Lynch v Bredbo - [2025] NSWDC 54

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District Court

New South Wales

Medium Neutral Citation: **Lynch v Bredbo Pty Ltd [2025] NSWDC 54**

Hearing dates: 30 October and 7 November 2024

Date of orders: 12 March 2025

Decision date: 12 March 2025

Jurisdiction: Civil

Before: Gibson DCJ

Decision:

(1) Cross-Claim dismissed.

(2) Costs reserved.

(3) Liberty to apply.

(4) Exhibits retained until further order.

Catchwords: INSURANCE – passenger injured in vehicle accident on rural property claims damages for personal injury – cross-claim by driver against the property's insurer – whether the injury arose out of or in connection with the insured's business – whether injury occurred during a recreational hunting trip - Firearms exclusion, Reasonable Precautions and Legality Condition clauses of the Policy considered – whether insurer entitled to deny indemnity on the ground of fraud – cross-claim dismissed

Legislation Cited: *Prevention of Cruelty to Animals Act 1979* (NSW), s 5

Insurance Contracts Act 1984 (Cth), ss 54, 56

Uniform Civil Procedure Rules 2005 (NSW), Part 24

Evidence Act 1995 (NSW), ss 136, 140

Cases Cited:

Alexander Raymond Walton v The Colonial Mutual Life Assurance Society Limited [2004] NSWSC 616

Amalgamated Television Services Pty Ltd v Marsden [2002] NSWCA 419

Angel v Hawkesbury City Council [2008] NSWCA 130; 20 08 ATR 81-955

Barrie Toepfer Earthmoving and Land Management v CGU Insurance Ltd [2016] NSWCA 67

Certain Underwriters at Lloyds of London v Dhillion Scaffolding Pty Ltd [2022] VSCA 92

Craig v Associated National Insurance Co Limited [1984] 1 Qd R 209; 3 ANZ Insurance Cases 60-553

CSR Limited v Adecco (Australia) Pty Ltd [2017] NSWCA 121

ET-China.com International Holdings Ltd v Cheung [2021] NSWCA 24

Fox v Percy (2003) 214 CLR 118

In the Matter of Colorado Products Pty Ltd (in prov liq) [20 14] NSWSC 789

Jones v Dunkel (1959) 101 CLR 298

Kmart Australia Limited v Marmara [2024] NSWCA 249

Liberty Mutual Insurance Company Australian Branch v Icon Co (NSW) Pty Ltd [2021] FCAFC 126

Malos v Malos [2003] NSWSC 118; 44 ACSR 511

McCann v Switzerland Insurance Australia Ltd and Ors (2 000) 203 CLR 579

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

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

QBE Insurance Australia Ltd v Vasic [2010] NSWCA 166

R v Dursun [2000] NSWCCA 68

Ritchie v Advanced Plumbing and Drains Pty Ltd [2022] NSWSC 330

Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41) [2023] FCA 555

Rolleston v Insurance Australia Ltd [2016] NSWSC 1561

Sgro v Australian Associated Motor Insurers Ltd [2015] NSWCA 262; (2015) 91 NSWLR 325

Sweeney v Boylan Nominees Pty Ltd [2006] HCA 19; 226 CLR 161

Sydney Trains v Argo Syndicate AMA 1200 [2024] NSWCA 101

Thornton v Telegraph Media Group Ltd [2011] EWHC 1884 (QB)

To v Australian Associated Motor Insurers Ltd [2001] VSCA 48

VACC Insurance v BP Australia Ltd (1999) 47 NSWLR 716

Wilkie v Gordian Runoff Ltd (2005) 221 CLR 522

Will v Brighton [2020] NSWCA 355; (2020) 104 NSWLR 170

Woolworths Ltd v McQuillan [2017] NSWCA 202

Category: Principal judgment

Parties: Mark Geoffrey Streeter (Cross-Claimant)
Insurance Australia Limited (Cross-Defendant)

Representation: Counsel:
Mr C Freeman (Cross-Claimant)
Mr H Neal (Cross-Defendant)

Solicitors:
Williamson Barwick (Cross-Claimant)
Meridian Lawyers (Cross-Defendant)

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Judgment

Introduction

1. The plaintiff, Stephen Lynch (who is now deceased), commenced proceedings on 5 May 2023 against Bredbo Pty Ltd (hereafter "Bredbo") and a director of Bredbo, Mark Streeter, for damages for injuries he suffered on 9 September 2022 when a vehicle driven by Mr Streeter on Bredbo's farm property overturned. Mr Lynch's claim against Bredbo has been resolved for $78,591.56 inclusive of costs.

2. Mr Streeter brought a cross-claim against Insurance Australia Limited ("IAL") for indemnity for this sum, arising from a "Countrypak" insurance policy IAL entered into with Bredbo for the period 31 July 2022 to 31 July 2023. That is the claim which is the subject of this judgment.

The issues for determination

3. In the course of their efficient and helpful preparation and presentation of their respective clients' claims, Mr Freeman and Mr Neal provided me with Schedules of Issues which I have refined into the questions set out below. As both counsel referred to the current pleading of the cross-claim as the "SOC" and the defence to the cross-claim as "ADCC" in their submissions, I have employed these acronyms as well.

4. These questions are:

    1. Did the plaintiff's personal injury arise out of Bredbo's "Business" (as the term "Business" is defined in the Policy) (SOC at 9(c)(i))?

    2. Was Mr Lynch's personal injury suffered in connection with Bredbo's Business arising from:

        1. the ownership or occupancy of the land, building or structure;

        2. private work carried out for the Insured or by its employees;

        3. and/or otherwise (SOC at paragraph 9(c)(ii))?

    3. When the accident occurred on the evening of 9 September 2022, while the cross-claimant was driving a farm vehicle known as a "Can-Am" over farm paddocks with the plaintiff as his passenger, was the accident one which occurred on a recreational hunting trip? (ADCC at paragraph 9(d)(ii)).

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4. Does the Firearms Exclusion in the Policy apply (ADCC at paragraph 9(d)(i))?

5. Did the cross-claimant hit a pig, and if so, did he intend to hit a pig (ADCC at paragraph 9(d)(iii)). or was it a reckless act?

6. If the cross-claimant deliberately drove the vehicle into contact with a pig, was this conduct amounting to a breach of:

    1. section 5 of the *Prevention of Cruelty to Animals Act 1979* (NSW) ; and/or

    2. the Legality Condition of the Policy; and/or

    3. the Reasonable Precautions Condition of the Policy, including whether Mr Streeter knew that the absence of the passenger door of the Can-Am vehicle was a danger (ADCC at paragraph 9(d)(iv)(D))?

7. At the time Mr Streeter submitted each of two claim forms, was he aware that the injury to Mr Lynch occurred when he deliberately (or recklessly, or negligently) hit a pig causing the vehicle to turn over (ADCC at paragraph 9(d)(iv)(D))?

8. As to the first of these claim forms, dated 6 October 2022 (particularised at paragraph 9A of the ADCC), were Mr Streeter's statements:

    1. deliberately misleading because he omitted to tell the cross-defendant that he deliberately, recklessly or negligently hit a pig during a recreational hunting expedition; and/or

    2. made by him with the dishonest intent of inducing a false belief in IAL for the purpose of obtaining an indemnity under the policy and /or made recklessly?

9. As to the second of these claim forms, dated 10 October 2022 (particularised at paragraph 9B of the ADCC), were Mr Streeter's statements:

    1. deliberately misleading because he omitted to tell IAL that he deliberately, recklessly or negligently hit a pig during a recreational hunting expedition; and/or

    2. made by the cross-claimant with the dishonest intent of inducing a false belief in IAL for the purpose of obtaining an indemnity under the policy and/or made recklessly (ADCC at paragraph 9(d)(iv)(B), (C) and (D)); and/or

    3. made in circumstances where his dishonesty was compounded by his knowledge of the contents of videos taken by Mr Lynch and a letter from Mr Lynch's solicitors?

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10. Did the cross-claimant, Mr Streeter, by reason of the contents of his email dated 24 April 2023 (particularised at paragraph 9(e) of the ADCC), act with the dishonest intent of inducing a false belief in the cross-defendant for the purpose of obtaining indemnity under the Policy, and/or amount to recklessness?

11. If yes to 8, 9 or 10 above (or any part thereof), was the cross-claimant Mr Streeter' s claim for indemnity under the Policy fraudulently made, entitling the cross-defendant to refuse to pay the claim pursuant to section 56 of the *Insurance Contracts Act 1984* (Cth) , and/or at common law? (ADCC at paragraph 9(d)(iv))?

12. Is the cross-claimant entitled to indemnity from IAL pursuant to the Policy in relation to the cross-claimant's liability to the plaintiff for his personal injuries, including legal costs and disbursements (SOC at paragraph 9(d))?

The background to the claim

5. Mr Streeter and his brother-in-law, Mr Cornford, were each s of Bredbo Pty Ltd, a corporate structure set up as what is sometimes referred to as a "family company" (*Malos v Malos* [2003] NSWSC 118; 44 ACSR 511). In their capacity as directors and shareholders of Bredbo, they decided that the company should purchase a farm consisting of a homestead and eight paddocks with cattle and sheep (Exhibit A p 67). The contract for purchase was entered into on 12 July 2021, for the sum of $1,200,000.

6. Shortly thereafter, as is not uncommon in corporations with this kind of family structure (*Mal os v Malos* at [27] – [30]), Mr Streeter and Mr Cornford had a falling-out. They decided to sell the farm. It was necessary, however, to carry out work on the homestead to make the property ready for sale. This included painting. Mr Streeter, a solicitor, suggested that he could hire one of his clients, Mr Lynch, as he was a painter. Mr Streeter had first met Mr Lynch around November 2021 when he had sought advice about a dispute with his former domestic partner (Exhibit A p 76). In August 2022, Mr Streeter and Mr Lynch agreed that Mr Lynch would undertake the necessary painting of the homestead and live on the property while he did this work (Exhibit A p 76).

7. Mr Lynch arrived at the farm on 29 August 2022. He undertook painting work for which he issued two invoices, both made out to "Streeter Law" (Exhibit A pp 77 and 224-225). The first of these, for $8,797.00, is dated 5 September 2022. The second, for $3,155.00, is dated 15 September 2022, which means it was issued after Mr Lynch's accident on 9 September 2022.

8. On 2 September 2022, Mr Streeter advised Mr Lynch by text message that he was coming down for the weekend and planned to do some shooting. This message is not in the tender bundle, but Mr Lynch's reply makes its contents clear.

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9. Mr Lynch not only agreed to this plan, saying that he was taking Sunday off as he had worked long hours during the week, but added further information which indicated what he understood the purpose of this trip would be. First, he said he had been shooting since the age of 13 and, second, he added that he had been told by "Andrew" (Mr Cornford) that Mr Streeter was "a good huntsman". Mr Streeter replied that he would be bringing his gun down and that "options abound" for a hunting trip on Sunday or Monday evening (Exhibit A p 84). Underlining the purpose of the trip, Mr Streeter then sent a further text message stating that "apparently there are 16+ deer on the top paddock & any pigs we can nuke - also we have licence to reduce the grass thieves (aka kangaroos) - looking forward to it – the moo is wanting [scil: should be "moon is waning"] so timing is perfect." Mr Lynch replied, "I will look forward to it Sir".

10. Mr Streeter arrived on 4 September 2022 as planned, but before arriving, he sent a further text message to Mr Lynch explaining that he wanted to postpone their proposed excursion (Exhibit A p 84), because he had brought his godson down with him and wanted to take him and another young person out instead of Mr Lynch. His precise words were that he wanted to take "the young ones this eve to shoot & you & I go out tomorrow eve?" (Exhibit A p 84). Mr Lynch agreed. Mr Streeter and his young companions went out that evening as planned and his trip with Mr Lynch accordingly was put off. It was later rescheduled to the following weekend.

11. On the night of 9 September 2022, Mr Streeter arrived at the property at around 7:00 PM and, after dinner with Mr Lynch (Exhibit A pp 77-78), made preparations for their outing, including stowing a rifle in the Can-Am, before taking his position in the driver's seat.

12. According to his statement of claim, Mr Lynch had not seen the Can-Am vehicle before. He was not, therefore, aware that there were any unusual features for this vehicle, such as the passenger door being missing. Mr Lynch also sets out that, in order to get into the vehicle, they had to get in through the passenger side as there was a problem with the driver's door.

13. Mr Lynch and Mr Streeter put on their seatbelts, and they then set off on their trip, the purpose of which is a matter of significant dispute.

14. Mr Lynch says, in paragraph 7 of his affidavit, that Mr Streeter invited him to go pig shooting. However, Mr Streeter says that after dinner, he said to Mr Lynch:

> "Would you like to go out and see the Property? There is a lot of wildlife out and about at night and we might see kangaroos, pigs. Deer. Goats, as well as the stock." (Exhibit A, p 78)

Mr Lynch takes two videos of the trip

15. Mr Lynch had his mobile phone with him and, when Mr Streeter commenced to drive the vehicle, he took the first of two videos.

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16. Care must be taken by the court when viewing photographs, videos, CCTV footage and surveillance material: *Angel v Hawkesbury City Council* [2008] NSWCA 130; 2008 ATR 81-955 at [68] – [93] . However, there is no hard-and-fast rule that expert evidence is required, so the findings will turn on the relevant facts: *Sydney Trains v Argo Syndicate AMA 1200* [2024] NSWCA 101 at [15] .

17. The first video shows how dark it was on the property. Mr Lynch can be heard to say, "We're out shooting pigs and kangaroo" and "hopefully we'll get a shot away and we'll get a take". (Exhibit 1 p 133). The vehicle's headlights show some bush areas in front of the car.

18. Mr Lynch's language is quite clear in the first video. There are problems in interpreting what occurred in the second video because Mr Lynch's phone flew out of his hand at the time of the accident, which occurred while he was videoing the scene in front of him. The parties have tendered an expert report from Mr Stephen Hope, who prepared the video and a transcript as follows:

> "4.2 I discovered that the video had been recorded on a mobile phone and the vision content was 480 x 848 pixels in portrait orientation with stereo audio. The duration was 2 minutes and 10 seconds. The codecs were MPEG-4, AAC audio and H.264 video.
>
> 4.3 The video was recorded at night from an initially moving 'quad agricultural vehicle' looking forward as the vehicle pursued pigs across a field. At 11 seconds the vehicle rolls to the left on its side and one of the occupants can be heard saying his 'leg is broke'.
>
> 4.4 I then opened the video in my digital audio workstation, DAW, software so I could apply appropriate audio applications to reduce background noise and increase the volume of the dialogue that was recorded.
>
> 4.5 I increased the gain of the audio after the 11 seconds point in the video to the end of the recording by +30dB and applied Clarity Vx Pro noise reduction to minimize the background noise which included engine noise. I saved the resultant audio as an audio WAV file named WhatsApp Video 2023-12-05 at 11.01.31 AM Processed_Clarity.wav 439.
>
> 4.6 To further reduce background noise I then applied iZotope RX 11 Spectral Noise Reduction and save the resultant audio as WhatsApp Video 2023-12-05 at 11.01.31 AM Processed_Clarity_RX11wav.
>
> 4.7 Attempting to reduce the echoic nature of the voice content of the previous file I then applied Clarity DeReverb Pro to the audio file and saved the resultant file as WhatsApp Video 2023-12- 05 at 11.01.31 AM Processed_Clarity_RX11_ClarityDeReverb.wav
>
> 4.8 With the audio processing completed I imported the original video file and three processed audio files into my non-linear video editing software and synchronized the

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processed audio with the video having muted the video's original audio track. I determined that the clearest version of the audio was the file WhatsApp Video 2023-12-05 at 11.01.31 AM Processed_Clarity_RX11wav.

4.9 I then used that audio file, synchronized with the video image, to output a new MP4 video file named WhatsApp Video 2023-12-05 at 11.01.31 AM Audio Processed.mp4

4.10 Playing the video file I then manually transcribed the spoken dialogue I could hear determining that there were two people speaking during the video. I identified the first speaker as P1, they were the person who had said their leg was broken after the vehicle rolled left. The other speaker I identified as P2 was first audible after the vehicle had rolled left and was speaking to P1. The transcript appears in the Appendix of this statement."

19. The transcript provided by Mr Hope (where Mr Lynch is P1, and Mr Streeter is P2) is as follows:

> "P1 We're after pigs… look at them go…look, look, look (laughs) ah hahahahahahahaha… Look at the fuckers! Woh Ohh! Yike! (sounds of vehicle as it turns over) Argh…fuck, fuck ugh my leg, my leg's broke…ugh..oh Oh..ugh Ogh..ogh (P1 continues groaning in pain) P2 Oh oh oh Gee, Oh shit… it's my… yeh ugh ehh My bad mate P1 (indecipherable noise) P2 My bad (indecipherable) P1 (indecipherable) My leg's broke, agh my leg's broke P2 Agh OK…ah, ah so I don't want your phone (indecipherable) P1 That's good for me, it's my right leg..Agh don't touch P2 Sorry I'll take you to hospital then…OK? P1 You're not going anywhere I left me phone over there isn't it? Over there… (Phone is picked up)."

20. In terms of visual presentation, the second video records (for the part of the conversation up to "Ohh!") a herd of pigs running fast in front of the vehicle. A large pig is seen running very close to the vehicle. There is a thump and the vehicle overturns. The pigs can be seen running ahead in front of the vehicle until the phone was thrown out of Mr Lynch's hand as he went out the passenger side of the vehicle and was thrown to the ground. Nothing can be seen thereafter other than the ground or night sky. He can be heard moaning in the distance until Mr Streeter picked up his phone and returned it. The video stops at that point.

21. Where the circumstances of the mechanics of injury are recorded on a device such as CCTV or a phone video, careful attention must be paid to what is shown, for the reasons set out in *Km art Australia Limited v Marmara* [2024] NSWCA 249 at [6] and [159] .

Comparison of the accounts of the accident by Mr Lynch and Mr Streeter

22. There is no dispute that the accident caused significant personal injuries to Mr Lynch, including a broken leg. He was taken by ambulance to Canberra Hospital where he arrived about 2:40 am on 10 September 2022. He described the accident to staff members at the hospital in some detail and when he commenced proceedings for personal injury, pleaded that

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Mr Streeter accelerated and deliberately hit the pig (paragraphs 9 and 18 of the statement of claim in these proceedings, filed 5 May 2023).

23. While in hospital, Mr Lynch was diagnosed with cancer and given a very short life expectancy. An examination of Mr Lynch pursuant to *Uniform Civil Procedure Rules 2005* (NSW) Part 24 took place at his bedside at Neringah Hospital on 26 July 2024. A transcript was tendered, and from its contents, he was clearly very ill at the time.

24. The areas of dispute are why Mr Lynch and Mr Streeter were out on the property and whether the vehicle did hit the pig, deliberately or otherwise.

25. In Mr Freeman's submissions (paragraphs 20 – 24), he seeks to cast doubt on or distinguish accounts given by Mr Lynch of the accident. He refers to what he describes as omissions, inconsistencies and errors in Mr Lynch's evidence and, in relation to the reliability of the video, draws my attention to the observations of Gleeson JA in *Woolworths Ltd v McQuillan* [2017] NSWCA 202:

> "[58] Any inference to be drawn from what cannot be seen on the video must be evaluated and weighed in the light of all the evidence. In this regard, his Honour seems to have ignored the following matters."

26. However, as Gleeson JA noted at [56] and [57], the CCTV evidence in those proceedings was poor; there were obstructions, there was poor lighting, some of the relevant parts of the store were not visible and the persons present in the CCTV could not be identified.

27. That is not the case here. The video evidence, although not of the very high standard seen in *Kmart Australia Limited v Marmara* (where I was the first instance judge), paints a compelling picture of what occurred.

28. Applying the approach set out in *Sydney Trains v Argo Syndicate AMA* and in *Kmart Australia Limited v Marmara* , I consider the video accurately records events and is the best evidence of why Mr Lynch and Mr Streeter were out that night and how the accident occurred.

Bredbo's insurance policy

29. As noted above, Bredbo was the insured under a Country Pack Insurance Policy Number 35U2070935 ("the Policy") issued by IAL, which was in force from 31 July 2022 to 31 July 2023 (Exhibit A pp 271, 273 and 281-364). Mr Streeter made a claim on the Policy in relation to Mr Lynch's claim against him. IAL denied indemnity and Mr Streeter then issued a cross-claim against IAL.

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30. The relevant section of the Policy (Exhibit 1 p 1 ff) is Section 7, “Business Liability”, for which the premium is $1200 per annum. IAL submits that this premium amount is relevant to the reading of both the insuring clause and the firearms exclusion, as the premium in question is not high.

31. The Policy comprises a Renewal Schedule (clauses [1] - [8]) and a Supplementary Product Disclosure Statement' (clauses [9] - [82]). The Renewal Schedule describes Bredbo’s occupation as “Beef Cattle Farming” in clause [4].

32. Page 6 of the Policy (Exhibit 1, p [20]) imposes the following obligations on the Insured:

> “You must take all reasonable precautions to prevent anything which could result in a claim under this policy (the Reasonable Precautions Condition)
>
> You must obey, and must use reasonable endeavours to make sure that anyone doing anything on Your behalf obeys, all relevant laws (the Legality Condition)”

33. Conformably with s 54 of the *Insurance Contracts Act 1984* (Cth) , the Policy then provided:

> “Failure to do any of these things may affect Our decision to reduce or reject Your claim and/or continue Your Insurance cover. The course of action We take when You fail to do any of these things will be considered in each circumstance based on what impact of effect Your failure to comply caused or contributed to the claim or Our decision to issue Your policy.”

34. IAL submits that if the insured does not comply, such conduct is causative of the accident and IAL is entitled to reduce its risk to zero.

35. The indemnity clauses (set out in Exhibit A at pp 329-330 and Exhibit 1 p 59 ff) are as follows:

> **“When We will pay**
>
> Subject to the terms, exclusions, definitions, endorsements and limitations of this Policy, We will indemnify the Insured for all amounts which the Insured is legally liable to pay as compensation in respect of:
>
> - Personal Injury
> - Property Damage
> - Advertising injury
>
> happening during the Period of Insurance [31 July 2022 to 31 July 2023] within the Geographical Limits [relevantly included Australia] and arising out of the Business or Your Products and caused by or arising out of an Occurrence (First Indemnity)

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We will also pay the amount you are legally liable to pay for Personal Injury, Damage to Property or Advertising injury due to an Occurrence in Australia and in connection with Your Business, arising from:

• Your ownership or occupancy of any land, building or structure (Second Indemnity)

• Private work carried out for You or by Your Employees

• Any of the products

…

With respect to the indemnity provided by this Section of the Policy, We will:

• defend, in Your name and on Your behalf, any claim or suit against you alleging Personal Injury, Property Damage or Advertising Injury and seeking damages on account thereof even if any of the allegations made in any such claim or suit are groundless, false or fraudulent;

• pay all charges, expenses and legal costs incurred by Us and/or by You with Our prior written consent:

- pre-judgment interest awarded against you on that part of the judgment payable by Us

- in the investigation, defence or settlement of any such claim or suit, including loss of salaries or wages because of Your attendance at hearings or trials at Our request, or

- in bringing or defending appeals in connection with such claim or suit

• pay all charges, expenses and legal costs recoverable from or awarded against You in any such claim or suit and all interest accruing on Our portion of any judgment until we have paid, tendered or deposited in court that part of such judgment which does not exceed the liability of Our liability.

…

Any amounts paid by Us as Defence Costs and Expenses and/or supplementary payments incurred, will be in addition to the applicable limit of liability."

36. "Defence costs and expenses" are then defined (Exhibit 1 p 60).

37. "Business" (Exhibit 1) is defined as "farming, grazing, cropping, harvesting, or other like primary producing activities or other activities" including "the ownership and occupation of premises by the Insured" and "private work undertaken by Employees for any director, partner, officer or executive of the Insured".

38. The insuring clause (Exhibit 1 p 59) provides that subject to the terms, exclusions, endorsements and limitations, IAL:

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> "Will indemnify the Insured for all amounts which the Insured is legally liable to pay as compensation in respect of:
>
> Personal Injury
>
> Property Damage
>
> Advertising Injury
>
> Happening during the Period of Insurance within the Geographical Limits and **arising out** of the Business or Your Products and caused by or arising out of an Occurrence."

39. A further insuring clause (Exhibit 1 pp 59-60) provides:

> "You are legally liable to pay for Personal Injury, Damage to Property or Advertising Injury due to an occurrence in Australia and **in connection with** Your Business, arising from:
>
> Your ownership... of any land, building or structure
>
> Private work carried out for You or by Your Employees
>
> Any of the Products."

40. This is the first of two clauses which use the term "in connection with", instead of "arising out of".

41. The exclusion clauses in Section 7 of the Policy (Exhibit 1 p 62) provide that IAL 'will not pay claims in respect of the following: ...'. This is followed by a list. At Exhibit 1 p 63, a list of exclusions is provided, such as when the Insured is receiving payment for recreational activities, including liability **in connection with** any activity involving weapons, including firearms. Once again, the use of the term "in connection with" should be noted.

42. The exclusion clause relied on by IAL in relation to Bredbo and Mr Streeter is clause 7 of the Policy which contains a Firearms Exclusion (at paragraphs 64 and 65) that excludes liability 'directly or indirectly caused by or arising out of an activity involving the use of a firearm, unless the Personal Injury... is directly caused by Your use of the firearm or by someone You have agreed to pay to use the firearm' ("the Firearms Exclusion").

43. Section 7 also contains a special condition that the Insured must take all reasonable precautions to prevent Personal Injury (Exhibit 1 p 65).

Principles for construction of a policy of insurance

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44. In *McCann v Switzerland Insurance Australia Ltd and Ors* (2000) 203 CLR 579 at [22] , Gleeson J stated:

> "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."

45. Interpreting a commercial contract such as a policy of insurance requires not only a businesslike approach and attention to the language and terms, but also to the commercial circumstances which the document addresses and the objects which the policy is intended to secure. Words should be given their ordinary meaning. While the *contra proferentem* rule applies in the case of ambiguity, where there is no ambiguity, there is no special rule to apply, and preference is given to construing the contract in the context of the commercial considerations for the transaction as a whole: *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at [16] . That means ensuring commercial efficiency, as well as using common sense: *Liberty Mutual Insurance Company Australian Branch v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126 at [152] . Ordinarily, the commercial purpose and surrounding circumstances are able to be identified from the contract itself: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [46]–[48] (French CJ, Nettle and Gordon JJ), at 132 [109] (Kiefel and Keane JJ), and at 134 [120] (Bell and Gageler JJ); [2015] HCA 37 .

Applying these principles to the Policy

46. Very few of these principles require consideration on the facts of this case, but three areas of the law relevant to determination of the Policy clauses are the following:

    1. Interpretation of "in connection with" and "arising out of".

    2. The question of what amounts to taking reasonable precautions.

    3. Issues arising where fraud is pleaded.

"In connection with" and "arising out of"

47. Three of the clauses set out above employ one or the other of these terms. In practical terms, what is the difference?

48. The term "arising out of" has been held to be narrower than "in connection with". In *CSR Limited v Adecco (Australia) Pty Ltd* [2017] NSWCA 121, the Court stated at [206] :

> "The words "arising out of" are well recognised as being of broad import. They require some causal or consequential relationship between the subject and the object,

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> but do not require the direct or proximate relationship which would be necessary if the expression was "caused by"."

49. I propose to interpret these clauses accordingly.

Taking reasonable precautions

50. The relevant principles are summarised in *Ritchie v Advanced Plumbing and Drains Pty Ltd* [2022] NSWSC 330 at [74] – [78] . In *Barrie Toepfer Earthmoving and Land Management v CGU Insurance Ltd* [2016] NSWCA 67, Meagher JA, with whom Ward JA and Sackville AJA agreed, stated at [80] :

> "In this context the notion of deliberately courting danger involves the taking of measures which are known to be an inadequate response to the recognised danger, or not taking any measures at all when it is appreciated that the taking of some measure is required: see [51], [74] above. An insurer bearing the onus of establishing non-compliance with an obligation to take reasonable precautions must prove that the insured has not taken such measures as it thinks are reasonable having regard to the danger which is recognised: Eather at 407 (per McHugh JA)."

51. How should the requirement to take reasonable precautions be interpreted? In *VACC Insurance v BP Australia Ltd* (1999) 47 NSWLR 716, Brownie AJA (in dissent) stated that the test should be subjective. More recently, in *Certain Underwriters at Lloyds of London v Dhillion Scaffolding Pty Ltd* [2022] VSCA 92, the Court appeared to endorse that the test is subjective. The Court stated that it is not what a reasonable person in the same position would have done, but whether the responsive actions, once the danger is known to the insured, such as ignoring the danger and proceeding regardless of the risk eventuating, amount to failure to take reasonable precautions.

52. IAL's submissions (at paragraph 42) accept that it bears the onus of establishing that reasonable precautions were not taken: *Barry Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd* at [76] – [78].

53. The question of whether recklessness can be made out is generally one of fact. This was the case in *Certain Underwriters at Lloyds of London v Dhillion Scaffolding Pty Ltd* , where Mr Dhillion knew that there was a risk with the scaffolding being built within close proximity to the powerlines. When asked if he thought it was safe for Dhillon Scaffolding to be erecting the scaffold within a 'No Go Zone' he said that he was 'just following the plan of … Martin [Elliott of Western Scaffolding]'. The taking of reasonable precautions required Mr Dhillion to take steps to ensure safety, as opposed to the "not my problem" approach that he took.

Issues of fraud

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54. Section 56 of the Act provides:

> Where a claim under a contract of insurance, or a claim made under this Act against an insurer by a person who is not the insured under a contract of insurance, is made fraudulently, the insurer may not avoid the contract but may refuse payment of the claim.

55. Where fraud is alleged, s 140 of the *Evidence Act 1995* (NSW) requires the court to find the case of a party proved on the balance of probabilities, taking into account the gravity of the matters alleged. In other words, there should be clear and cogent proof of these allegations.

56. In *To v Australian Associated Motor Insurers Ltd* [2001] VSCA 48, Buchanan JA held (at [19]):

> [19] …. sub-s.(1) is concerned with fraud in the making of the claim, that is, fraud in the formulation and presentation of the claim. In my opinion if a false statement is knowingly made in connection with a claim for the purpose of inducing the insurer to meet the claim, the claim is one made fraudulently within the meaning of s. 56(1) . It is not necessary to analyse the false statement to determine whether or not the falsity attaches to the basis upon which the insured is claimed to be liable.

57. In *Alexander Raymond Walton v The Colonial Mutual Life Assurance Society Limited* [2004] NSWSC 616, Einstein J held (at [44]):

> "[144] The operation of s 56 of the Act has been considered in a number of cases. Relevant principles include the following:
>
> - the test for fraud is satisfied if the insured has a dishonest intent to induce a false belief in the insurer for the purpose of obtaining payment or some other benefit under the policy. As such, where the insured makes a false statement with knowledge in a claim to induce the insurer to meet the claim, the claim is made fraudulently. The fraudulent statement need not be material to the insured's claim nor is the insured absolved of any responsibility by asserting that he considered his claim to be valid. (See *Tiep Thi To v Australian Associated Motor Insurers Ltd* [2001] VSCA 48; (2001) 3 VR 279; *Naomi Marble & Granite Pty Ltd v FAI General Insurance Company Ltd (No 1)* [1999] 1 Qd R 507 and *Mourad v NRMA Insurance Ltd* (2003) 12 ANZ Ins Cas 61-560);
>
> - it is not necessary to show prejudice as having been suffered by the insurer for s 56 t o be relied upon. The only restriction upon an insurer's right to refuse payment of the claim is the discretion granted within s 56(2) of the *Insurance Contracts Act* (see *Tiep Thi To v Australian Associated Motor Insurers Ltd* [2001] VSCA 48; (2001) 3 VR 279)."

58. The question is whether the false statements were made with the intent to induce the insurer to pay the claim. There must be cogent and precise evidence to support such an allegation. For example, in *Sgro v Australian Associated Motor Insurers Ltd* [2015] NSWCA 262; (2015) 91 NSWLR 325, Meagher JA held (at [73]-[74]):

> "[73] The respondent's defence did not plead, as it should have done in order to engage the application of s 56(1) , that the appellant had knowingly made each of the false statements for the purpose of inducing it to accept his claim that the vehicle had been stolen. One consequence of this, as the learned President's reasons show, was that, when considering the respondent's reliance on that defence, the primary judge neither addressed nor made a finding as to the appellant's alleged fraudulent purpose in making the false statements.
>
> [74] A second consequence of this deficiency in the pleading was to create apparent uncertainty as to whether the respondent had made a positive case that the claim was fraudulent because the vehicle was known by the appellant not to have been stolen. Plainly enough, if that allegation was made, the respondent would have borne the burden of proof, the satisfaction of which was to be addressed in accordance with subss 140(1) and (2) of the *Evidence Act 1995* (NSW) as informed by the principles in *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336. This uncertainty is apparent from the primary judge's statement at [132] declining to make "any findings as to fraud in the absence of cogent evidence going to such critical issues as the number and location of keys and remotes for the vehicle and motive". In circumstances where there was no allegation that the claim was fraudulent in the sense referred to above, there was no occasion for her Honour to make any findings directed to such an allegation."

Credit issues

59. Tugendhat J, in *Thornton v Telegraph Media Group Ltd* [2011] EWHC 1884 (QB) at [73] – [74] , sets out "the main tests" for the determination of whether a witness is lying or not:

> "[73] There is great assistance to be obtained from extra-judicial writing of Lord Bingham in a chapter headed "The Judge as Juror: The Judicial Determination of Factual Issues" … Lord Bingham cited Sir Richard Eggleston QC Evidence, Proof and Probability (1978), 155 who set out the main tests to be used by a judge to determine whether a witness is lying or not.
>
> (1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
>
> (2) the internal consistency of the witness's evidence;
>
> (3) consistency with what the witness has said or deposed on other occasions;
>
> (4) the credit of the witness in relation to matters not germane to the litigation;

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(5) the demeanour of the witness.

[74] Lord Bingham then added these observations:

"In choosing between witnesses on the basis of probability, a judge must of course bear in mind that the improbable account may nonetheless be the true one. The improbable is, by definition, as I think Lord Devlin once observed, that which may happen, and obvious injustice could result if a story told in evidence were too readily rejected simply because it was bizarre, surprising or unprecedented … so long as there is any realistic chance of a witness being honestly mistaken rather than deliberately dishonest a judge will no doubt hold him to be so, not so much out of charity as out of a cautious reluctance to brand anyone a liar (and perjurer) unless he is plainly shown to be such.""

60. Matters that the courts have taken into account in relation to statements made in the course of seeking indemnity in relation to an insurance policy include:

    1. Preparedness to lie to persons seeking to investigate the events about the circumstances of the accident: *Ritchie v Advanced Plumbing and Drains Pty Ltd* [2022] NSWSC 330 at [34] (lies told to police).

    2. Compounding the lie by telling the lie to more than one person: *Ritchie v Advanced Plumbing and Drains Pty Ltd* at [34] (lies told to fire investigator as well as to police); *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; 203 CLR 579 at [118] ("many lies").

    3. Refusal to admit the truth on oath in the courtroom: *Ritchie v Advanced Plumbing and Drains Pty Ltd* at [34] . This includes reconstruction of events (at [38]).

61. As Beazley P stated in *Sgro v Australian Associated Motor Insurers Ltd* at [57] , "fraud for the purposes of s 56 involves a finding that a person has been untruthful and deliberately so, with the intent of obtaining a financial gain". Proof of untruthfulness, whether in or out of court, is an essential part of the findings necessary for fraud.

Making findings about credit where fraud is alleged

62. Making findings concerning the credibility of a witness is part of the task of the judge whether fraud is alleged or not and the general guidelines for such findings are set out in *Fox v Percy* (2003) 214 CLR 118 at [31] .

63. The interaction between fraud and credit finings is helpfully described by Black J in *In the Matter of Colorado Products Pty Ltd (in prov liq)* [2014] NSWSC 789 at [10] :

"The evidence given by Clare, on the one hand, and Helen and Kenneth, on the other hand, was starkly inconsistent in numerous respects. I have been conscious of the importance of the credit of witnesses in cases where a trial judge is faced with a stark

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choice between irreconcilable accounts: *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 at [28] ; *Craig v Silverbrook* [2013] NSWSC 1687 at [142] per Sackar J. I recognise that, as the Plaintiffs point out, the credibility of a witness and his or her veracity may be tested by reference to the objective facts proved independently of the testimony given, in particular by reference to the documents in the case, by paying particular regard to his or her motives, and to the overall probabilities: *Armagas Ltd v Mundogas SA* [1985] 1 Ll R 1 at 57. I have also had regard to Atkin LJ's observation in *Societe d'Avances Commerciales (Societe Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana")* [1924] 20 LI L Rep 140 at 152 that "an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour", recently cited by Sackar J in Craig above at [141]. In *Camden v McKenzie* [2007] QCA 136; [2008] 1 Qd R 39 at [34] , Keane JA (as his Honour then was) similarly noted that:

"[u]sually, the rational resolution of an issue involving the credibility of witnesses will require reference to, and analysis of, any evidence independent of the parties which is apt to cast light on the probabilities of the situation."

That observation was recently cited with approval by Leeming JA (with whom Barrett JA and Tobias AJA agreed) in *State of New South Wales v Hunt* [2014] NSWCA 47 at [56] ."

64. Where an allegation of fraud is made, the following must be taken into account:

    1. The allegation must be clearly pleaded and the acts said to give rise to fraud must be identified with precision, but the court should take into account the evidence as a whole: *Rolleston v Insurance Australia Ltd* [2016] NSWSC 1561 at [34] – [35] . For example, where there is only circumstantial evidence, the full impact of the proved circumstances should be considered in combination.

    2. The onus of proof remains on the party alleging fraud and is required to be satisfied to the *Briginshaw* standard: *Rolleston v Insurance Australia Ltd* at [29] – [35] .

    3. Proof will not be established merely because the court disbelieves a particular witness: *Craig v Associated National Insurance Co Limited* [1984] 1 Qd R 209; 3 ANZ Insurance Cases 60-553.

65. The fact that an unsatisfactory or dishonest answer is given, or a dishonest or illegal act performed, does not automatically mean that such a person cannot be a witness of credit in relation to all, or even some, of the other disputed issues of fact: *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 [780] - [789] . Nor should an adverse credit finding in relation to one issue be translated into a generalised finding of lack of credit, for the reasons explained in *ET-China.com International Holdings Ltd v Cheung* [2021] NSWCA 24 at [188] .

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The bases of the challenge to indemnity

66. IAL denies liability to indemnify Mr Streeter on five grounds:

    1. Lynch's personal injury did not arise out of, and was not in connection with, Bredbo's Business, such that the claim does not fall within the insuring clause.

    2. Mr Streeter's claim for indemnity on the Policy is in respect of liability for Personal Injury 'directly or indirectly caused by or arising out of an activity involving the use of a firearm', such that the Firearms Exclusion is engaged.

    3. Mr Streeter intentionally or recklessly hit the pig, and was thereby in breach of s 5 of the *Prevention of Cruelty to Animals Act 1979* (NSW) and the Legality Condition of the Policy

    4. In the circumstances of the accident, Mr Streeter was also in breach of the Reasonable Precautions Condition of the Policy.

    5. In submitting a Claim Form dated 6 October 2022 (the First Claim Form), a further Claim Form dated 10 October 2022 (the Second Claim Form)e, and an email dated 24 April 2023 (the 24 April 2023 email), Streeter made statements to IAL with the dishonest intent of inducing a false belief in IAL for the purpose of obtaining indemnity under the Policy, and/or recklessly; entitling IAL to deny indemnity on the ground of fraud.

67. Each of these grounds also raises issues as to the truthfulness and reliability of Mr Streeter, whether a finding of fraud is made or not.

Issues 1 and 2: Does the claim fall within Section 7 of the Policy and is the firearms exclusion engaged?

68. In order to fall within the insuring causes of section 7 of the Policy, Mr Streeter must establish that the purpose of the trip in the course of which Mr Lynch suffered his injuries was an activity arising out of or in connection with Bredbo’s business. There are two factual matters to be determined:

    1. Whether the accident had any connection with Bredbo’s ownership and occupation of the house on the property (the “building” insured), and whether the facts of the accident fall into any of the other categories for coverage, such as whether Mr Lynch was an employee within the definition of business on page 43 of the Policy.

    2. Whether the firearms exclusion is engaged.

Bredbo’s business

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69. As well as farming, grazing and other agricultural activities, it is not in dispute that the policy would apply to activities arising out of or in connection with ownership and occupation of the premises and any private work undertaken by employees for any director, partner, officer or executive of the insured.

70. The defendant, while not disputing this reading of the text, submits that the issue of "ownership or occupancy" needs to be read down in light of the clauses that follow. To construe ownership or occupancy so broadly as to mean that any activity for liability in connection with home ownership and/or occupancy would be covered would be unrealistic.

71. The requirements for "ownership and occupation of premises" and "private work undertaken by Employees" need to be read in this light. Mr Lynch did not suffer an injury arising out of his activities while occupying the premises or carrying out his painting work. His presence at the farm related to activities arising out of his contract with Streeter Law to paint the farmhouse, but that has no causal connection with his injuries, which he suffered while on a trip which, I have next found, was a recreational hunting trip.

72. As to the first of these, I accept the interpretation given by IAL, as otherwise this clause would be so broad as to cover insurance for any liability in connection with ownership and/or occupancy of the farm and, in addition, the second insuring clause would have no work to do. The mere fact that Mr Lynch was on the premises doing painting work does not mean that he is covered for all and any activity, whether that be recreational hunting or some other activity. The circumstances of the injury have to be connected to the ownership or occupancy of the premises.

73. As to the second, the definition of "employee" is "any person who is employed by You and/or in respect of whom You are required to have cover for workers compensation or similar cover by any workers compensation legislation." I have considered this carefully, as Mr Lynch was working on the property getting the premises ready for sale, which would suggest that his presence on the property was as a result of activities on the "premises" which were undertaken at the request of a "director" and a workers compensation policy may well have extended liability for an employer.

74. Mr Lynch was not an employee of Bredbo. At most, he was carrying out the work as an independent contractor (*Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19; 226 CLR 161 at [13]) but he did not contract with Bredbo. He addressed his invoices to "Streeter Law" (Exhibit A pp 77 and 224-225), suggesting that before and after the accident, he considered Mr Streeter's legal firm to have contracted with him. The farm was owned by a Bredbo, which was controlled by family trusts relating to the respective families of the two directors and had nothing to do with Mr Streeter's legal office. Mr Streeter appeared to acknowledge that his law firm retained Mr Lynch to do the painting (Tcpt 52 – 54 and 95).

75. I am comfortably satisfied that Mr Lynch was not an employee of Bredbo and the extension of the Policy to employees does not apply.

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The firearms exclusion

76. The following facts are not in dispute:

    1. Mr Streeter obtained a firearms licence on 20 July 2020 and purchased a rifle in September 2021. He had a valid licence which was endorsed for "vermin control". He had a licence to shoot kangaroos and had done so in the past, including submitting forms to the relevant government department and he was also qualified to lay poison baits around the property.

    2. Mr Streeter safely stowed his Tikka 308 rifle in the gun rack between himself and Mr Lynch.

    3. There is contemporaneous evidence of the likely purpose of this trip in Mr Streeter's text messages of 2 and 4 September 2022.

    4. Mr Lynch had turned on his mobile phone to record aspects of the trip and spoke words indicating why he understood he was going out with the plaintiff. Mr Streeter is sitting beside him, and I am comfortably satisfied that he would have had some idea of what Mr Lynch was saying.

    5. Contemporaneous hospital records described Mr Lynch's account of what happened which is that he was "out pig hunting tonight".

77. Mr Streeter's evidence establishes the following:

    1. The Policy schedule describes the occupation for Bredbo as beef cattle farming, a description accepted by Mr Streeter as accurate (Tcpt 30). In the claim forms, Mr Streeter described the business as a farm grazing cattle and sheep.

    2. Mr Streeter's description of work on the farm, in his email to his broker dated 27 September 2022, did not refer to shooting at all, whether recreational or otherwise. Similarly, in setting out the activities and work of the farming nature in the cross-claim, Mr Streeter does not refer to recreational shooting.

    3. There is no suggestion that anyone was ever charged a fee for going shooting on the farm, although there was the option to extend cover for "farm hosting" under section 7 of the Policy.

    4. Finally, Mr Streeter agreed in cross-examination that recreational hunting trips involving the use of arrival would have nothing to do with Bredbo's business.

78. There are thus two versions as to why Mr Streete and Mr Lynch were out driving over wet paddocks at night in a farm vehicle.

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79. Mr Streeter submits that I should not accept IAL's submission that this was a recreational hunting trip. I summarise those submissions and my findings.

Mr Streeter's submissions

80. Mr Streeter first submits that his evidence of the property sustaining damage due to wildlife, including kangaroos, pigs and deer, as set out in his affidavit, has not been challenged, and that his actions in taking a gun with him should be seen in the context of a need for caution.

81. I reject this submission. Apart from the reference to there being more than 16 deer in a paddock the week before, there is no evidence of significant animal presence, let alone danger, or of any need to shoot feral animals and, if so, why this was being done while Mr Streeter was out driving with inexperienced shooters such as his godson or Mr Lynch. There was no evidence of there being any need to cull feral animals such as kangaroos or pigs for the purpose of the sale of the property, or that there had been recent damage to the property from the activities of wild animals requiring action to be taken by the owners, whether for the proposed sale or otherwise.

82. Mr Streeter next submits that there is no reliable evidence of the trip being for hunting purposes.

83. First, Mr Streeter submits that I should treat Mr Lynch's statements at the hospital with caution. While Mr Lynch told the hospital (and repeated in his affidavit) that they were going out to shoot pigs, no pigs were in fact shot. No injured or dead pig can be seen at the site of the accident, either as a result of a gunshot or as a result of being struck by the vehicle.

84. Second, the text messages sent the week beforehand did not necessarily reflect the intention of Mr Streeter and Mr Lynch on the night of the accident.

85. In those circumstances, Mr Streeter submits that I should accept his evidence that he only took a rifle in the vehicle in case he saw a deer. He stated in his affidavit and in cross-examination that he only saw one deer, but it was too far away, and he was unable to shoot it, a statement on which he was not further cross-examined.

86. I reject these submissions. The contemporaneous documentation and the video demonstrate what occurred. I am comfortably satisfied that the vehicle did in fact strike the pig. The absence of evidence of any injured or dead pig does not establish that no impact occurred.

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87. Mr Streeter next relies upon the response of IAL when he disclosed to IAL that he had a rifle in the vehicle in case he saw any deer (Exhibit A p 426). The response of IAL was merely to ask if the weapon had been discharged, which amounted to an acceptance of Mr Streeter's statements as to what occurred.

88. I reject this submission. Read in context, IAL's correspondence demonstrates that it was making inquiries into all aspects of the claim.

89. Mr Street next submits that the rifle was secured in the vehicle at all times up to the accident and played no part in it.

90. This submission relies upon an interpretation of the Policy that is too narrow.

91. Mr Streeter next submits that IAL was aware from business commercial commonsense that shooting takes place on rural properties and that the exclusion in the policy relates only to personal injury or property damage caused by "your use" of the file around by someone who "you have agreed to pay to use the firearm". IAL must be taken to have understood, if there was a specific clause about paying someone to use a firearm, that using a firearm itself must be part of Bredbo's business activities. Mr Freeman rhetorically asks why Bredbo would be entitled to cover for firearms used on behalf of the insured if firearm use were not part of its ordinary operations.

92. I do not accept this submission. The fact that the gun had not yet been fired (or indeed may never have been fired) does not mean that the events were not in connection with the activity of shooting: *QBE Insurance Australia Ltd v Vasic* [2010] NSWCA 166 at [38] – [39] .

93. Finally, Mr Streeter submits that I should accept that he was simply showing Mr Lynch the farm and the wildlife.

94. Given the wealth of evidence to the contrary, I do not accept this is what occurred, but even if it had, the fact that Mr Streeter prepared his rifle and stored it in the gun rack in case he saw a deer is sufficient to amount to preparing the rifle for the purpose of the expedition for intentional use if any occasion arose.

95. I am comfortably satisfied that the claim does not fall within the insuring clauses of section 7 of the Policy, except for one matter. I do not accept Mr Neal's submission (paragraph 59) that I should read the word "premises" in the Policy down as applying only to the homestead. Common sense would suggest that a rifle would not be used in connection with homestead occupation unless a crime occurred. However, the rejection of this submission makes no difference.

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96. I next apply these findings of fact to the firearms exclusion clause. Is the firearms exclusion engaged?

97. The firearms exclusion clause is expressed in very broad terms, namely that it will apply to any claim aware the loss arises “directly or indirectly” part of an activity “involving the use” of a firearm. It is an exclusion followed by a writeback of cover. Unlike the writeback, the firearms exclusion does not require liability to arise out of actual use of a firearm, but out of “an activity involving the use” of a firearm. It is similar to the other firearms exclusion set out in the Policy in relation to the insured is receiving payment for recreational activities.

98. In terms of business efficacy, the clause is aimed at a wide range of conduct because of the inherently dangerous nature of firearms. It is not restricted to injury caused by the gun being shot. In circumstances where the party taking out insurance was not receiving payment for recreational shooting activities, cover is provided only in very limited circumstances, such as when someone is accidentally shot. That accords with business sense, in that a person who paid to shoot kangaroos could be assumed to be more likely to act with care because they were paying for the trip in question. This is one of the reasons why the factual situation in *QBE Insurance Australia Ltd v Vasic* , a decision cited as supporting Mr Streeter’s argument, may be distinguished from the facts of this case (additionally, that decision deals with and insuring clause, not an exclusion clause, which was worded very differently).

Issues 3 and 4: Recklessness and the legality condition

99. There is a strong factual correlation between the assertions of recklessness and the breach of the legality condition.

Recklessness

100. Mr Streeter (submissions at p 157 – 8) submits that Mr Cornford’s failure to repair the Can-Am mean that Mr Cornford was the reckless person, and that if anyone was reckless, it was him. Mr Cornford had been at the property recently and may even have driven the vehicle himself.

101. The correspondence in Exhibit A confirms that in the division of tasks for selling the property, it was Mr Streeter’s job to have the vehicle repaired. Mr Cornford gave him reminders. He did not do so.

102. The dangers of driving a vehicle which had no door on one side and an unusable door on the other were obvious. To this can be added the risk of driving after nightfall on a country property over wet and uneven terrain without proper roads or lighting. Other factors to take into account include the lateness of the hour and isolation of the farm.

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103. Mr Streeter acknowledged in cross-examination that he was driving too fast, that he knew it had been raining and that he knew of the risk because of the missing car door. The evidence of recklessness is clear beyond doubt.

104. As to whether hitting the pig was deliberate or simply reckless, Mr Neal draws my attention to the following:

    1. Mr Streeter was driving at night, and it was dark (Tcpt 34).

    2. Mr Streeter was driving over an uneven, undulating paddocks, not a road, where there were potholes and other road dangers (Tcpt 46).

    3. Because it had rained earlier, the earth in the paddock was soft and wet, which made driving conditions dangerous (Tcpt 43).

    4. It is clear from the video that Mr Streeter was following the pigs and was in fact gaining ground on them (Tcpt 46).

    5. One of the pigs in the video can be seen to have turned to the left, and Mr Streeter immediately turns left behind it, appearing to chase it and to accelerate the vehicle to do so (Tcpt 45).

    6. Mr Streeter was driving faster than he should have been and acknowledged that he was driving "too fast" (Tcpt 48, 64).

105. To this list I would add that the photographs of the Can-Am show it to be a lightweight farm vehicle with a missing passenger door and little protection for the driver or passengers of the kind which would be filed in a registered vehicle.

106. There is an additional reason why I would not accept Mr Streeter's evidence on this issue, namely his denials in evidence about whether he was chasing the pigs or merely following them. Although he states in his affidavit (paragraphs 66 and 67) that he was "following" the pigs, one of which veered to the left, he admitted in cross examination that he had chased the pig which veered to the left:

    > "Q. Right. I want to put four propositions to you about your conduct that we've seen in the video. You were chasing the pigs, weren't you?
    >
    > A. Yes. We were driving after the pigs.
    >
    > Q. And you accelerated and turned left to chase one pig, didn't you?
    >
    > A. Yes. (Tcpt, 30 October 2024, p 49(38))
    >
    > …
    >
    > Q. You were chasing pigs, Mr Streeter, at the time, weren't you?
    >
    > A. Yes." (Tcpt, 30 October 2024, p 57(47))

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107. I consider these statements as an admission by Mr Streeter that he was in fact chasing the pigs and in particular the pig that had veered to the left.

108. Does Mr Streeter only make that concession now, or did he always know that he had been chasing the pigs because he was in fact out on hunting expedition with Mr Lynch?

109. In paragraph 75 and 76 of his affidavit, Mr Streeter seeks to explain away his description of the accident as occurring because they had hit a hole or bog, not a pig. He denied in cross examination that he knew at the time that he had hit a pig but I am satisfied from the video evidence that the impact which caused the vehicle to roll would have been felt by him first before the vehicle rolled, in circumstances where he must have known or at least suspected that he had struck a pig.

110. The question of whether he did so deliberately is not an easy one to determine. I take into account however the description in earlier text messages of "nuking" pigs and the excited tone of voice of both vehicle occupants, which demonstrates that they were out on a pig "kill" which in the case of Mr Streeter involved more than mere reckless driving.

111. If I have erred in finding that Mr Streeter was intending to hit the pig deliberately, whether he did so or not, I would alternatively find that he drove the vehicle recklessly in circumstances where the vehicle was unsafe, particularly at night, after rain, over uneven terrain and where there were feral animals about.

The legality condition

112. Where the conduct of the insured breaches statutory obligations and regulations imposed for the safety or persons or property, evidence may be led of the relevant provision and the conduct asserted to be the breach thereof: *Ritchie v Advanced Plumbing and Drains Pty Ltd* [2022] NSWSC 330 at [81] – [93] .

113. In his submissions (paragraph 144), Mr Neal submitted that even on the criminal standard, on a finding that Mr Streeter intentionally or recklessly struck the pig, he breached s 5 of the *Prevention of Cruelty to Animals Act 1979* (NSW) . Mr Freeman approached the issue in a similar fashion but also referred to the requirement for comfortable satisfaction in paragraph 24 of his submissions.

114. I am satisfied that findings of this kind should be made only if the court is satisfied that the evidence meets the standard required by s 140 of the *Evidence Act* : *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41)* [2023] FCA 555 at [100] – [110] . I particularly note that I must give full weight to the presumption of innocence in such matters, for the reasons explained by Besanko J.

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115. The elements of offences concerning animal cruelty are set out in *Will v Brighton* [2020] NSWCA 355; (2020) 104 NSWLR 170, together with a consideration of the defences applying when the animal is a pest, albeit not in relation to s 5 .

116. Consideration of the elements in this offence, even if only to a *Briginshaw* standard, requires the satisfaction of these elements in the manner set out by Besanko J in *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41).*

117. There is no evidence of intention or any act of significance other than driving direct at a pig which was trying to escape while running in front of the vehicle. I am not satisfied pursuant to the *Briginshaw* standard that sufficient evidence has been made out. Accordingly, there has been no breach of the legality provision.

Credit

118. It is common ground that the question of Mr Streeter's credit is a significant issue.

119. Mr Streeter has also made submissions in relation to the reliability of Mr Lynch's evidence and to IAL's failure to call Mr Cornford.

Credit issues: Mr Streeter

120. IAL submits that Mr Streeter has lied about the purpose of the trip, the circumstances causing the accident and related matters (such as Mr Lynch's status as an employee) with the dishonest intent of inducing a false belief in the insurer that he had a valid claim (Mr Freeman' s closing submissions, paragraph 84).

121. However, the lies IAL asserts Mr Streeter told are not the only reason for refusing indemnity. The contemporaneous documentation, including Mr Streeter's own text messages and the contents of the forms he filled out when he made claims are sufficient to establish that the claim does not fall within the insuring clauses of section 7 of the Policy. The fact that he sought to mislead IAL as to the real cause of the accident, which is another basis upon which his claim must fail, is additional but not essential (*R v Dursun* [2000] NSWCCA 68 at [33] : "icing on the cake").

122. Nothing could be clearer from his own documentation than that Mr Streeter had taken his godson out for recreational shooting the weekend before, that he had offered the same treat to Mr Lynch (who thought this was "excellent" and said in reply that he had had some shooting experience before: Exhibit A p 84) and that they had been discussing hunting during the trip

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right up to the moment of the accident. The impact of these contemporaneous records of undoubted veracity is such that an adverse finding on credit for Mr Streeter is not essential for IAL to succeed.

123. It remains the case, however, that Mr Streeter not only lied to IAL in his claim forms but that he lied on oath in this court. I particularly note:

    1. Mr Streeter's defence of his dishonest presentation of Mr Lynch as a "worker" (Tcpt 68 – 69) as being due to his understanding of workers compensation legislation. Mr Freeman submits that this was "**never** challenged" (submissions, paragraph 87, bold emphasis added by Mr Freeman). It was not only challenged (Tcpt 55 – 57, 68) but conceded (Tcpt 55 – 57, 68), although Mr Streeter preferred the word "misleading". He also proffered a different explanation in the witness box, namely his attempt to explain its use by saying it was because he had been filling out the document using "cut and paste", an explanation I reject as similarly dishonest.

    2. Mr Streeter's failure, when correcting the first claim form, to include information about the video. Mr Freeman submits that the video "does **not**" (submissions, paragraph 88, bold emphasis added by Mr Freeman) support any finding that the video correctly showed they were chasing pigs, and this was the cause of the accident. Again, this is incorrect. Not only does the video confirm that they were chasing pigs, but Mr Streeter eventually admitted this in cross-examination.

    3. Mr Streeter's failure, in the first claim form, to include the time of day for the accident, occurred because the time of the accident made his explanation - that he was taking Mr Lynch out to show him around the property - implausible. Mr Freeman submits that the omission of information that the event occurred at night was not something he had "decided *not* to tell the insurer" (submissions, paragraph 89, italicised emphasis added by Mr Freeman) and, worse, had never been particularised in the defence. It is submitted that this was at best an oversight. It was, however, directly put to Mr Streeter that he deliberately withheld this (Tcpt 75), and I am satisfied from his unsatisfactory response that this was a lie.

    4. A further ground for challenge from Mr Freeman is that the omission of the time was not particularised. I do not consider it was necessary to particularise this lie as it goes to credit rather than fraud.

124. These statements of events, as made in the claim form and repeated in the witness box, were, individually as well as collectively, sufficient to make me comfortably satisfied that Mr Streeter knowingly lied in his claim forms and in his evidence, in circumstances amounting to fraud for the purposes of s 56 , as is set out at paragraphs [134] – [145] below.

125. Mr Streeter is thus not a witness of credit. I would not accept his evidence on any issue unless that evidence were corroborated by reliable independent evidence or was against his interest.

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Credit issues for IAL: Mr Lynch's evidence and the failure to call Mr Cornford

126. Mr Freeman challenged the reliability of Mr Lynch's evidence and pointed to the defendant's failure to call Mr Cornford.

The reliability of Mr Lynch's evidence

127. When assessing Mr Lynch's account of events, I have taken into account the following:

    1. It is appropriate, when considering what Mr Lynch has said (or not said) to take into account the significant health difficulties he had and the circumstances in which his evidence was given in a bedside court. As Mr Neal points out in his submissions in reply, he was heavily medicated and near death at the time.

    2. Mr Freeman submits that Mr Lynch did not describe the driving as reckless (submissions at paragraphs 21 – 22). Mr Freeman argues that the court "would be entitled to conclude that had he believed such matters, it would have been included in his evidence" (paragraph 22). This would have been mere opinion, and not factual evidence so I have not taken these asserted omissions as evidence of any kind.

    3. There is no submission that Mr Lynch was anything other than scrupulously honest about the events in question.

128. Mr Lynch's evidence does not play a significant role in the findings of fact, but it is consistent with the pre-accident text messages, his statements as heard on the videos and what he reported to the hospital staff. I accept his evidence while allowing for the fact that he was very seriously ill from a time very soon after hospitalisation.

Drawing a Jones v Dunkel (1959) 101 CLR 298 inference

129. Mr Freeman submits that I should draw a *Jones v Dunkel* (1959) 101 CLR 298 inference from the failure of IAL to call Mr Cornford.

130. In my determination of the relevant facts concerning the night in question, I have not had any regard to any aspect of Mr Cornford's evidence save for the fact that he drew Mr Streeter's attention to the fact of there being a video of the accident and, after that, of the contents of that video. Correspondence from Mr Cornford was restricted on tender, pursuant to s 136 of the *Evidence Act* and, in any event, since he was not present on the night in question, his opinion about what the video showed, and any conversations he had with Mr Lynch, would not be factually probative to any significant degree.

131. Mr Freeman submitted that Mr Cornford had been at the farm on previous weekends and should be taken to have known about the poor condition of the vehicle in circumstances

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where, rather than fix it himself, he may well have driven it. It is clear from the correspondence between Mr Streeter and Mr Cornford that they were dividing up the tasks necessary to perform for the purpose of sale of the property and that the question of repair of the vehicle was an issue agreed to be a matter for Mr Streeter. Whether or not Mr Cornford had driven the vehicle in its unsatisfactory unrepaired state is irrelevant to the issues in this case.

132. If I have erred in failing to take into account Mr Cornford's claims and observations, I would note the dangers of evidence from persons with a partial view of events due to the breakdown of a family company, which I consider (although there are no judgments of precedent on this point) ought to be dealt with in a similar way to other civil proceedings concerning family finances such as "bank of Mum and Dad" cases.

133. Mr Cornford's evidence was, in any event, tangential to the events in question, but with one exception. That exception relates to the correspondence he sent in which he told Mr Streeter what was in the videos. Not only did Mr Streeter not try to see the videos, but he did not correct his version of the cause of the accident to IAL or inform them of the very material fact that there was a video available of the events in question.

Issue 5: Has the defendant established that the claim for insurance was fraudulently made?

134. A finding of fraud is a serious matter (*Sgro v Australian Associated Motor Insurers Ltd* at [57]) and the evidence must be considered with care.

135. At the time of the accident, Mr Streeter and Mr Lynch had a brief discussion about medical costs, according to Mr Lynch's affidavit. Mr Streeter was not cross-examined about this, but the conversation must have happened because, on 30 September 2022, three weeks after the accident, Mr Lynch's solicitors sent a letter to Mr Streeter. This letter stated that Mr Lynch would not be making any claim for workers compensation because he was not an employee of Mr Streeter, or any entity, adding only that Mr Lynch reserved his rights. In apparent response to this letter, Mr Streeter filled out a claim form and signed it on 6 October 2022 (IAL Tender Bundle pp 99 – 102).

136. The following information was provided in that document:

    1. The claim form stated that the incident occurred on 9 September 2022 but the box for the time of day was not ticked.

    2. The description of the accident was: "the worker was the passenger in an all-terrain vehicle on a rural property. The vehicle swerved on soft ground and rolled. The worker was injured and suffered a broken leg. An ambulance arrived and took the passenger to Canberra Hospital".

    3. IAL was informed that a letter from Mr Lynch's solicitors had been received (in answer to question 6).

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4. In question 10, concerning responsibility for the accident, Mr Streeter replied: "Yes – there had been local heavy rainfall, and the terrain was softer and wetter than expected. As I was turning the steering wheel of the vehicle, the right front tyre of the vehicle sunk into a bog/hole and this caused the vehicle to turn over."

5. In response to question 13 concerning injuries, Mr Streeter similarly wrote: "The worker was the passenger in an all-terrain vehicle on a rural property. The vehicle swerved on soft ground and rolled".

137. On 9 October 2022, Mr Cornford sent an email to Mr Streeter stating that the claim had "a number of fraudulent claims" (IAL Tender Bundle p 103). These were firstly that Mr Lynch was not a worker for Bredbo and that they had been "hunting for deer" and secondly that it was "not the truth" that the vehicle sank into a bog or hole and rolled over as a result. He stated that Mr Lynch had "concrete evidence" which he had "personally seen" (i.e. the video).

138. Mr Cornford told Mr Streeter to withdraw the claim and stated that any further claims "need to be truthful".

139. On 12 October 2022, Mr Streeter completed a second CGU claim form (IAL Tender Bundle pp 104 – 107). The differences are that "claimant" was substituted for "worker" and the box for the time of day (8:45 PM) was ticked.

140. On the evening of 12 October 2022, Mr Cornford sent a second email to Mr Streeter, with a copy to their respective wives. A challenge is made to this document being tendered on the basis that Mr Cornford was not being called as a witness. This email was admitted into evidence subject to s 136 . I can, however, take into account that a second email was sent accusing Mr Streeter of "lies and deceit" and telling him that Mr Lynch had a video of "the entire event".

141. On 8 November 2022, Mr Streeter sent an email to his insurance broker describing the accident as having occurred when Mr Streeter "was driving with the claimant in the Can-Am to conduct an inspection of the property". The broker passed this information on to the insurer. Despite knowing there was a video showing them chasing after pigs, he never changed those instructions to his broker; in an email dated 4 October 2023, the broker referred to Mr Streeter claiming that the purpose of this trip was to "check out the property – to see if there were any stock where they should not be, to show Stephen the extent of the property and show him the animals/wildlife around the farm. I had a rifle in the Can-Am in case I saw a deer."

142. The declaration in the claim form includes a statement that in setting out the relevant details the insured had not sought to benefit unjustly from the claim by fraud, wilful misrepresentation or exaggeration. It also contains a statement that the information on the claim form is true in every respect.

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143. For the reasons set out above, I am satisfied that Mr Streeter recklessly chased and struck the pig and that the circumstances of the accident as shown on the video demonstrate that he must have known that he had struck a pig and that this was the reason for the accident. The circumstances in which he stated to the contrary on the claim form while knowing the true situation is of itself sufficient evidence of fraud.

144. Fraud is also established by the following:

    1. Mr Streeter was not taking Mr Lynch out to inspect the property or indeed to see any feature of the property, as it was pitch dark. He was taking Mr Lynch out for the reasons set out in his text messages (Exhibit A p 84), namely on a recreational hunting trip.

    2. Whether Mr Streeter thought he was on a hunting trip or not, his description of what caused the vehicle to roll was untruthful. His description of the cause of the accident makes no reference to chasing pigs, in circumstances where his attention was all given to the pigs running away from the front of the vehicle and this was the major contributing factor to the accident, whether the vehicle caught its wheels in a bog or hole or not.

    3. Mr Streeter knew that Mr Lynch had been taking at least one of the videos but was careful not to ask to see them, although he must have known that these would be of interest to IAL. He omitted to tell the insurance company that one of the doors to the vehicle was missing, which constituted a danger to occupants of the vehicle if the car rolled in a fashion that it did.

    4. Although he disclosed the fact that he had a rifle, this account is at best a half-truth, in that the video shows the accident occurred while Mr Streeter was chasing after pigs.

145. Individually each of the findings in paragraphs 143 and 144 above would be sufficient to demonstrate fraud. IAL has discharged the very heavy onus imposed in relation to fraud for each of these factual matters.

Concluding remarks and orders

146. The twelve issues for determination at paragraph 4 above are answered in favour of the IAL, the cross-defendant, save for Issues 6(a) and 6(b) (which relate to the Legality Condition of the Policy), which are answered in favour of Mr Streeter, the cross-claimant. The cross-claim is accordingly dismissed.

147. Mr Neal asks the court to reserve the issue of costs as there will be an application for special costs orders. I have granted liberty to apply in relation to costs and also in relation to any slip rule applications, as there were significant ongoing technology problems in the preparation of this judgment.

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Orders

1. Cross-Claim dismissed.
2. Costs reserved.
3. Liberty to apply.
4. Exhibits retained until further order.

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