I understand.

A. Before I start – if we have to do some manual work – it depends. If there's services there, we have to clean around the services. Sometimes the excavator can't do all the work so you have to do some of it with your shovels.

Q. I see. And are you saying to me that from time to time you did some of the shovel work?

A. I definitely did.

Q. And was that similar to what I – the sort of shovel work I saw you doing on the screen?

A. Definitely not.

Q. Why not?

A. Because I think the shovel you – on the screen there, I think there was a little bit of clay just on the road and I just shovelled it out of the way

85 During re-examination Mr Heron was asked to distinguish between the work that he is currently doing now for Jonishan and the work that he was doing at MMA. Mr Heron provided the following response.

A. Well, the job I'm doing with Jonishan is solely supervision and just – just inspecting and liaising with foremen and meetings, and as I said, you know, if there's a little safety issue, a barrier or something like that, I will make sure it's – safety is priority. With MMA, it was completely different. I was hands on, down in deep trenches, a lot of sand, lot of running sand up to my knees and up in my gumboots full of water, and up and down ladders all the time, and in – helping to install pipes, inspecting, up and down ladders, deep and very heavy manual work. (Tcpt, 1 February 2024, 228(30)-(40)).

86 Mr Heron was also asked to expand during re-examination on what he was required to do when shovelling in trenches:

Q. Just following up from what his Honour asked, you have told us what the difference was in respect of what you saw on the screen. So what do you say that you did with the shovel in the inspecting of the trenches with MMA?

A. Sometimes I had to get down to the proper levels. We might have to – might have to level it off to a proper level, and sometimes the – and especially around the services, we had to hand-dig around the services (Tcpt, 1 February 2024, p. 246 (40)-(48).

Mr Heron's "Own Occupation" – MMA's submissions

87 MMA submits that if the inquiry was as to Mr Heron's "core duties", the Court should find these were what was set out in the **position description.**

88 Mr Gollan submitted that the Court should only treat the resume as a general overview of the activities that Mr Heron performed for MMA and otherwise undertake a more granular inquiry of the work Mr Heron was doing.

89 Mr Gollan also relied on the evidence Mr Heron provided during cross- examination and re-examination about what work he was required to do in trenches during his time at MMA. This includes evidence that he was required to be involved with "inspecting trenches", clean around "services", shovel, sustain "proper levels", install trench boxes", "work in sand", "deal with a lot of very wet material."

90 While he relied on the position description, Mr Gollan also submitted that it would be artificial for the Court to enter into an exercise which required it to categorise the activities Mr Heron performed in trenches for MMA as "core/essential" and "non-essential". Instead, Mr Gollan submitted on behalf of Mr Heron that it cannot be controversial Mr Heron's work required him to work in trenches, an environment which is typically a confined space and was required to do the duties outlined in the position description and the duties he outlined during the course of cross-examination and re-examination.

Mr Heron's "Own Occupation" – Zurich's submissions

91 In written and oral closing submissions, Zurich sought to alert the Court to what Zurich submitted were deficiencies in MMA's evidence as to what were the core or essential aspects of Mr Heron's role as a supervisor. In particular, Zurich submits MMA could have adduced evidence on this issue by calling Mr McCarthy, the controlling mind of MMA, but chose not to do so.

92 Zurich invited the Court to draw a *Jones v Dunkel* inference that Mr McCarthy's evidence would not have assisted MMA. The principle in *Jones v Dunkel* was summarised in *Jagatramka v Wollongong Coal Limited* [2021] NSWCA 61 at [49] (Bathurst CJ, Bell P and White JA):

> [49] …It is important to bear in the mind the use that can be made of the failure to call a witness, including a party witness who appeared to be in a position to cast light on whether or not an inference should be drawn. As was pointed out succinctly by the plurality in *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361; [2011] HCA 11 at [64], the rule in Jones v Dunkel permits an inference, not that evidence not called by a party would have been adverse to the party, but that it would not have assisted the party. The failure cannot fill gaps in the evidence, as distinct from enabling an available inference to be drawn more comfortably. See also *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345; [2012] HCA 17 at [165] – [167] , [232],

93 Zurich disputes MMA's characterisation of the work which Mr Heron was required to do for MMA in trenches as core or essential. Zurich does not dispute that Mr Heron was required to enter and exit trenches and that Mr Heron did have sometimes to perform some physical tasks in trenches. However, Zurich does dispute the extent to which Mr

Heron was required to undertake tasks which were not purely supervisory in nature and the extent to which they were an essential part of his job. Four pieces of evidence were relied upon in support of this submission.

94 First, Zurich submits that the application does not disclose that Mr Heron performed any work underground.

95 Second, the resume does not specify that Mr Heron was required to perform work in trenches.

96 Third, the affidavit evidence of Mr Heron was that he was only “required to inspect trenches and the laying of pipe” (Affidavit, Francis Heron, 7 February 2024 at par 5).

97 Finally, during cross-examination, Mr Lloyd SC put to Mr Heron that most of his work for MMA did not involve Mr Heron having to get into trenches. In reply, Mr Heron said that “sometimes I mightn’t have had to get into trenches” but that it all depends on the job (Tcpt, 30 January 2024, p.63(24)).

98 By reference to that evidence, Zurich submits that the Court should find that Mr Heron was only required to inspect the construction of trenches and the laying of pipe and was not required to perform any manual work in trenches. It was Zurich’s contention that it was not a core or essential feature of his role that Mr Heron was required to always enter into trenches. It was also submitted that the evidence does not establish any manual handling or physical aspects of supervisory work were a core or essential part of Mr Heron’s occupation as at 12 November 2021.

99 Zurich also submitted that the Court was required to weigh up the evidence provided by Mr Heron as to what was involved in the process of inspection in trenches in re-examination and what Mr Heron answered during cross-examination. It was said that Mr Heron gave no evidence that involvement in manual work in trenches was an essential part of his duties. The evidence that Mr Heron did provide about his work in trenches in re-examination was also submitted to be vague, including references to “it depends, it could be, we [not I] have to set up” (see Tcpt, 1 February 2024, p. 245(50) – p.246(45)).

100 The evidence in re-examination was also submitted to be inconsistent with the evidence adduced in cross-examination. In particular, Mr Heron said during cross-examination that “sometimes I mightn't [sic] have had to get into trenches” (Tcpt, 30 January 2024, p.63(24)). The evidence adduced in re-examination was also submitted to be inconsistent with the duties recorded in the application form and the resume.

Mr Heron's "Own Occupation" - consideration

101 For the reasons which follow, the Court finds that Mr Herron's "Own Occupation" was "Construction Manager/Project Supervisor" for MMA, which involved the duties or responsibilities specified in the resume, being:

(1) Interpret plans and estimate costs and quantities of materials needed.

(2) Plan construction methods and procedures.

(3) Coordinate the supply of labour and materials.

(4) Supervise construction sites and direct site managers and subcontractors to make sure standards of building performance, quality, cost schedules and safety are maintained.

(5) Make sure that construction regulations, standards and by-laws are enforced in building operations.

102 In reaching this conclusion, I have applied the approach set out in [59] above. The particular things Mr Heron did as part of his occupation reflected his job and not his occupation. It is also convenient at this point to say two things about the utility of the parties' focus on identifying "core or essential" tasks, as opposed to everything else Mr Heron did.

103 First, in my respectful view, whether a task was essential is at best only a factor in determining what was, as a matter of fact, Mr Heron's "occupation". In determining "occupation", all his specific tasks are relevant, but which are the more important tasks may shed light on "occupation". However, essentiality *may* be determinative at a later point in the Court's analysis, being the effect of a disability on the likelihood of the life insured ever again engaging in the "occupation". If the extent of a disability prevents performance of an essential task, then there will no real likelihood of a return to the "occupation". I say "may" only to avoid suggesting that essentiality will be determinative in all cases. For example, if the disability prevents performance of what, taken individually, are non-essential tasks, the cumulative effect may also render a return to the "occupation" unlikely.

104 Second, in the present case, even Mr Heron accepted, as common sense would suggest, that his particular tasks changed with different jobs and he did not have to get down into trenches at every project. What is clear is that when he did so, he did it for

the purpose of managing or supervising the project. To the extent he may have picked up a shovel, the Court finds, to his credit, that he was doing so to "help out" and not because his occupation required him to undertake labouring tasks.

105 This conclusion is supported by the ordinary meaning (according to the *Macquarie Dictionary*, online ed, September 2024) of "manager" ("a person charged with the management or direction of an institution, a business or the like") and "supervisor" ("someone who supervises" being "to oversee (a process, work, workers, etc) during execution or performance; superintend; have the oversight and direction of").

106 Mr Heron's experience and qualifications were directed to, and enabled him to perform, the duties identified in [101] above.

107 Mr Heron accepted that the responsibilities in the resume remained accurate as at November 2021 (see [67] above).

108 This conclusion is supported by, and consistent with, the division of tasks set out in the application form (see [64] above) including the minimal amount of manual labour. Mr Heron accepted that this division of tasks also remained accurate at November 2021 (see [65] above).

109 I reject MMA's reliance on the position description because I do not consider it to be a document upon which the Court can rely with any confidence for these reasons:

(1) It is not Mr Heron's document;

(2) He could not recall whether the document was before him when he swore his affidavit (Tcpt, 31 January 2024, p.198(25-36)) and said he had no idea about it (Tcpt, 31 January 2024, p 199(37-38));

(3) The document is incomplete on its face. Under the heading "responsibilities [plural] and duties" it has "Responsibility 1 (Manual elements of the position)" but does not include any other responsibilities (which presumably would be non-manual).

(4) The strong emphasis on the manual work (the purpose of the position is described as "primarily a hands-on position") is inconsistent with the ordinary English meaning of the job title ("Construction Manager/Supervisor"), the application form, the resume and Mr Heron's own evidence, which consistently emphasised supervision and never suggested he had a "primarily hands-on" role. It was not even part of MMA's case that Mr Heron's job was primarily a manual one.

(5) The strong emphasis on manual work is also inconsistent with other parts of the claim form where Mr Heron is described as "construction/site supervisor" with duties being "supervision and some manual work" (see [78] above).

(6) Accepting Mr Heron's speculation, it is likely to have been prepared by Mr McCarthy (whose company owned the policy) and, by reason of it being cross-referenced in, and provided with, the claim form, there is also a real possibility it was prepared for the purposes of the claim. There is, therefore, a real risk that

this is a self-interested MMA document which should not be preferred over the application form and resume: the application form obviously not having been prepared for the claim, and there being no suggestion the resume had been prepared for that purpose.

110 I accept Zurich's submission that Mr Heron's evidence in re-examination about the tasks he performed in trenches appeared to exaggerate what he was doing. For example, it was only in re-examination that Mr Heron suggested that his work with MMA is 'completely different' to his work at Jonishan (Tcpt, 1 February 2024, p. 228(31-39)):

> "Well, the job I'm doing with Jonishan is solely supervision and just – just inspecting and liaising with foremen and meetings, and as I said, you know, if there's a little safety issue, a barrier or something like that, I will make sure it's – safety is priority. With MMA, it was completely different. I was hands on, down in deep trenches, a lot of sand, lot of running sand up to my knees."

111 This evidence is inconsistent with other documentary evidence, the videos and Mr Heron's evidence that at MMA he would just be "helping out" when he was performing manual tasks and that most of the digging was done by excavators.

112 However, to the extent it is relevant, the Court does find that on some (but not all) jobs on which he worked for MMA, one of his specific tasks in carrying out his supervisory role was to climb up and down ladders to inspect the work performed in the trenches. The Court also accepts that Mr Heron may have performed some manual work while in the trenches but finds this was an example of him "helping out" rather than being in the course of performing his supervisory role. However, consistently with what is set out in [57] and [59] above, Mr Heron's work supervising in and around trenches was a particular task in carrying out his job and not determinative of his occupation.

113 Finally, it is not necessary to consider Zurich's *Jones v Dunkel* submission. This is because Zurich has failed to identify any evidence that establishes Mr McCarthy was available to give evidence. MMA is now under the control of an administrator and no question was put to Mr Heron relevant to the issue of Mr McCarthy's availability. In any event, the Court has been able to reach its conclusions, to the extent they are adverse to MMA, without the need to draw an inference that Mr McCarthy's evidence on any particular point would not have assisted MMA.

Mr Heron's degree of disability

114 Clause 1b of the definition of "Own Occupation TPD" in the policy requires the Court to consider whether the life insured "is disabled at the end of the period of three consecutive months to such an extent that they are unlikely ever again to be able to engage in their 'Own Occupation'". This invites consideration of Mr Heron's condition on 21 February 2022, a point recognised by the parties (see [122] below). Nevertheless, in practical terms the debate was between Zurich's contention that Mr Heron had in effect resumed his "Own Occupation" and MMA's contention that Mr

Heron's current employment was materially different (especially in that it did not involve going into and out of trenches) and that Mr Heron was unable to return to his "Own Occupation" because that type of mobility was integral to it.

115 For the avoidance of doubt, Zurich sought to explain the significance of the term 'extent' in clause 1b:

> 1b. Is disabled at the end of the period of three consecutive months to such an **extent** that they are unlikely ever again to be able to engage in their 'Own Occupation'.

116 Zurich submitted, and the Court accepts, that the inclusion of the term "extent", means that while the insured may be "disabled" at the end of three consecutive months (the date of disability) that does not satisfy the definition. It instead requires consideration of whether the disability of the life insured is severe to such an extent that they are unlikely ever again to be able to engage in their "Own Occupation".

117 The parties agreed that the relevant test for determining whether Mr Heron was "unlikely ever" again to be able to engage in his "Own Occupation" is set out in [88]-[89] and [109] of the judgment of Leeming JA (with whom Beazley P and Emmett AJA agreed) in *TAL Life Ltd v **Sheutrim**; Metlife Insurance Ltd v Sheutrim* (2016) 91 NSWLR 439; [2016] NSWCA 68 (emphasis added):

> [88] It seems clear to me that the headnote of White has caused some subsequent decisions to depart from what was applied in Beverley (as well as by White J herself in Wiley). Further, I accept TAL's submission that in most cases any attempt to express a likelihood in percentage terms will have merely the illusion of mathematical precision. I also agree with TAL's submission that the bracketed words in the TAL policy tell against the construction in the headnote. Those words confirm **what flows from the ordinary meaning of the language of unlikely ever, namely, that where there is a real chance that a person may return to relevant work, even though it could not be said that a return to relevant work was more probable than not, the insurer would not be satisfied that the definition applies. "Unlikely ever" is, in this context, much stronger than "less than 50%".**
>
> [89] What follows is this. **To make an assessment of TPD, it is not sufficient for the insurer to be satisfied that it is more likely than not that the person will never return to relevant work. On the other hand, if there is merely a remote or speculative possibility that the person will at some time in the future return to relevant work, an insurer will not, acting reasonably and in compliance with its duties, be able to be satisfied that the person is not TPD.** The critical distinction is between possibilities which are readily contemplatable even though they may not be more probable than not, and possibilities which are remote or speculative. **A real chance that a person will return to relevant work, even if it is less than 50%, will preclude an Insured Person being unlikely ever to return to relevant work**.

118 Determining whether Mr Heron is unlikely ever again to be able to engage in his "Own Occupation" requires the Court to consider the nature and scope of the work that Mr Heron is now able to perform following the surgery. As submitted by Zurich, this is a forward looking inquiry from the date of disablement as to his ability to be able to engage in his "Own Occupation". Both parties agreed that this question was not to be determined by Mr Heron's own opinion of his current abilities but instead is to be determined by reference to the expert medical evidence provided to the Court. This is consistent with the approach adopted by Leeming JA in ***Shuetrim*** (emphasis added):

> [109] As has been seen, the primary judge saw Mr Shuetrim cross-examined about aspects of his statements, and found that he had exaggerated his symptoms. MetLife did not have that advantage in early 2015. Even so, I can see no breach of duty in an insurer relying upon medical and psychiatric evidence in order to reach the state of satisfaction that an Insured Person is unlikely ever to return to work. It cannot be the case that it is unreasonable, or in breach of an obligation of good faith and fair dealing

> (or for that matter of utmost good faith) for an insurer to rely not upon the inevitably self-serving statements by the insured and instead to rely upon professional opinion. To be clear, that view does not contain an implied criticism of the sincerity of Mr Shuetrim's statements. **I am instead agreeing with TAL's submission that "[o]ne thing Mr Shuetrim can't do and doesn't do in his statement is to tell us how he is going to be feeling in five, ten, 20, 30 years' time. It's impossible for Mr Shuetrim, without medical qualifications, to give an opinion about whether he's ever going to recover to the point of being able to work again".**

119 I respectfully agree with these dicta. However, in the context of the proper construction and application of clause 1b, the focus on Mr Heron's abilities must be a stepping stone to determining the questions invited by clause 1b:

(1) In what way(s) was Mr Heron disabled as at 21 February 2022? This requires an assessment of what he could and could not do when compared to an able-bodied person.

(2) Is (or are) the identified disability (or disabilities) as a result of illness or injury? There was no issue that causation was satisfied in this case.

(3) Is the extent of the disability (or disabilities) such that he is unlikely ever again to be able to engage in his "Own Occupation".

120 In contention in these proceedings is the nature of the work that Mr Heron is now able to perform following the surgery. As I have noted, the parties accepted this was not a matter to be determined by reference to Mr Heron's own opinions, but was to be decided with the benefit of expert medical opinion. Because the Court had the advantage of expert medical evidence, it is not necessary to set out the various expressions of medical opinion that were made in the course of Zurich's consideration of the claim.

Agreed facts and expert evidence – Dr Mitchell and Dr O'Sullivan

121 The Court's attention was drawn to various expert reports made by **Dr** Robin **Mitchell** and Dr O'Sullivan to assist with the determination of what Mr Heron is currently able to do. The Court also had the benefit of both doctors providing evidence concurrently in

the witness box. Dr O'Sullivan was called by the plaintiff. Dr Mitchell was called by the defendant. They both presented as thoughtful, well qualified and appropriately disinterested professional witnesses who were doing their best to assist the Court.

122 Both doctors had been provided with extracts of the videos depicting Mr Heron conducting activities at his home and at the site. The parties had also agreed a set of topics upon which to examine the doctors, being:

(a) Having regard to any disability caused by Mr Heron's hip condition as at February 2022, was there a real and not speculative chance he was capable of returning to perform any or all of the duties he was performing for MMA immediately before his surgery either at any time in the future or by the age of 65.

(b) For any of the duties Mr Heron had a real and not speculative chance of being capable of returning to as at February 2022:

(i) Is there an increased risk of injury to Mr Heron caused by his hip condition?

(ii) If so, what is the nature of that increased risk caused by his hip condition?

(iii) If so, does that opinion hold if he is performing the task carefully?

123 There was no issue as to the doctors' expertise. Dr O'Sullivan is an orthopaedic surgeon whose practice is largely centred around both primary and revision hip replacement surgery. It was also Dr O'Sullivan who had performed the surgery on Mr Heron. Dr Mitchell is an Occupational Physician who conducted an independent medico-legal examination on Mr Heron on 17 February 2023 and 7 March 2023. Dr Mitchell accepted that he would defer to Dr O'Sullivan's opinion on questions specifically relevant to hip replacements. The last time Dr O'Sullivan saw Mr Heron was 12 months after the surgery. Dr Mitchell last saw Mr Heron on 7 March 2023.

124 Before the doctors were cross-examined, they had a discussion to identify matters of agreement between them. Dr Mitchell informed the Court that they agreed that there were some aspects of Mr Heron's work with MMA which posed an unacceptable risk of a fall with the possible consequence of Mr Heron suffering a fractural dislocation. However, there were other non-physical aspects of Mr Heron's work with MMA which did not pose any risk to Mr Heron. Both doctors also agreed that Mr Heron could safely undertake the various activities involved in his current work at the site for Jonishan.

125 Dr O'Sullivan gave evidence of two possible risks to which he believed Mr Heron would be exposed if he continued to conduct the work at MMA which Mr Heron had described to him – in particular, that he was working in trenches, alongside pipes and walking on uneven and wet ground:

(1) His primary concern was that Mr Heron would fall and suffer a "periprosthetic fracture". Dr O'Sullivan explained a "periprosthetic fracture" refers to a fracture which occurs around the area where the implant was inserted in the hip. Dr

O'Sullivan said that the consequences of such a fracture would lead to further revision surgery which increases the risk of infection and it is sometimes the case that such fractures do not heal even after revision surgery. However, Dr O'Sullivan described the occurrence of such fractures as 'rare', only occurring in 1% to 2% of patients who are engaging in 'normal activities' and fall in the course of such activities. Dr O'Sullivan said that Mr Heron's work would only increase the risk of a fall but that the risk of a fracture because of that fall would not change.

(2) Dr O'Sullivan was also concerned about Mr Heron being required to work in confined spaces, often on his knees. This could potentially place Mr Heron's hip in a position which would lead to a dislocation of the hip. However, Dr O'Sullivan also noted that dislocations only occur in 1% of all patients who receive hip replacements.

126 Dr O'Sullivan explained to me that the position of danger for a hip replacement patient is if the hip is too flexed through the knee bring brought up to the chest, the knee going across the midline (known as adduction) and/or the leg or knee being internally rotated.

127 Dr Mitchell agreed with Dr O'Sullivan that the aspects of Mr Heron's work with MMA which required him to conduct work in trenches and in confined spaces would increase the risk of injury to his hip. They both believed that working in such conditions "posed an unacceptable risk of a fall" as someone could be careful with how they worked but still be at a high risk of falling over when working on wet and uneven ground.

128 Upon further questioning by Mr Lloyd SC as to the nature of the risks identified by Dr O'Sullivan referred to at [125] above, both doctors accepted that while Mr Heron falling would create a risk of a periprosthetic fracture occurring, there is nothing about Mr Heron having the surgery that would put Mr Heron at a greater risk of fracture. It was also accepted that the risk of a fracture is a different risk compared to the risk of dislocation, which is a risk for which the probability of occurring for a patient increases by the very fact they have had hip replacement surgery. Dr O'Sullivan mentioned that dislocation in native (non-replaced) hips was extremely rare, usually occurring in motor accidents.

129 Both doctors also accepted the proposition put by Mr Lloyd SC that while there is a risk of harm associated with Mr Heron walking in trenches and confined and wet spaces, there is a real and not speculative chance that he would physically be able to do those things after the surgery. As Dr O'Sullivan said, "I think he's physically able to do it [walking in trenches in a wet and damp area]. The question is whether it's a good idea that he does it." (Tcpt, 19 March 2024 p.290(5)). Mr Lloyd SC suggested, and Dr O'Sullivan agreed, correctly in my respectful view, that this opinion went to the prudence of doing something, rather than ability to do it.

Response to videos

130 Mr Lloyd SC proceeded to show both doctors various extracts of the videos. Among other things, the extracts showed Mr Heron carrying various items including fence post footings weighing between 5-7kg, walking on ungraded and sloped surfaces, conducting work on his knees and appearing to jump down from the tray of his ute rather than use steps of some kind.

131 Both doctors agreed that Mr Heron appeared to be functioning well for someone who had previously undergone hip replacement surgery.

Doctors' understanding of Mr Heron's role at MMA

132 Both doctors were questioned by Mr Lloyd SC as to their understanding of the nature of the work conducted by Mr Heron at MMA. Dr O'Sullivan said Mr Heron:

> "… described his job as laying pipeline, which involved getting down into trenches, walking along within (sic) these trenches, often on uneven ground and often on a concrete pipe, working in quite confined spaces, often with power tools like angle grinders, that sort of thing." (Tcpt, 19 March 2024, p. 280(50)).

133 Dr O'Sullivan accepted that when he wrote his expert report on 8 February 2024 and described the nature of Mr Heron's role, the description provided was based on information Mr Heron provided to Mr O'Sullivan.

134 Mr Lloyd SC then asked the witnesses to assume that various duties and tasks (subsequently listed) were a part of Mr Heron's job at MMA and answer if there was a real and not speculative chance that he could return to doing them. Both witnesses agreed that Mr Heron would have been able to return to these tasks (Tcpt. 19 March 2024, pp 282-285):

- Walking up and down stairs.
- Walking over uneven ground.
- Ascending and descending sloped ground.
- Using a ladder.
- Interpreting plans and administrative work.
- Planning, construction methods and procedures.
- Supervision based tasks and given directions to people.
- Administrative exercises, knowledge of regulations, laws, bylaws.
- Using a shovel.
- Hand digging on the ground on soft soil even if it was in a confined space.
- Erecting light cyclone style fencing.
- Driving for extended periods.

- Incidental lifting tasks for objects weighing between 3 to 4 kg's.
- Attaching chains and ropes to various machinery.
- Bending down.
- Working 10 hour days.
- Walking around a confined area (see Tcpt, 19 March 2024, p. 289(38)-(50))

Mr Heron's current capabilities – MMA's evidence and submissions

135 MMA submitted that it would be erroneous for the Court to place significant weight on what Mr Heron is now capable of doing in his work at Jonishan because there are no parallels between the work undertaken by Mr Heron at MMA and at the site. The absence of the need for Mr Heron to enter into trenches in his current role at Jonishan was said to be a critical difference between the two roles.

136 MMA contends that the medical conclusion that Mr Heron returning to a trench would create an "unacceptable risk of a fall" (Tcpt, 19 March 2024, p.261(35)) and the associated risks of injury to Mr Heron, establish the he is unable to return to his "Own Occupation". Mr Gollan also sought to rely on Dr Mitchell's expertise as an occupational physician and his assessment that there were some aspects of his job which he would not certify Mr Heron to return to because there was an increased risk of further injury to his hip (Tcpt, 19 March 2024, 264(17)). However, no further questions were asked as to which aspects of Mr Heron's role with MMA Dr Mitchell would not certify Mr Heron to return.

137 Mr Gollan also submitted that Dr O'Sullivan's evidence suggested that no matter how careful Mr Heron was in a trench he would still be at an unacceptable risk. Particular attention was drawn to this response provided by Dr O'Sullivan to my question on what the doctors meant by the phrase 'unacceptable risk of a fall' (Tcpt, 19 March 2024, p. 266(30)-(48)):

> HIS HONOUR: Mr Gollan was asking you some questions about the current job. I'd like to go back to what you told me you agreed on at the start, where you said that as to the first job, you had both agreed that there were some aspects which involved and my note is you said, "An unacceptable risk of a fall with consequential risk of damage to the prosthesis." Now I'd like to just hone in on what you say those aspects are, and I'd like to hear from both of you about that, up to the extent you don't agree. Let me ask this question first - when you talk about unacceptable risk of a fall, does that assume someone who is taking reasonable care doing whatever it is they're doing?
>
> WITNESS O'SULLIVAN: I think the work conditions, like going down into the trenches and walking on pipes and things like that, the way it was described to me suggested that you could be as careful as you liked, but there was still a risk of slipping and falling. Because often the ground is wet, often there's uneven soil, there might be soil or sand on top of the - the concrete trench - concrete pipes, I'm sorry - that would, you know, obviously lead to a - a falls risk. So my primary concern was that aspect of his work - was the going down into the trenches, walking along pipes and - and work of that nature.

138 Attention was also drawn to this exchange (see Tcpt, 19 March 2024, p.267 (32)-(40)):

> HIS HONOUR: Dr O'Sullivan, you mentioned the risk of walking along the uneven ground and a wet pipe. That's one aspect of "some aspects", are there any other aspects that you had in mind when the answer was given that you'd agree that there were "some aspects" that involved an unacceptable risk of a fall?

> WITNESS O'SULLIVAN: The other aspect was getting down into confined spaces, and getting into an awkward position, which is more of risk of dislocation rather than falls.

139 Mr Gollan took issue with the distinction attempted to be drawn by Mr Lloyd SC that just because prudential considerations suggested Mr Heron should not return to trench work, this did not mean that he was physically unable to return to work requiring entry into a trench. Mr Gollan pointed to McHugh J's judgment in *X v The Commonwealth* (1999) 200 CLR 177 at [33]; [1999] HCA 3 where his Honour said:

> It would be extremely artificial to draw a distinction between a physical capability to perform a task and the safety factors relevant to that task in determining the inherent requirements of any particular employment. That is because employment is not a mere physical activity in which the employee participates as an automaton. It takes place in a social, legal and economic context. Unstated, but legitimate, employment requirements may stem from this context. It is therefore always permissible to have regard to this context when determining the inherent requirements of a particular employment.

140 It was submitted that this authority demonstrates prudential matters cannot be hived off from considerations of whether someone is able to perform their occupation. It is on this basis that Mr Gollan submitted that the fact that Mr Heron's work required him to be in a trench and that the doctors had expressed concerns about Mr Heron performing work in a trench meant that Mr Heron was unlikely ever again to be able to return to his "Own Occupation".

Mr Heron's current capabilities – Zurich's evidence and submissions

Video evidence

141 On or around 16 October 2023, FERMS entered a sub-contract arrangement with **Jonishan** for Mr Heron to work as a Project Supervisor. Between 16 October 2023 to 31 December 2023 Mr Heron charged Jonishan for 506 hours of work, described as 'supervisory' work, at a total cost of $55,660.00.

142 The scope of the tasks Mr Heron is required to perform for Jonishan is contested. To assist the Court to resolve this issue, the Court was shown extracts from several hours of the videos showing Mr Heron doing work for Jonishan between December 2023 and January 2024. The Court was also assisted by the evidence provided by Mr Heron during cross-examination and his affidavit affirmed 16 January 2024.

143 Zurich submits that the basis upon which this surveillance evidence is relevant is reflected in the judgment of McPherson JA in *McArthur v Mercantile Mutual Life Insurance Co Ltd* [2002] 2 Qd R 197, 208 [23]; [2001] QCA 317 where his Honour stated:

> [23] …Even if it is the first of those two dates, the effect of that evidence was, as the reasons of Muir J. demonstrate, to show that at that date the plaintiff was not totally and permanently disabled within the meaning of the definition in para. (b)(ii). This accords with the principle that the court does not speculate when it may know. It is quite true, said Scott L.J. in *Williamson v. John I. Thornycroft & Co.* [1940] 2 KB 658, 659:
>
> "that the measure of damages has to be assessed as at that date, but courts in assessing damages are entitled to inform their minds of circumstances which have arisen since the cause of action accrued and throw light upon the reality of the case."

The decision in that case was approved in *Willis v. The Commonwealth* (1946) 73 CLR 105.

144 It was submitted that this surveillance evidence is useful to the Court to the extent it enables the Court to see what Mr Heron can now perform in his current role after the surgery, which enables the Court to infer that as at 21 February 2022 he was not unlikely ever again to be able to do those things. I accept that submission.

145 Zurich set out at paragraph 89 of its closing submissions all of the tasks which it contended the videos incontrovertibly demonstrated Mr Heron was now able to do. During the hearing, Zurich also tendered a detailed summary of all of the activities the videos demonstrated Mr Heron undertaking. On the basis that the Court concludes that the list of activities the doctors agree Mr Heron is now capable of doing after his surgery (see [134] above) is dispositive of MMA's claim, it is unnecessary in these reasons to set out that paragraph and summary in full. However, I record that the Court accepts that these accurately record Mr Heron's current capabilities.

Expert evidence

146 Zurich submits that the expert evidence of Dr Mitchell and Dr O'Sullivan identified that as at February 2022, Mr Heron was only restricted from being able to return to what they understood were his duties with MMA in two respects:

(1) Walking along concrete pipes in trenches; and

(2) Certain tasks in the trenches which required Mr Heron to work in confined spaces and place his hip in an 'awkward position.'

147 These risks are said to be concerned with only a subset of trenchwork. In other words, it is not the fact of Mr Heron being in a trench which caused concern to the experts, it is only a subset of work in trenches which the doctors were concerned about.

148 Zurich accepted that Mr Heron was unlikely ever again to be able to walk along pipes in trenches as at 12 February 2022, however it said this concession was irrelevant based on the absence of evidence that Mr Heron had to walk along pipes in trenches (Tcpt, 19 March 2024, p. 266(40)-267(15)).

149 Zurich also submitted that the experts agreed Mr Heron had a real and not speculative chance as of 12 February 2022 of returning to work which involved using ladders for "whatever purpose", work which involved being in a confined space and work which involved being able to "get down on to the ground, walking along pipes and – work of that nature of that work (Tcpt, 19 March 2024, 283(7)-(9)). It was submitted that Dr O'Sullivan also stated that Mr Heron had a real and not speculative chance of being able to walk around a confined and wet space (Tcpt, 19 March 2024, 289 (8)-(50)), although I do not overlook that Dr O'Sullivan maintained his prudential concern about such activity.

150 Mr Lloyd SC submitted that Dr O'Sullivan's concern of Mr Heron placing his hip in the position of danger, namely "if the hip is too flexed, if the knee is brought up to the chest, if the knee is above the midline, if the knee is moved across the midline," is not a

concern which the Court needs to address (Tcpt, 19 March 2024, 284(27)-(32)). This is because Zurich submits that none of the evidence of what Mr Heron says he was performing for MMA would require Mr Heron to place himself in those positions.

151 It was said that none of the activities Mr Heron referred to during re-examination that he had to do in a trench would excite the sorts of concerns Dr O'Sullivan had expressed. For example, excavating areas for the trench (not physically done by Mr Heron but by excavators), checking levels in a wet and sometimes sandy environment in the trench, getting into the trench by using ladders and a rope for safety, and cleaning services with a shovel, were never suggested to be activities that would put Mr Heron in a position of concern. To the contrary, it was submitted that the doctors' evidence supports that Mr Heron is capable of doing all of those tasks.

152 Zurich also sought to emphasise that the doctors agreed (and the Court finds) that Mr Heron had made an "excellent recovery" for a man of his age and that he had "a pretty impressive level of functioning for a man of his age" (see Tcpt, 19 March 2024, p.279 (34)-(38) and p.280(23)-(25). This submission was said to be borne out by the variety of activities that Mr Heron is now performing in his role at Jonishan and the vigorous way in which he goes about his duties.

153 Mr Lloyd SC also noted in his closing written submissions that the doctors accepted that there would be no difficulty with Mr Heron getting into trenches by using a ladder, there was no difficulty with Mr Heron being on the ground doing some digging of soft surfaces (Tcpt, 19 March 2024, p.284(17) and p.284(47) and using a shovel (Tcpt, 19 March 2024, p.283, (39)-(45)). It was submitted that any of the concerns about Mr Heron and work in trenches was one of risk, and as such was described as a prudential question rather than a physical one. That means that Mr Heron could physically do work in trenches.

154 Zurich submitted that Dr O'Sullivan's evidence that dislocation occurred infrequently, in about 0.5% of patients who undergo hip replacement surgery and usually when the leg is in an awkward position, underscores how infrequent the risk of injury would be if Mr Heron was to return to a trench environment (Tcpt, 19 March 2024, 287(44)-(49)). Consistent with the submission at [148], the absence of an attempt to identify when and how Mr Heron's work required him to put his leg in an awkward position shows that there was not a serious risk of dislocation.

155 Mr Lloyd SC also reiterated the range of tasks which were submitted Mr Heron did with MMA and the doctors acceptance that there was a real and not speculative chance he could return to doing those activities (see [134] above).

156 Finally, Mr Lloyd SC argued that while, consistent with *Sheutrim*, Mr Heron's evidence is not dispositive of what he has a real and not speculative chance of being able to do, Mr Heron's acceptance that his ability to inspect trenches was 'not a problem' (Tcpt, 31 January 2024, p.210(5)) is relevant. It is consistent with the evidence of the doctors.

Mr Heron's current capabilities and degree of disability – consideration

157 The videos of Mr Heron working at the site clearly show activities Mr Heron is now able to perform without difficulty. Mr Gollan sought to reject the utility of this evidence on the basis that the work Mr Heron was previously performing for MMA and now for Jonishan has "no equivalence", the work is "vastly different." I accept Zurich's submission that while the exact tasks performed by Mr Heron in the two roles are not identical, there were significant similarities in that both jobs required Mr Heron to be a 'supervisor' of construction work, the remuneration and hours were the same, and the industries in which the work was being done was materially similar. Therefore, the videos are relevant to the question of what he may be able to do now, and therefore to what he might have been able to do (or not do) viewed prospectively from 12 February 2022.

158 The Court finds that Mr Heron is now able safely to perform all of the activities identified in [134], [145] and [153] above. However, as I have said in [119] above, that finding is a stepping stone to the essential question of disability. The area upon which the parties focussed was working in trenches. Based on the medical evidence, the Court finds that Mr Heron can safely use a ladder to go down into and up out of a trench for the purposes of supervising or inspecting work in a trench. This conclusion is fortified by Mr Heron's own evidence of his situation after the surgery that "inspecting trenches, not a problem. It's…all the manual work involved with it" (Tcpt, 31 January 2024, 210(5)).

159 However, the Court also finds by reference to the medical evidence that there are some activities that Mr Heron cannot safely undertake in a trench. While a compendious finding is neither possible nor necessary, those activities include walking along a concrete pipe in a trench and undertaking work in a confined space in a trench that might put his hip into an "awkward" position. The Court finds that for the purposes of

clause 1b of the definition of “Own Occupation TPD” his disability, being a condition which is the result of his illness or injury, is the post-surgical condition of his hip which does not permit him to undertake those activities.

160 The next issue is whether by reason of that disability, Mr Heron was disabled to such an extent as at 12 February 2022 that he was unlikely ever again to be able to engage in his “Own Occupation” as found in [101] above. The Court finds that he was not disabled to such an extent for three reasons.

161 First, Mr Heron himself accepted that even when working at MMA, whether or not he had to get into a trench depended on the particular job and not every job required it. To use the language of the parties, the Court finds that the ability to do the things the Court has found Mr Heron cannot do in [158] above is not an essential ability for him to be able to engage in his “Own Occupation” as found in [101] above.

162 Second, it is uncontroversial that the onus was on MMA to prove the facts to demonstrate that the policy should respond. There was no evidence adduced by MMA that Mr Heron would not be able to engage in his “Own Occupation” as found in [101] above by reason of his inability to undertake the activities identified in [159] above.

163 Third, the Court finds that Mr Heron is currently engaged in his “Own Occupation” as found in [101] above by undertaking his current work with Jonishan. That is a matter which is relevant to the assessment of unlikelihood for the purposes of clause 1b as at 12 February 2022 (see [143] above).

164 Based on the matters referred to in the preceding three paragraphs, the Court finds that as at 12 February 2022 the extent of Mr Heron’s disability (being that identified in [158] above) was not such that it was unlikely that he would ever again be able to engage in his “Own Occupation” as found in [101] above. I add, for completeness, that I would have reached the same conclusion even if the evidence was that Mr Heron could not safely enter, work in and exit trenches at all.

165 The Court’s conclusion may be further explained by reference to another hypothetical. This example is intended to illustrate one aspect of the importance of the word “Total” in the expression “Own Occupation TPD”, the policy’s “glossary of special terms” defining TPD to mean, in this context, “total and permanent disability”.

166 “Total” highlights the commercial purpose of the policy as being to provide a benefit when the effect of the disability is completely (totally) to foreclose the life insured’s participation in their “Own Occupation”. The Court has found that Mr Heron’s proven disability does not have that effect in relation to his “Own Occupation” of “Construction Manager/Project Supervisor” as set out in [101] above. However, the outcome would have been different if, for example, Mr Heron had not enjoyed the excellent post-

operative outcome which he has had, and was instead left, for example, unable to walk more than a short distance without discomfort and needing to use a walking stick, despite the best efforts of his surgeon and physiotherapists.

167 Unlike the activity now prevented by his proven disability (which the Court has concluded is not essential for him to be able to engage in his “Own Occupation”), the need to be able to walk safely and easily, including over dirt slopes and uneven ground is self-evidently an essential part of the supervisory and management role of Mr Heron’s “Own Occupation” because such conditions are inevitably part of a construction site. While his current disability does not shut Mr Heron out of the complete universe of employment available in his “Own Occupation” (as is demonstrated by his work with Jonishan), a post-surgical disability of the kind I have postulated would have meant he could never return to his “Own Occupation”. In this hypothetical scenario, the policy would have responded.

Conclusion

168 The further amended statement of claim will be dismissed and, in the absence of any special application, costs should follow the event.

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Amendments

08 October 2024 - change to syntax in paragraphs 134 and 155

Decision last updated: 08 October 2024