SUPREME COURT OF QUEENSLAND

CITATION:	*Delta Pty Ltd v Team Rock Anchors Pty Ltd & Anor* [2017] QSC 115
PARTIES:	**DELTA PTY LTD (ACN 007 069 794)** (plaintiff) **v** **TEAM ROCK ANCHORS PTY LTD (ACN 120 856 822)** (first defendant) and **MECHANICAL AND CONSTRUCTION INSURANCE PTY LTD (ACN 106 907 055)** (third defendant)
FILE NO/S:	No 8800 of 2012
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 July 2017
DELIVERED AT:	Brisbane
HEARING DATES:	22 May 2017 to 2 June 2017
JUDGE:	Dalton J
ORDER:	**Judgment for the third defendant against the plaintiff.**
CATCHWORDS:	INSURANCE – THE POLICY – THE INSURED – where the plaintiff sub-contracted with the first defendant – where the first defendant breached that contract and caused loss to the plaintiff – where the first defendant had an insurance policy with the third defendant – where the insurance policy defined 'insured' as the first defendant and its principals and subcontractors not otherwise insured – whether the plaintiff was insured by the first defendant's insurance policy with the third defendant INSURANCE – PUBLIC LIABILITY INSURANCE – GENERALLY – CLAIM FOR INDEMNITY AS INSURED – where the plaintiff claimed against the third defendant as an insured under the policy – where the policy required the plaintiff to establish that the plaintiff was legally liable to pay compensation to the contractor for property loss – where the first defendant's breach meant that a retaining wall moved an unacceptable amount – whether the plaintiff became liable to pay compensation for property loss – where the plaintiff

claimed that a shortfall in payment from the contractor to the plaintiff amounted to the plaintiff paying the contractor compensation – whether the contractor suffered property loss as defined in the policy – whether a shortfall in payment amounted to a payment of compensation – whether the plaintiff's losses were indemnified under the insurance policy

INSURANCE – THE POLICY – OTHER MATTERS – ASSIGNMENT – where the plaintiff settled its claim against the first defendant – where the settlement deed assigned the first defendant's claim against the third defendant to the plaintiff – whether assignment valid

INSURANCE – PUBLIC LIABILITY INSURANCE – GENERALLY – CLAIM FOR INDEMNITY AS ASSIGNEE – where the plaintiff prosecuted the claims assigned to it by the first defendant against the third defendant – where the policy required the plaintiff to establish that the first defendant was legally liable to pay compensation to the plaintiff for property loss – whether the settlement between the plaintiff and first defendant established legal liability of the first defendant to the plaintiff – whether the settlement between the plaintiff and first defendant was reasonable – whether the plaintiff suffered property loss – whether the plaintiff's losses were indemnified under the insurance policy

Limitation of Actions Act 1974 (Qld), s 10

Albrighton v Royal Prince Alfred Hospital [1980] 2 NSWLR 542, applied
BNP Paribas v Pacific Carriers Ltd [2005] NSWCA 72, applied, distinguished
CGU Insurance Ltd v Watson [2007] NSWCA 301, cited
Hunter v Stronghold Insurance (Australia) Ltd [1991] VicSC 5, cited
Penrith City Council v Government Insurance Office of NSW (1991) 24 NSWLR 564, cited
Peters v General Accident Fire & Life Assurance Corp Ltd [1937] 4 All ER 628, considered
Schneideman v Barnett [1951] NZLR 301, followed
Stewart v McKenna & Ors [2014] IEHC 301, followed
Strahinja Pandurevic v Southern Cross Constructions (NSW) Pty Ltd & Ors [2012] NSWSC 623, cited
The Distillers Company Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd (1973-1974) 130 CLR 1, applied
Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd (1998) 192 CLR 603, cited, distinguished
Vero Insurance Ltd v Baycorp Advantage Ltd [2004] NSWCA 390, cited

COUNSEL:	J Gleeson QC, with B Jellis, for the plaintiff No appearance for the first defendant DA Savage QC, with S Lumb and F Savage, for the third defendant
SOLICITORS:	Thomson Geer for the plaintiff TurksLegal for the third defendant

[1] Queensland Investment Corporation (QIC) owned land at 175 Albert Street, Brisbane. On 26 May 2006 it entered into a contract with the plaintiff, Delta, to undertake excavation works on the site. Delta is a demolition and earthworks contractor based in Victoria. In 2006 it was hoping to establish a business base in Queensland, and this was one of its first projects in Queensland. Essentially Delta was to excavate a deep basement preparatory to a high rise building being built on the site by others. In September 2006 QIC contracted with Watpac as the builder, and the contract between QIC and Delta was novated so that Delta was in a contractual relationship with Watpac. At about the same time, that is September 2006, Delta engaged the first defendant (TRA) to install anchors and walers to secure the retaining walls for the basement excavation. TRA began work in November 2006 – t 1-86.

[2] Concrete piles had been driven around the perimeter of the construction site.[1] As the site was excavated, TRA was to drill holes of a relatively narrow diameter through the piles and into the earth behind them, sloping down at an angle of 30 or 50 degrees from the point of entry on the piles. The holes were to vary in length, but could be up to 20 metres long, depending upon design requirements. Into each hole was to be put a bundle of thick wire strands. Grout was to be injected so that the last, say, few metres of wire strands would be covered with grout and thus bonded to the subsoil. After allowing time for the grout to set, stress was to be placed on that part of the bundle of strands still protruding through the pile to check that the anchor was firmly bonded. If it was, it was to be clipped into place on the face of the pile so that it remained under tension, holding the piles back against the earth walls of the excavation. These devices are known as rock, or ground, anchors. They can also be called post-tensioned anchors.[2] TRA was to install 697 of them. They are described in some documents as temporary, for they are only designed to operate until a permanent retaining wall is constructed. That is, they are not expected to operate for the life of the building.

[3] Walers are horizontal beams which were to be inserted between the piles. The rectangular spaces formed between walers and piles were to be covered with concreting mesh and then concrete was to be sprayed onto the mesh (shotcreting). TRA was responsible for the shotcreting pursuant to a separate subcontract – t 6-12.

[4] The end result was to be a retaining wall around the basement excavation. It was to be built in sections, starting from the top, as the excavation proceeded. The retaining wall was to prevent the surrounding earth collapsing into the hole made by the excavation.

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1 By a separate piling subcontractor – t 1-45.
2 Exhibit 1, tab 40, p 8 (FMG Report).

Given the location of the building site, any such collapse would have had dire consequences not only for people working in the basement excavation, but for people and property in the vicinity of it.

[5] Before any works were undertaken on the site, QIC had commissioned bore-hole testing across the site. Based on that, an engineering group, Robert Bird, had designed a performance specification for the retaining walls. There was no criticism of this design. TRA, by one of its directors, Barry Jones, a civil engineer, designed shop drawings for the ground anchors. There was no issue in the case about these shop drawings; had the anchors been installed in accordance with the shop drawings, the Robert Bird performance specification would have been met, and the retaining wall would have functioned adequately.

[6] TRA's performance under its ground anchor subcontract was woeful. The great majority of anchors installed were not in accordance with the shop drawings. The bundles of wire tendons did not contain sufficient tendons. Nor were they long enough. Nor were they grouted into position properly at their ends. They were not capable of performing as they should have done.

[7] Survey monitoring points were located around the perimeter of the site on top of the retaining walls. By May they showed unacceptable movement of one wall, SW1. The Superintendent appointed pursuant to the contract between Watpac and Delta issued a direction to Delta on 3 May 2007 to backfill against SW1 and install a further two rows of rock anchors in that wall. That was done, but movement of SW1 continued. On 28 June 2007 the Superintendent issued a further instruction to Delta in relation to the SW1 wall. Lastly, on 24 July 2007 the Superintendent instructed Delta to backfill the entire excavation and essentially start excavating again, testing and replacing defective anchors as the re-excavation proceeded. Delta complied with all these directions.

[8] Cost and delay was incurred. At first Delta's senior engineer in Brisbane was Mr Attard. He went on leave, and in the last days of June 2007 Delta sent Mr Welsh, an engineer, to the site. He remained in Brisbane until the re-excavation was complete. He worked very long hours, nearly every day, supervising and co-ordinating what was happening on site. He gave evidence and impressed as responsible, honest and intelligent. I accept Mr Attard as an honest witness as well. However, he had less to do with the job and his memory of it was not as good as Mr Welsh's.

Exhibit 35: Delta's Log of Costs

[9] One of Mr Welsh's jobs was to create a log of all the costs Delta incurred because of the problems which began with movement in SW1. This log became Annexure D to the plaintiff's particulars of loss dated September 2015, and was exhibit 35 at trial. Mr Welsh explained that the log of costs was a tally of the costs Delta incurred (t 2-55) from the time it became evident that issues with the SW1 wall would take the job outside budget parameters (tt 4-3-4). To give an idea of the general nature of what was in his log of costs he said:

> "So we were recording the information for materials being imported into the excavation, so soil being imported, the labour that was engaged on the

> project, the machinery that was engaged on the project and any other secondary subcontracts. So we had traffic management, there were permits, there were other hire – external hire equipment that was outside of Delta's fleet." – t 2-56.

[10] Mr Welsh typically wrote up the log of costs daily – t 2-56. It recorded costs Delta incurred with third parties – purchase of soil, hire of equipment, engagement of traffic management contractors. It also recorded the cost to Delta of the Delta employees and Delta machines on the site. Those costs were calculated by Mr Welsh according to detailed accounting records which Delta kept to allow it to track its own costs, and say, make accurate quotations or tenders for jobs – t 4-18. That is, exhibit 35 showed the cost to Delta of complying with the Superintendent's directions, first to stabilise SW1, but later to backfill the entire site and re-excavate, testing and replacing anchors as it went. This was a process which lasted from May 2007 until around April 2008 (t 2-47 and t 6-49). The total amount of costs in this schedule was around $4.1 million.

Exhibit 38: Costs of Filling and Re-excavating

[11] At some point in time, for the litigation, Mr Welsh extracted some of the information in exhibit 35 and put it in a separate spreadsheet. That spreadsheet became Annexure 2 to the statement of claim. In it he isolated the costs associated with the activities of importing soil to backfill first against SW1, and then the entire excavation. It also shows the costs of removal of the soil subsequently. The total amount of these costs was $1.478 million.[3]

Detail of the Failure of the Ground Anchors

[12] The general nature of the shortcomings in the TRA work has been described. The contract drawings allocated a number to each of the four retaining, or shoring, walls in the excavation: SW1, SW2, SW3 and SW4. SW1 was parallel with Regent Lane. Excavation along SW1 occurred last, after excavation against SW2, SW3 and SW4 was already well advanced, if not complete.

[13] I have reports from two expert engineers, exhibits 76, 77 and 79. There is little difference of opinion expressed between the two witnesses. Generally, I prefer the report of Mr Ervin to that of Dr Baigent. Dr Baigent's report is comparatively superficial and does not contain the depth of analysis evident in Mr Ervin's report. Mr Ervin gave evidence and impressed as a very learned professional who was careful to say precisely what he meant and not go beyond what was supportable in his view on the evidence and scientific analysis.

[14] As well I have a report of FMG, an engineering firm which Delta engaged in June 2007.[4] It was not controversial at the trial. It documents the movement of survey points around the perimeter of the site over time (*inter alia*). The work in the FMG report is relied upon by both Dr Baigent and Mr Ervin.

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[3] t 2-60.

[4] Exhibit 1, tab 40.

[15] The FMG Report records the following:

> "4.1 FMG was provided with survey information by [Delta] which indicated minor lateral wall movements were occurring at the top of the retaining wall SW1, SW2 and SW3 in January 2007.
>
> 4.2 D Hargreaves, of [Robert Bird Group] advised FMG that the expected maximum lateral movement expected in the wall was up to 40mm.
>
> 4.3 From the sequence of events provided by [Delta] and included as Appendix D, on 28 March 2007 a leak first appeared through an anchor within the SW1 wall … On 13 April exploratory works identified that the water main within the lane [Regent Lane] had burst … Rectification works to the water main was carried out on the 14th of April 2007. The wall continued to move and on the 6th of June another leak had developed in the SW1 wall. Investigation identified a second leak within the water main which was fixed on the 15th of June 2007. Settlements were also observed in the surface level of the Elizabeth Street pavement near the lane corner … It is during this period (and on 21 June 2007) that FMG was engaged to carry out this investigation.
>
> …
>
> 4.6 During FMG's inspection of the site on 25 June 2007 the following was observed:
>
> 4.6.1 Up to 77mm lateral inward movement of SW1 retaining wall
>
> 4.6.2 Up to 11mm settlement of the Elizabeth Street pavement
>
> 4.6.3 Voids in the soil strata below the laneway pavement.
>
> …
>
> 4.8 As part of this investigation, FMG recommended pull out tests be carried out for some anchors where the SW1 wall had moved laterally. …"

[16] Mr Ervin discusses just how bad TRA's performance in installing the rock anchors was. He notes that in the top two rows of anchors on SW1, 18 failed when tested, including nine of which anchors were part of the initial remedial works.[5] He notes that all but four of the 85 anchors removed from SW1 were less than their design lengths and in many instances were significantly shorter: 67 of the 85 anchors were less than 75% of their design length and some anchors were as little as 30 to 40% of their design length. Some anchors were so short that their total length was less than the minimum free length (unbonded length).[6] Mr Welsh's evidence was that the anchors which were very significantly under length were on SW1 – t 2-45. Of course, this was not known until all anchors had been tested.

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5 Exhibit 79, paragraph 5.1.6.

6 Exhibit 79, paragraphs 5.2.6 and 5.2.8.

[17] Mr Ervin's evidence allows me to conclude that many of the quality assurance records filled in by TRA contained false information. The drilled anchor lengths recorded were in accordance with the shop drawings or longer, notwithstanding the anchors were much shorter.[7] Further, the quality assurance records in relation to each anchor show when rock was encountered. It is evident that these records were false in relation to several of the anchors on SW1. The anchors were drilled downwards at 30 or 50 degrees from entry point, and each row of anchors was separated by a vertical distance of around three metres. The quality assurance records show that rock was encountered in the lower row of anchors on SW1 at a point above where it was encountered when drilling the first row of anchors.[8]

[18] Mr Ervin says: "It is almost inconceivable that the workers installing the anchors would not have known of the shorter than design length anchors … or realised that it was probable such anchors would not be able to perform their design function." He describes the actions of TRA in installing the anchors, "to have been extremely poor practice and practice which might have endangered the lives of workers within the excavation and in adjacent properties."[9]

Consequences of the Failure of Ground Anchors

[19] At first there was confusion as to what was causing the SW1 wall movement. Some movement of retaining walls is acceptable.[10] Only SW1 was moving unacceptably. It was initially thought that movement was caused by the water leak in Regent Lane having charged SW1 with too much weight for the design. That is, it was thought that the movement in SW1 might be the consequence of the water leak. FMG were still undecided about this issue at the time of their report.[11] Ultimately, I accept Mr Ervin's view on this issue, which is that the leaking water pipes in Regent Lane and consequent charging of SW1 should not have caused SW1 to move, had the ground anchors been installed according to design and the shop drawings.[12]

[20] Mr Ervin says that SW1 moved "an alarming amount (up to 77mm)". He says, "Similarly, I understand there was settlement and road damage observed adjacent to Wall SW2 (Elizabeth Street), again indicating the as installed anchors on this wall were not adequate."[13] In relation to SW3 and SW4 Mr Ervin says, "No significant movement was observed on these walls, and therefore it is not possible to say whether the anchors, as installed, were adequately performing their intended function."[14] He goes on to say that regardless of whether or not there was any movement on SW3 and SW4, there were a number of anchors there which had been so poorly installed that they would not have been operating to their design capacity.[15]

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7 Exhibit 79, paragraph 5.2.9.
8 Exhibit 79, paragraph 5.3.4.
9 Exhibit 79, paragraphs 8.4.2 and 8.4.1 respectively.
10 t 1-52, Attard; t 8-31 and t 8-32, Ervin.
11 Exhibit 1, tab 40, p 20.
12 Exhibit 79, paragraphs 5.71 and 5.72.
13 Paragraph 5.4.1.
14 Paragraph 5.4.2.
15 Exhibit 79, paragraph 5.4.3.

[21] As to backfilling against SW1 Mr Ervin says:

> "The instruction to backfill against wall SW1 and install a further two rows of anchors in SW1 was made on 3 May, 2007. This followed on from observed and increasing movement of Wall SW1, with about 50mm of movement occurring up to the beginning of May 2007. … By this time the excavation was well advanced … with the last row of anchors 33% complete. The consequences of a collapse of part or all of Wall SW1 would have been considerable and the risks to personnel working within the excavation needed to be considered. Some remedial/restoration works were therefore not only prudent but responsible considering the safety of personnel and the site.
>
> I consider placing backfill to have been a suitable interim measure to provide additional support to Wall SW1. It could be, and was, commenced virtually without delay."[16]

[22] Dr Baigent gives the view that because of the defective rock anchor installation, the failure of SW1 was inevitable (paragraph 5.12 of his first report). Mr Ervin considers that inevitable is too strong a word, noting that SW2, SW3 and SW4 also had defective anchors and did not fail. However, he thought it was reasonable to say that the support of SW1 was "severely compromised by the defective anchor installation, and that the possibility of failure of this, and the other walls, would have been of great concern had the defective nature of the anchors been known."[17]

[23] Mr Welsh, who arrived on site in the last week of June 2007, said:

> "The state of the project, it was in distress. We had had issues with wall movement on one of the four shoring walls. It was unclear as to why we had had movement." – t 2-43.

[24] The email chains at exhibits 19 and 20 show that on 2 May 2007 Mr Attard sent Watpac an email saying that survey point M10 (on SW1) "has now moved to 50mm". The response from Watpac was:

> "The recent wall movement has become extremely concerning. Could you please be available to attend a site meeting at 10.00am tomorrow to discuss the issue and immediate safety concerns."

[25] The supervising engineers (Butler Partners) were of the same view:

> "We agree that the latest set of monitoring results for M10 are concerning in view of the significant increase in movement recorded over the last 2 days.
> …
>
> In view of the recent significant increase in wall movement and the fact that the deflection is now in excess of the predicted amount we recommend that the following be undertaken **immediately:**

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16 Exhibit 79, paragraphs 5.6.1 and 5.6.2.
17 Exhibit 79, paragraph 6.3.3.

1. Place fill against the excavation face in front of M10 to a height of not less than the upper row of anchors, extending laterally to M9 and M11.

2. Install additional stressed anchors to the face to locations and capacities to be confirmed in the morning.

3. Inspect the wall for signs of distress and cease work directly below the M10 area." (emphasis in the original)

[26] The original designers, Robert Bird Group, agreed with Butler Partners' recommendations and the parties all met on site on 3 May, as a result of which the Superintendent's direction of 3 May 2007 issued, essentially in accordance with Butler Partners' recommendations:

"Stage 1

- place fill material against the excavation face as a minimum in the zone marked '1'. Place fill to the level of the top row of anchors, with a 4m (min) berm as indicated, taking care to protect any anchors and walers against damage.

- install additional anchors to capacities and locations to be advised tomorrow (4/05/07)

Stage 2

- re-use fill material from zone '1' for placement in zone '2', to levels and details as for zone '1'

- install additional anchors to capacities and locations to be advised tomorrow (4/05/07)."

The exhibit does not show where zone 1 and zone 2 were, but it is not controversial that they were at positions along SW1.

[27] On 28 June 2007 a further Superintendent's direction issued in the following terms:

"Based upon the advice provided by Robert Bird Group and Butler Partners following their meeting with Watpac, Delta, and Team Anchor earlier this afternoon, as a matter of urgency Watpac are instructed to undertake the following emergency works.

1. Continue the importing of fill back into the site so as to increase the size of the stabilising berm against the SW1 Shore Wall. The elevational and lateral extent of the berm is to be reviewed and agreed with Robert Bird Group and Butler Partners throughout this activity. Work to complete this exercise will only cease upon satisfactory instructions from the above parties.

2. Commence the repair to the fractured fire hydrant water main with the intention that subject to the successful location of the cause of the leak the repair will be completed before normal business hours tomorrow morning. In any event, and on account of the fact that QFRS have

> closed down Hoyts Cinema for the evening, Watpac are directed to ensure that the leak from the hydrant main is stopped now, so as to prevent any further water surcharge against the SW1 Shore Wall.
>
> In line with the instruction issued on Friday 22 June, Watpac are requested to continue daily monitoring of the SW1 Shore Wall and to provide records of the same to RCP, Robert Bird Group, and Butler Partners for ongoing monitoring of the current situation.
>
> As discussed, the above instructions have been issued under advice from QICs Structural and Geo-technical Engineers and are to be implemented with immediate effect to ensure the stability of the Shore Wall. Based upon the analysis of the SW1 Shore Wall carried out to date, and the results tabled at this afternoons meeting, Dave Hargreaves and Bruce Butler are both extremely concerned as to the continued stability of the SW1 Shore Wall if the above instructions are not carried out without further delay. At the present time the issuing of the above is not an approval for any cost or time adjustment entitlement to Watpac under the contract." – exhibit 21.

[28] The last direction from the Superintendent is not in evidence but it was uncontroversial that it was to backfill the entire site. What is in evidence is a letter from Watpac's project manager to Mr Welsh dated 24 July 2007 (the date of the Superintendent's third direction). The letter says:

> "Following ongoing discussions over the recent weeks and our meeting on 23rd July 2007, given the results of testing to hand, we confirm your company's concurrence that it would be prudent to commence filling operations to the 'hole'. As discussed testing by QPS will continue and the filling operation will be monitored against the results gained from further testing.
>
> We note the filling operation will commence Tuesday evening 24th July 07 and endeavour to be operational through both day and night given the ability to source a cartage company throughout the night. Present site activities will see the continuation of the stressing of the bottom row of anchors and the night shifts completion of weep holes through SW3." – exhibit 33.

[29] It can be seen that Watpac's letter records Mr Welsh's agreement to the course undertaken. Mr Welsh's evidence about the three directions was as follows. As to the first two directions: these were not to backfill the whole site but just "to stabilise the SW1 wall, because that was the wall that was experiencing the excessive movement" – t 2-45. The third (24 July) direction was made after investigations, during which it was discovered that the TRA anchors were short:

> "So that led to a loss of confidence on what the rest of the site – so this was all on SW1. And there was an instruction given to start testing on the other three walls, so SW2, SW3 and SW4. And from some of those results, there were anomalies with the data and we didn't have [the] confidence [of] our client, Watpac. And the developer, QIC, didn't have confidence and the

> instruction was given to backfill the entire base of [the] excavation on the 23rd or 24th of July in 2007." – t 2-45.[18]

[30] It is evident from the exhibits extracted, and from Mr Welsh's evidence, that the placement of earth against SW1 was undertaken urgently in circumstances where the engineers were very concerned that SW1 was moving unacceptably. The direction to backfill the entire site was not made in those circumstances. It was made after investigations had raised questions as to TRA's faulty installation of anchors. It was made because QIC, Watpac, and indeed Delta, had lost confidence in TRA's work after SW1 had been stabilised.

[31] In cross-examination Mr Welsh's evidence was to this effect – see tt 6-49-51, and in particular at t 6-51:

> "And the filling of the site was occasioned by a concern over the work that TRA had done in respect of the SW1 wall?--- That's correct.
>
> It wasn't done because of [a proved][19] instability in the SW4 wall – for example?--- Yes, that's correct.
>
> Or the SW3 wall?--- That's correct.
>
> Or even the SW2 wall?--- There had been some movement in SW2, and there was also evidence of damage that had occurred outside of the site on the SW2 wall. There was subsidence of the roadway on Elizabeth Street, and there was some concern particularly over the SW2 wall."

[32] This view of the matter is also supported by the expert reports. Under the heading "Brief background" Dr Baigent says:

> "The retaining wall (SW1) adjacent to Regent Lane suffered the greatest lateral movement of approximately 77mm. The lateral movement resulted in the formation of voids and cavities in the soil behind the retaining wall. Underground services including stormwater pipes and a water main were damaged and repeatedly repaired as a result of the wall movement. The neighbouring Regent Theatre suffered cracking damage also.
>
> The retaining wall (SW2) adjacent to Elizabeth Street also suffered lateral movement which resulted in cracking to the road surface."[20]

[33] Speaking of SW1, at paragraph 6.9 of his first report Dr Baigent says, "… it is my opinion that the installation was so deficient that unacceptably high and unsafe lateral movements were inevitable.[21] Based on the results of the [FMG] investigation, it is my opinion that there was a high likelihood that sections of the retention wall could have collapsed had the excavation been taken to its final required depth." Later at paragraph 6.13 he says, of SW1:

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[18] The words in square brackets are mine, to convey the meaning I took from this part of the evidence.
[19] My correction to the transcript.
[20] Exhibit 76, paragraphs 2.5 and 2.6.
[21] This is the conclusion which Mr Ervin cavils with – see [22] above.

> "… it is my opinion that the retention wall was fundamentally unsafe. It is my opinion also that there was no alternative but to carry out the works outlined above. As I have noted above, I consider it highly likely that there would have been a collapse of the wall had the excavation works continued. A collapse would have had a catastrophic effect on any adjacent buildings. A collapse could also have endangered the lives of any workers in the excavation."

[34] This part of his report is a response to a question enquiring whether work of: backfilling the excavation, testing of the anchors, installation of two additional rows of remedial anchors in SW1, replacement of certain anchors and re-excavation of the backfill was necessary. Despite the terms of the question ("backfilling the excavation") Dr Baigent has only answered in terms of supporting SW1.

Claims Arising out of the Excavation Contract and Failure of the Ground Anchors

[35] While Delta, in the form of Mr Welsh, compiled a log of costs it suffered due to TRA's breaches of the subcontract, Watpac, also suffering cost and delay, began preparing a claim against Delta. Watpac and Delta settled Watpac's claim in relation to the installation of defective ground anchors by a deed made in 2010.

[36] Delta made a claim against its insurer, HSB. The claim was for the amount in the log of costs (exhibit 35) and the amount of Watpac's claim. In broad terms, HSB paid part of Delta's claim, but only after litigation was commenced.

[37] Delta sued TRA in this proceeding, commenced in 2012, and then settled with TRA. That settlement involved taking an assignment of TRA's rights against TRA's insurer, Mecon. Mecon was a third party to the proceeding at that stage. It became the third defendant after Delta settled with TRA and prosecuted claims against it directly. The trial before me was Delta's prosecution of TRA's claim against Mecon for indemnity pursuant to the Contract of Insurance between TRA and Mecon. Delta also alleged that it was an insured under the Mecon policy and prosecuted its own claims for loss against Mecon.

[38] While TRA is still a party to this proceeding, it did not appear at trial, although its director (Ms Julie Jones) sat in Court the entire trial, in the public gallery.

[39] To understand the issues in this litigation it is necessary to understand the detail of these three claims and what became of them.

Delta's Claim against Watpac

[40] Exhibit 55 is an extract printed from Delta's electronic books. It shows that Delta submitted invoices to QIC and Watpac and that they were paid. The first was dated 26 July 2006 and the last 4 June 2007.

[41] Delta's claims for payment from QIC and then Watpac were processed according to the *Building and Construction Industry Payments Act,* ie., via payment claims and payment schedules.[22] There were variations to the work that affected the amount that was to be paid under the contract.[23] There were claims for variations made by Delta on Watpac before work on the rock anchors began, and claims that had nothing to do with the rock anchors. Some claims were agreed between Delta and Watpac, and some were disputed. Indeed, there were some claims which were in dispute between Delta and QIC before the novation. There were about 35 claims for variation by the time Mr Welsh arrived on the job.[24]

[42] Before the ground anchor work began, Watpac had alleged that Delta was delaying the works, and indeed delaying the critical path of the works. Watpac's claims in relation to that issue were worth a significant amount of money.[25] The date of practical completion for Delta's works was originally 22 January 2007.[26] Liquidated damages were in the amount of $7,500 per day up to a maximum of $200,000.[27] The rock anchors were a relatively small part of the work Delta contracted to do; the rock anchor contract was worth only $450,000.[28] As part of the novation of the contract, the date for practical completion of Delta's works was adjusted out to 15 February 2007, but the works were nowhere near complete at that time.[29] On 26 February 2007 Watpac issued a notice to Delta asking why it should not take the work out of its hands because its programming showed it would complete its contract 57 days after the date for practical completion (then 9 March 2007).[30]

[43] At the time the certificate of practical completion issued for Delta's work under its contract with Watpac there were outstanding claims between Watpac and Delta.[31] There were claims made by Delta against Watpac, including for payment for works done under the contract at that point.[32]

[44] Exhibit 55 does not reveal any of these matters; it is just a limited extract printed out of Delta's electronic accounting system. There are records of all these matters in the payment claims and payment schedules in Delta's possession – tt 1-86, 1-87 and 1-88. There are witnesses who had knowledge of these things – see tt 1-89-90ff. There was no attempt by Delta to tender any documents or call any witnesses which gave information as to how the disputes, and agreements, between Delta and Watpac which took place during the course of the contract affected the amount to be paid under it.

[45] On 10 October 2007 Watpac made a claim on Delta "for the costs associated with the rectification works of the damaged shoring walls". This was in an amount of $737,615. It included an amount of around $75,000 for "repair to services Regent laneway" and an

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22 t 1-86, Attard; t 5-54, plaintiff's counsel.
23 t 1-83, t 1-86, Attard; t 6-25, Welsh.
24 t 6-25.
25 tt 1-83-87, Attard.
26 t 6-11.
27 t 6-11.
28 t 6-12.
29 t 6-13.
30 Exhibit 58.
31 t 6-48.
32 t 6-49.

amount of around $95,000 for "additional two rows of anchors". As well there was a claim for over half a million dollars for "fill site and retest anchors".[33] Mr Welsh said that Watpac's costs in relation to this last item were the costs of an independent anchor contractor who came in to test TRA's anchors, and Watpac personnel engaged on the job whose cost was wasted because they could not progress the job whilst the backfilling took place – t 5-46. There were additional costs for delays which subsequent contractors (ie., subsequent to the excavation contract) incurred – t 5-46.

[46] An updated version of this claim was lodged on 31 May 2008.[34] The claim was by that stage for an amount of $2,477,259. It included amounts for technical advisors. It included further amounts under the description "fill site and retest anchors". It included an amount of $115,302 for "grout injection under Regent laneway/Elizabeth Street", a small amount for "additional dilapidations report of Regent building" and an amount reimbursing QIC for a payment to an adjoining property owner. There was apparently movement and damage to the Regent Building – t 5-46. Watpac put Delta on notice that there might be costs in this regard.

[47] The last of these claims against Delta is dated 1 August 2008. The amount was $2,480,998.[35]

[48] The claims note that Watpac is setting off the amounts of its claim against the amount it owes Delta for work pursuant to the excavation contract.

[49] On 10 December 2010 Watpac and Delta settled some of their differences. They entered into a deed.[36] As can be seen from recitals A and B, the deed related to work on the Albert Street site. The recitals continued:

> "C Watpac has notified Delta of the following claims that Watpac asserts against Delta:
>
> - The rectification ground anchor claim.
> - The Regent building damage claim.
> - The Regent building ground anchor compensation claim.
>
> D Watpac and Delta have agreed to settle the rectification ground anchor claim and final sum payable under the excavation contract on the terms of this deed."

[50] In accordance with those recitals the first three operative provisions were:

> "**1 Releases & Indemnity**
>
> **Mutual releases**

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[33] Exhibit 51.
[34] Exhibit 52.
[35] Exhibit 53.
[36] Exhibit 10.

1.1 Subject to clause 1.3, on execution of this deed by both parties, each of Delta and Watpac release each other from all liability … in relation to, or arising out of the following:

1.1.1 The excavation contract and the performance, purported performance or breach of the excavation contract.

1.1.2 The rectification ground anchor claim.

Delta releases

1.2 Delta releases Watpac from all liability … in relation to or arising out of the following:

1.2.1 The Regent building damage claim.

1.2.2 The Regent building ground anchor compensation claim.

Claims not released by Watpac

1.3 Watpac does not release Delta from any liability … in relation to or arising out of the following:

1.3.1 Any latent defects, not known by the parties at the date of this deed, in the work performed, or purported to be performed, by Delta under the excavation contract.

1.3.2 The Regent building damage claim.

1.3.3 The Regent building ground anchor compensation claim."

[51] Then the deed provided:

"**2 Acknowledgment & agreement**

Acknowledgment

2.1 Each of Delta and Watpac agree and acknowledge each the following:

2.1.1 The final total sum payable by Watpac to Delta under the excavation contract is $3,773,020.60 [plus GST].

2.1.2 Watpac has, to the date of this deed, paid Delta $3,326,021.36 [plus GST] of the sum stated in clause 2.1.1.

…"

[52] The only provision for payment of any sum under this deed was at clause 2.2 which provided:

"**Watpac must pay balance of excavation contract sum & release bank guarantees**

2.2 Within 14 days of Delta executing this deed, Watpac must do each of the following:

2.2.1 Pay Delta $446,999.24 [plus GST], being the balance of the sum mention in clause 2.1.1.

…"

[53] There are some relevant definitions in the deed:

"…

Rectification ground anchor claim means that claim Watpac asserts against Delta for costs and damages incurred by Watpac arising out of or related to the defective installation of temporary ground anchors by Delta, the rectification of which required the basement excavation to be re-filled and then re-excavated as existing temporary ground anchors were tested for adequacy and supplementary ground anchors were installed.

Regent building means the Regent theatre building, which is beside the project in Elizabeth Street.

Regent building damage claim means the claim asserted by the owners and occupants of the Regent building for damage said to have been caused to the Regent building by the installation of temporary ground anchors on the project and which claim Watpac asserts against Delta, as follows:

- The owners and occupants of the Regent building have asserted the claim against QIC as owner of the project, but may assert that claim directly against Watpac.
- QIC as principal, under the head contract, asserts that QIC is entitled to claim any liability of QIC to the owners of the Regent building against Watpac as the head contractor on the project.
- Watpac, as head contractor on the project and principal under the excavation contract, asserts that Watpac is entitled to claim any liability Watpac has for the claim to QIC or to the owners or occupants of the Regent building from Delta as the contractor under the excavation contract.

Regent building ground anchor compensation claim means the claim QIC has asserted against Watpac for compensation paid by QIC to the owners of the Regent building for the estimated additional costs of constructing foundations for any new development on the site of the Regent building caused by the installation of additional ground anchors installed during the rectification work referred to in the definition of the rectification ground anchor claim and which Watpac asserts against Delta, in the event of the claim being pursued by QIC, as follows:

- QIC asserts that Watpac, as the head contractor on the project, is liable to QIC for the compensation QIC says it has paid the owners of the Regent building, and any other related costs or damages.
- Watpac, as head contractor on the project, and principal under the excavation contract, asserts that Watpac is entitled to claim any liability Watpac has for the claim to QIC from Delta, as the contractor under the excavation contract."

[54] There was no evidence at trial as to whether anything further occurred in relation to the two claims which were not settled by this deed.

Delta's Claim against HSB

[55] Delta sued HSB Engineering Insurance Ltd in the Supreme Court of Victoria on 24 June 2010. The pleadings are exhibits 11 and 12 in this proceeding. From them it can be seen that Delta alleged a policy which insured it against the risk of physical loss and damage to property, made on 15 June 2006 and renewed on 7 June 2007. The property insured was property which was "owned by the Insured or for which the Insured may be responsible".[37] The policy had an extension (extension 7) which provided that:

> "In the event of any imminent or actual loss of or damage to the Property Insured, the Insurer shall be liable for costs and expenses of saving, protecting or recovering the Property Insured …"[38]

[56] The claim made against HSB was that there was damage to property, namely Regent Lane, Elizabeth Street and the Regent Theatre (ie., property belonging to third parties, located outside the building site). The claim under extension 7 was for work done by Delta because the retaining walls were at risk and there was a risk of consequent collapse of surrounding areas.[39] Delta advanced the amount of Mr Welsh's log of costs ($4,146,969.75) together with the claim for nearly $2.5 million which Watpac had made against it.

[57] It appears that HSB initially granted indemnity limited to extension 7 to the policy, but only the original policy, not the renewed policy.[40] It paid Delta $709,143. Exhibit 60 shows that this was paid pursuant to extension 7, "in respect of those costs incurred by or on behalf of Delta in backfilling the site … before 5 August 2007 and which exceed the applicable policy excess." Exhibit 60 shows the costs were: "imported materials"; "plant/operator"; "Hire"; "Project manager/supervision/foreman", and "traffic control".

[58] By the time the proceedings commenced, HSB said it paid that money by mistake, although it is not clear what the mistake was. In the statement of claim Delta alleged that the figure of $709,143 was only part of the costs it claimed under extension 7.[41] It seems that HSB denied indemnity under the renewed insurance because it said any relevant occurrence took place before the inception of the renewed insurance.[42] HSB denied liability outside extension 7 because Delta's claim was "works to rectify or repair third party property not Property Insured".[43]

[59] The settlement deed between Delta and HSB was made some time in December 2010 judging from the date on the word processing reference.[44] The Court proceedings were

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37 See paragraph 4(e) of the defence, exhibit 12.
38 Paragraph 4(i) of the defence, exhibit 12.
39 Particulars to paragraph 9 of the statement of claim, exhibit 11.
40 Paragraph 19(a) of the defence, exhibit 12 and exhibit 60.
41 See paragraph 23 of the statement of claim, exhibit 11.
42 Paragraph 19(b)(ii) of the defence, exhibit 12.
43 Paragraph 27 of the defence, exhibit 12.
44 Exhibit 13.

to be dismissed and there was to be no order as to costs. HSB was to pay to Delta a total amount of $2,309,143.32, which included the amount of $709,143.32 it had already paid. That is, HSB was to pay an additional $1.6 million to Delta. It is clear from Annexure 3 to the settlement deed that all the amount paid by HSB to Delta was referrable to Mr Welsh's log of costs. That is, it is clear that HSB was paying part of that amount, and no part of the other amounts advanced by Delta against it in the litigation. It is not clear from the documents how the parties fixed on the amount of $2,309,143.32 as the amount which was to be paid, and Delta chose not to call any evidence to clarify the point.

[60] Interestingly, Annexure 3 to the settlement deed between Delta and HSB shows that of the $2,480,998.43 which Watpac had claimed against it, Delta had recovered an amount of $1,245,563.88 from the insurer QBE.

Delta's Claim against TRA

[61] The statement of claim in this proceeding made Delta's claim against TRA. It was alleged against TRA that it breached its subcontract and was negligent[45] in the way it installed the rock anchors. It was said that this caused Delta the loss and damage pleaded at paragraphs 16 and 17 of the statement of claim.[46] The amount of loss claimed was about $2.8 million.

[62] By an undated deed pleaded to have been made on 24 May 2016, Delta, TRA and Mr Jones[47] agreed to settle their claims in this proceeding and TRA agreed to assign Delta "certain of TRA's rights under the Mecon policy".[48]

[63] As to the settlement, the deed provided:

> "2.1 Subject to clause 2.2, and without any admission as to liability, TRA hereby agrees to settle the Delta Claim upon the basis that:
>
> (a) TRA agrees to pay to Delta the amount of $2,581,179.18, in full and final settlement of the Proceeding including the Delta Claim and the TRA Counterclaim (**the Settlement Amount**) upon demand; and
>
> (b) there be no order as to costs.
>
> 2.2 TRA remains, and shall remain, liable to Delta for the Settlement Amount, but TRA's liability in respect of the Settlement Amount is limited to the amount actually recovered by Delta under the Mecon policy as assignee of TRA.

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45 Paragraphs 11 and 24 of the statement of claim.

46 The claim at paragraph 17 was not pressed against Mecon. There was a further claim made by Delta against TRA under the *Trade Practices Act* – see paragraphs 27 to 36 of the statement of claim, but that was abandoned by Delta on the trial against Mecon – t 1-17.

47 Mr Barry Jones was originally the second defendant in this proceeding. Delta released and discharged Jones and consented to the claim against him being dismissed.

48 Recital F of exhibit 14.

2.3 TRA acknowledges that Delta's agreement to clause 2.2 is in reliance upon TRA's representations as to TRA's current financial position to the effect that TRA lacks the financial capacity to meet any substantial part of TRA's liability to pay the Settlement Amount."

[64] In the deed there is a footnote after the figure $2,581,179.18. The footnote reads:

"Being the total amount claimed in paragraph 16 of the Claim ($2,831,179.18) less $250,000 on account of TRA's counterclaim."

[65] As to assignment, the deed provided:

"3.1 By this Deed, TRA agrees to assign the Mecon Claim to Delta for the sum of $1.00 (**Purchase Amount**).

3.2 TRA and Jones shall provide reasonable assistance to Delta in relation to the exercise of Delta's rights under the Mecon policy as assignee of TRA."

[66] The "Mecon Claim" was defined as meaning:

"… the whole of TRA's beneficial interest in the Mecon policy including all rights and entitlements to obtain indemnity and to recover under the Mecon policy in respect of TRA's liability to Delta for and in respect of the Delta Claim."

Delta's Present Claim

[67] The way this proceeding was run after settlement between Delta and TRA, was that Delta simply asserted the same loss it had asserted against TRA against Mecon. That is, the pleading was not in any way recast. Conceptually the loss Delta now asserts against Mecon is the same loss which Delta asserted against HSB: Mr Welsh's log of costs and Watpac's claim against Delta. However, the quantum of both these claims has been affected by the settlements Delta has made with HSB and Watpac.

[68] The pleading of loss and damage is at paragraph 16 of the statement of claim. There are four items particularised. The first is, "Direct unrecovered cost for rectification works undertaken by Delta". The origin of this claim is Mr Welsh's log of costs (exhibit 35). As will be recalled, that schedule is the cost to Delta of rectification work after SW1 was noted to be moving unacceptably. Counsel for Delta said that the word "unrecovered" in the description of this item meant "unrecovered from HSB". He said that the amount of item 1 – $1,885,218 – was the amount of Mr Welsh's log of costs less the amount recovered from HSB – t 2-22. In fact it is not. The amount in the log of costs was $4,146,969.75. The amount recovered from HSB was $2,309,143.32. The difference is not the amount at item 1 but an amount of $1,837,826.43. The $50,000 or so difference was never explained by the plaintiff.

[69] Item 2 of the particulars to paragraph 16 of the statement of claim is an amount of $142,000, which is the cost of flights and accommodation for Delta personnel who needed to travel to, and stay in, Brisbane to undertake rectification work. Conceptually

it is the same as the costs claimed in Annexure D. The reason the costs were not included in Annexure D is not known; they could have been – t 2-22.

[70] Item 3 is similar. It is an amount of $20,000 paid by Delta to experts who assisted in the rectification works.

[71] Item 4 to the particulars of paragraph 16 of the statement of claim is "Shortfall in payments under Contract due to TRA's breaches … (in substance the amount paid by Delta to Watpac as compensation)." The amount is $720,577.70.

Insurance Claims against Mecon

[72] Having described the factual matters, the past claims made by and against Delta, and the nature of the loss pressed in this proceeding, I turn to the claims Delta makes against Mecon. It makes claims directly against Mecon, as insured under the policy, and it prosecutes the claims it bought from TRA.

Delta's Claims under the Mecon Policy as Insured

[73] **Definition of Insured.** The insurance policy was exhibit 16. It is in the name of Team Post Tensioning Pty Ltd as insured. This was a company related to TRA. However, Mecon conceded that TRA ought to be regarded as a named insured under the policy – paragraph 41(a) of the defence. The definition of insured in the Schedule of Cover is as follows:

> "Team Post Tensioning Pty Ltd
>
> principals and subcontractors who are not
>
> otherwise insured."

[74] Delta says that it was TRA's principal on the Albert Street job. Mecon denied this because the Principal or Head Contractor on the job was Watpac. Neither party provided any authority on this point. I think that Delta's construction is to be preferred, particularly having regard to the language used in the definition of "you/your" (see below at [80]).[49] The intention seems to be that the insured would be another contractor with whom TRA was in a direct contractual relationship on a construction project. That person might have been up or down the contractual hierarchy relative to TRA. There is no sensible reason why the Principal on any particular building site would be deemed to be an insured under TRA's policy, regardless of whether or not it was in a direct contractual relationship with TRA. There is no generic word other than principal to describe a superior contractor in a contractual chain; cf. the term subcontractor which can be used more generically. I conclude that Delta was a principal within the meaning of that definition of insured.

[75] Delta said that the phrase "who are not otherwise insured" related only to subcontractors and not to principals. Again, no authority was cited for this proposition. In my view,

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[49] *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, [22].

the definition applies both to principals who are not otherwise insured and subcontractors who are not otherwise insured. There is no sensible reason why the phrase would only apply to subcontractors. Reading the phrase as applying to both principals and subcontractors means that it fulfils a sensible purpose: extending insurance cover to losses related to the contractor's work which are not otherwise covered by insurance.

[76] There was a submission on behalf of Delta that s 45(1) of the *Insurance Contracts Act* 1984 would operate so as to render void the requirement that a principal or subcontractor did not otherwise have insurance. It acknowledged that this submission was contrary to authority.[50] Indeed it is contrary, in my view, to the provision at s 45(2) of the *Insurance Contracts Act.* I reject it.

[77] Delta said it was not otherwise insured within the meaning of that definition, or to be more accurate, it said Mecon had failed to prove that Delta was otherwise insured within the meaning of that definition. In fact the evidence was that Delta had at least two insurance policies relevant to loss it suffered on the Albert Street Project. As already discussed, it had insurance with HSB and the HSB policy appears to have been a similar type of policy to the Mecon policy. As noted in its deed of settlement with HSB, it appears that Delta also had substantial insurance with QBE – see [60] above. Delta cited no authority for the proposition that Mecon bore the onus of proving that Delta had other insurance. In my view the onus lay on Delta to prove that it was an insured under the policy, and thus the onus lay on it to prove it had no other insurance. In any event, once the evidence showed that Delta had policies with HSB and QBE, Delta bore the persuasive onus of proof on this issue. No-one on behalf of Delta gave evidence as to what insurance cover it did or did not have. Delta put neither the HSB nor QBE policy before the Court and indeed, apart from the reference to QBE in Annexure 3 to the settlement deed with HSB, I do not recall any reference to QBE throughout the trial. The QBE insurance appears to have responded, in part at least, to indemnify Delta against the claim made on Delta by Watpac.

[78] In these circumstances I think Delta has failed to prove that it was not otherwise insured, and thus failed to prove it was an insured within the meaning of the policy definition just discussed.

[79] I note that had Delta put on evidence about its insurance position, questions of construction would have arisen[51] as to whether or not the phrase "who are not otherwise insured" is apt to describe a party who simply does not have insurance; a party who has relevant insurance, say Contractors All Risks Insurance, but which insurance does not respond to the particular loss for which indemnity is sought, or a party who has responsive insurance, but for some reason is excluded from relying upon it. I do not think the answer to this question is easy, but it does not arise for my consideration for Delta chose to put no proper evidence of its insurance position before the Court in circumstances where there were at least two policies which might have been relevant to the loss it claims. I do not have the factual material necessary to undertake the analysis required by this difficult question.

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[50] *Lambert Leasing Inc v QBE Insurance (Australia) Ltd* [2016] NSWCA 254.

[51] Cf. *Strahinja Pandurevic v Southern Cross Constructions (NSW) Pty Ltd & Ors* [2012] NSWSC 623 where this clause of a Mecon policy was in issue.

[80] **Extended definition of Insured for liability section of policy.** In relation to its claim under the liability section of the Mecon policy, Delta relies upon an extended definition of "you/your" in the policy to say that it is insured. This definition in the policy reads:

> "'**you/your**' means anyone insured by the Policy.
>
> **For Section Two only, 'you/your' also includes:**
>
> …
>
> (b) any principal but only for the principal's liability that arises out of the work performed by you for that principal provided that:
>
> (i) the work was carried out by you in an attempt to comply with a contract or agreement to perform work that was made between you and that principal, and
>
> (ii) MECON's liability shall not exceed the minimum amount of liability insurance a contract or agreement relating to a particular Project requires you to effect."

[81] Consistently with my finding (above), I find that Delta was a principal within the phrase "any principal" at the beginning of (b). There is no doubt that work was performed by TRA for Delta. Mecon argued that TRA's work was so poor that it could not be regarded as "an attempt to comply with a contract … to perform work". I reject that submission on the basis of the facts discussed at [12] – [18] above. So I accept that Delta was covered by this extended definition of insured, but only for Delta's liability within Section Two of the policy. I turn to consider whether or not there was any such liability in Delta.

Public Liability Claim

[82] Delta claims against Mecon under cl 5 of the policy. It is in Section Two. It provides:

> "**5.00 In accordance with the terms, exclusions and conditions of the Policy MECON will provide indemnity for all amounts which you become legally liable to pay in compensation for Personal Injury or Property Loss that happens within the Territorial Limits during the Period of Insurance as a result of an Occurrence which arises in connection with your Business.**
>
> With MECON's prior written permission, and included within the applicable limits of Indemnity, MECON will also pay:
>
> **5.01** legal charges, expenses and costs incurred by you; and
>
> …
>
> **5.03** costs incurred by you for temporary protective repairs undertaken to prevent any immediate threat of Property Loss or Personal Injury."

Claim under cl 5.00

[83] This section of the policy grants indemnity against amounts which an insured becomes legally liable to pay in compensation for property loss. Property Loss is a defined term in the policy. That part of the definition relied upon by Delta is:[52]

> "**'Property Loss'** means:
>
> (a) physical loss, damage or destruction of tangible property including resultant loss of use of such property and/or,
>
> …"

[84] Delta claims the amount of $720,577 pleaded at Item 4 of the particulars to paragraph 16 of the statement of claim.[53] The description of this claim is: "Shortfall in payments under Contract due to TRA's breaches … (in substance the amount paid by Delta to Watpac as compensation)". I reject this claim. There are several independent and sufficient reasons.

[85] **No factual basis for amount claimed.** Delta argues that were it not for the defective installation of ground anchors by TRA, it would have been paid another $720,557 under its contract with Watpac. That figure is calculated by taking the contract price on the face of the original contract between Delta and QIC, and deducting the amounts which Delta was paid by QIC and Watpac during the course of the job,[54] and under the 2010 settlement deed.

[86] This is a most unrealistic equation. There is no warrant for assuming that at the end of the excavation contract Delta was entitled to be paid the very sum nominated in that contract as the contract price – see [41] – [43] above. Notwithstanding all the evidence at those paragraphs above, an attempt was made to have Mr Welsh swear to the truth of this unlikely equation:

> "Now, it shows that the amount paid by QIC – and I will deal with the GST-inclusive amounts, which is sort of the fourth column from the right, cash receipt amount?---Yes. It shows that QIC paid $1.238 million?---Yes.
>
> That Watpac paid $3.658 million?---Yes.
>
> And that those two sums, when added together, are $4.897 million?---Yes.
>
> Now it has been admitted by the insurer in this matter that the Delta contract had a contract sum of – again, speaking GST-inclusive – $6.109 million?---Yes, that's correct.
>
> When you subtract from $6.109 million the figure there of $4.897 million, you have a sum of $1.212 million. May I ask you to assume that?---Yes. That's fine.
>
> What does that sum of $1.2 million represent?---So that sum is the balance of the amount of contract works that otherwise would have been paid to

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[52] See paragraphs 76(g) and 79(c) of the statement of claim and paragraph 43 of the written submissions, exhibit 82.

[53] Paragraph 81 of the statement of claim; paragraph 20(a) of the written submissions, exhibit 82.

[54] Exhibit 55.

> Delta, had it not been for the ground anchor issue and the prolongation of the works on the project.
>
> Just pardon me a moment, please, your Honour.
>
> Just didn't catch the last part of that answer. What did you say was referable to?---So the amount that was outstanding – so the $1.2 million – was money that Delta otherwise would have been entitled to under our total contract value for contract works that were performed. But it wasn't paid and was considered offset against Watpac's losses and their claims to Delta Group for the ground anchor issue and the losses that they had incurred. So that $1.2 million was ultimately reduced by the amount that was paid under the Watpac settlement in 2010.
>
> Paid to Delta?---Paid to Delta; that's correct." – t 6-7.

[87] It was said in submissions that Mr Welsh was never directly challenged on his swearing to the truth of this equation. That is true, but he was cross-examined so as to elicit the matters which I summarise at [41] – [43] above. Given the matters conceded in cross-examination, and the similar matters sworn to by Mr Attard, I am not persuaded that the passage which appears at t 6-7 (set out at [86] above) is reliable as meaning that, but for the faulty installation of the rock anchors, Delta was entitled to the very amount stated on its contract with QIC.

[88] **No basis to say amount claimed related to the Occurrence.** As at 2010 there was a dispute between Watpac and Delta as to what Delta was entitled to be paid for performance under the excavation contract. This was independent of the dispute about what was owed in respect of the ground anchor rectification. Mr Welsh said so – t 6-49. And so much is acknowledged in the settlement deed – see Recital D and cl 1.1, which both show that the "rectification ground anchor claim" and the "final sum payable under the excavation contract" are separate issues between the parties, both which are settled. See also the evidence referred to at [43] and [48] above.

[89] There was no evidence as to what happened at the settlement negotiation between Delta and Watpac, or as to how the final sum payable to Delta under the excavation contract was arrived at. By the deed the parties agree and acknowledge that Delta is being paid "the final total sum payable by Watpac … under the excavation contract" – cll 2.1.1 and 2.2.1. This should be taken at face value, and is a direct contradiction of what I have termed the unrealistic equation which is the basis for Delta's claim. Even if this statement is not taken at face value, there is no evidence at all that the difference between the price on the contract, and what Delta was ultimately paid under it, is referrable only to the ground anchor rectification claim.[55]

[90] **No liability to pay any amount in compensation.** All of the foregoing overlooks the fundamental point that Delta has not shown that it ever became liable to pay any sum as compensation – see cl 5.00 of the policy. The Delta/Watpac Deed did not oblige Delta to pay any sum. There is no evidence that it ever paid any sum.

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[55] Cf. *Lumbermen Mutual Casualty Co v Bovis Lend Lease* [2005] Ll Rep IR 74.

[91] **No liability to pay any amount in compensation for Property Loss.** Furthermore, there is no evidence that Delta paid any sum as compensation for Property Loss. The "rectification ground anchor claim" the subject of the deed was defined as a claim for "costs and damages", not a claim for Property Loss. The basement was refilled and re-excavated; existing ground anchors were tested, and supplementary ground anchors were installed. There was delay and the cost of the work. This is not Property Loss; this is economic loss.

[92] Some of the Watpac claims against Delta were based on property loss suffered by others: the owner of the water mains in Regent Lane; the owner of the adjoining building which QIC was liable to compensate under a Ground Anchor Deed, and the owner of Elizabeth Street (presumably the State). These people may have suffered property loss.[56] Watpac or QIC may have been liable to compensate them for property loss.[57] But Delta was not liable to compensate Watpac for Property Loss.[58] Watpac's claim against Delta was for economic loss. Watpac lost no property. It is not pleaded that Watpac lost property. The pleading is that the owners of Regent Lane, Elizabeth Street and the Regent Theatre lost property.

[93] **Wall Movement not Property Loss.** It was also pleaded Wall Movement itself was property loss.[59] In my opinion Wall Movement, as defined in the statement of claim, was not capable of amounting to Property Loss within (a) of the definition in the policy. Wall Movement was defined in pleading to mean the "significant lateral movement" of the retaining walls caused by TRA's breaches of the subcontract – paragraph 12 of the statement of claim. Movement of a wall cannot be loss or damage to tangible property in my view. A wall might move so much that it is itself damaged. Movement of a retaining wall might cause damage to property it fails to support. In both those cases the damage is to tangible property. But I cannot see that movement is damage independently of either of those things. The conceptual difficulty with the plaintiff's case is reflected in the fact that the Wall Movement is also pleaded to be the Occurrence for cl 5.00.[60]

[94] As it manifested in cross-examination of Mr Ervin, the plaintiff's claim appeared to be that SW1 was damaged and this amounted to Property Loss.[61] I reject this.

[95] First, it was not pleaded that Watpac owned the retaining wall. On the evidence before me the owner of the retaining wall was QIC.

[96] Secondly, there is no evidence that the retaining or shoring walls were lost, or destroyed. To the contrary, once unacceptable movement was detected in SW1, all the

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[56] The plaintiff made little attempt to prove this, or to prove that the property loss was caused by the failure of the rock anchors and consequent wall movement. While the experts assumed these matters as part of the factual background they recorded in their reports, there was no real factual examination of whether movement of the shoring walls caused this.

[57] There was no proof of this by the plaintiff.

[58] Cf. the wider words "for and/or arising out of" in *Bayer Australia Ltd v Kemcon Pty Ltd* (1991) 6 ANZIC 61-026.

[59] Paragraphs 11-13 and 79(c) of the statement of claim and paragraph 44 of the written submissions, exhibit 82.

[60] See paragraph 78 of the statement of claim.

[61] tt 8-23-26 l 25.

retaining walls were buttressed and supported, first with soil backfilling the site and then with properly installed rock anchors. After this they went on to fulfil their function. That is, they may at some point have been imperilled,[62] or stressed,[63] but timely steps were taken: they were saved, not lost. If they were damaged in the process of backfilling and re-excavation, there was no evidence led of it.

[97] The plaintiff's counsel tried very hard to have Mr Ervin swear that the movement in SW1 as and from March 2007 amounted to that wall being impaired. This was no doubt with a view to establishing that SW1 was damaged, having regard to definitions of damage in some of the cases.[64] Mr Ervin rejected the characterisation that SW1 was "impaired". He said that the wall was "not performing as it should … inasmuch as it has moved more than you would've expected by this point in time, the wall is behaving in an unexpected manner". He thought SW1 continued to fulfil its "primary function" of preventing collapse of the excavation, but so far as its secondary function of limiting deflections of the adjoining land was concerned, it was failing to do its job – tt 8-33-34.

[98] I cannot see that this failure to prevent the adjoining earth moving could itself amount to damage of tangible property, separate and independent to (1) any loss of property which the deflection caused to surrounding owners, and (2) damage to the wall itself. The case authorities relied upon by the plaintiff did not support that idea, and if anything, showed it to be incorrect having regard to their contrasting facts.[65]

[99] In any case, it was not the plaintiff's pleaded case that SW1 was property which was damaged. Its case was that Wall Movement was Property Loss, as defined. To run a case that SW1 was damaged, an Occurrence other than Wall Movement would need to have been postulated – perhaps failure of ground anchors at SW1. This was not the plaintiff's pleaded case. Moreover, Watpac's claim against Delta was not a claim that SW1 deflected and that Delta became liable to pay for the reduced worth of SW1 because of that deflection. The deed of settlement between Delta and Watpac settled no such claim. No attempt was made by the plaintiff at trial to either characterise the Watpac claim in this way, or to dissect out parts of it which could be characterised this way.

[100] **Other issues.** In light of my conclusions above, it is not necessary to determine other points raised by the insurer relating to cll 8.13 and 10.01(c) of the policy. Nor need I deal with the insurer's point that the Wall Movement did not amount to an Occurrence, as defined.

[101] Further, I need not determine the point raised by the insurer that it was necessary for Delta to establish its actual liability to Watpac (rather than a liability created by a settlement) in accordance with *Vero Insurance Ltd v Baycorp Advantage Ltd.*[66] Nor is it

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62 t 8-24 and Mr Ervin's opinion at [22] above and Dr Baigent's at [33].

63 t 8-33.

64 *AXA Global Risks (UK) Ltd v Haskins Contractors Pty Ltd* [2004] NSWCA 138, [41] and the cases cited there.

65 *Guardian Assurance Co Ltd v Underwood Constructions Pty Ltd* (1974) 48 ALJR 307; and see the discussion of this case in *AXA* (above) at [47], particularly the part in brackets at the conclusion of that paragraph.

66 [2004] NSWCA 390, [48]-[50].

necessary to consider the alternative point, ie., whether or not the settlement between Delta and Watpac was a reasonable settlement. Although, as to this second point my view is that Delta did not prove the settlement was reasonable. It proved almost nothing that could be used by me to assess the reasonableness of this settlement.

Claim under cl 5.01

[102] Separately Delta pleads that it is entitled to recover the amount of $27,692 against Mecon pursuant to cl 5.01 ([82] above). Having regard to the situation of this clause in the policy I construe it to mean that the only claim is for legal costs incurred in relation to a legal liability for which Mecon is obliged to provide indemnity under cl 5.00.[67] There is no such legal liability. That is enough to dispose of this claim.

Claim under cl 5.03 for Temporary Protective Repairs

[103] For convenience I repeat the relevant part of the policy extracted at [82] above:

> "With MECON's prior written permission, and included within the applicable limits of Indemnity, MECON will also pay:
>
> …
>
> **5.03** costs incurred by you for temporary protective repairs undertaken to prevent any immediate threat of Property Loss or Personal Injury."

[104] Delta claims the cost of complying with the Superintendent's directions first to place fill beside SW1, and then to backfill the entire site pursuant to cl 5.03 of the policy (above). It also claims the cost of removing that backfill (essentially re-excavating the site). That is, it claims costs in accordance with exhibit 38, the revised version of what was Annexure 2 to the statement of claim – see [11] above.

[105] Once again, having regard to the situation of cl 5.03 within the policy, I construe this clause as relating only to costs incurred to prevent or minimise Property Loss for which Delta could have become legally liable. Indeed this was implicit in the submissions made by counsel for the plaintiff on this topic.[68] I am not convinced that simply because, as events transpired, Delta never became legally liable to pay any compensation for Property Loss that is the end of the matter. Costs which fell within the insuring clause at 5.03 of the policy would be incurred in situations of immediate threat, before any details of the physical cause of the threat, much less who might be legally liable for it, could be determined. The aim of spending the money claimed under cl 5.03 is to prevent the occurrence of Property Loss.

[106] **Limitation of Actions Act.** It is admitted on the pleadings that Delta's proceeding against Mecon is taken to have started on 29 June 2016.[69] All the costs claimed by Delta pursuant to cl 5.03 were therefore incurred more than six years before the commencement of the proceeding. Section 10 of the *Limitation of Actions Act* 1974

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67 *AstraZeneca Insurance Co v XL Insurance* [2013] 1 Ll Rep IR 290.
68 tt 10-36-37.
69 Defence paragraph 105; Reply paragraph 80.

provides that Delta had six years from the date on which its cause of action arose to commence proceedings. There are diverging views in the authorities as to whether or not a cause of action against an insurer arises when loss within the policy is suffered[70] or whether refusal to indemnify by the insurer is a pre-requisite to the cause of action arising.[71]

[107] As a matter of strict legal construction, I must say I prefer the second tranche of cases. The defendant cited the observations of Professor Carter in "*Indemnities against Breach of Contract*"[72] which contained the following passage:

> "Where an insurer agrees to indemnify an insured against fire, it is obvious that the insurer is not promising that fire will not occur. Thus, the occurrence of a fire does not amount to a breach of contract. Rather, the promise of the insurer is to indemnify against loss caused by fire. It is, therefore, the suffering of a loss which puts the insurer in breach of contract. It would therefore seem correct to say that breach of the indemnity promise occurs when the loss is suffered, rather than when the indemnifier refuses to pay the loss." (my underlining).

[108] It seems to me this reasoning is quite contrary to accepted principles of contract law. The insured is entitled to indemnity when loss is suffered; I cannot see how the insurer is in breach at that time.

[109] I can see that a difficulty arises if an insured may leave making a claim many years (as in this case). Perhaps the solution should be a legislative one. In any event, I am against the insurer on this point.

[110] **Quantum of any possible claim.** At a factual level Mecon says that the only works which were undertaken to prevent an "immediate threat of Property Loss" were the works involved in placing earth against SW1. The direction to backfill the entire site was not caused by anyone perceiving an immediate threat, but because testing of rock anchors, which followed earth buttressing to SW1, revealed that the ground anchors had not been installed in accordance with the shop drawings. It was said that the 24 July direction was made because Watpac lost faith in TRA's work and required, essentially, that the job be started again. Nor was the re-excavation of the site work which was undertaken to prevent any immediate threat of property loss. It was not even just the removal of work which had been installed to prevent an immediate threat of property loss. The re-excavation of the site, including the re-excavation of soil placed against SW1, was an integral part of the work necessary to perform the Delta (and TRA) subcontracts according to their terms. I think these submissions are correct having regard to the facts which I have outlined at [18] – [34] above. Thus the only amount for

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[70] *Callaghan v Dominion Insurance Co Ltd* [1997] 2 Ll Rep 541 and the cases cited in that case; *Cigna Insurance Asia Pacific Ltd v Packer* (2000) 23 WAR 159 and *Commonwealth v Vero Insurance Ltd* (2012) 291 ALR 563, (*obiter*).

[71] *Hunter v Stronghold Insurance (Australia) Ltd* [1995] VicSC 5; *Penrith City Council v Government Insurance Office of NSW* (1991) 24 NSWLR 564 per Giles J; see also per Giles JA in *CGU Insurance Ltd v Watson* [2007] NSWCA 301, [59], as a member of the New South Wales Court of Appeal, the other members of the Court agreeing.

[72] Paper presented at the 25th Annual Banking and Financial Services Law and Practice Conference, p 435.

which Delta could have a claim under this clause would be for the costs recorded in exhibit 38 incurred before 24 July 2007. These costs are in an amount of $245,285.12.

[111] **Reduced quantum of any possible claim.** The costs in exhibit 38 were proved by the tender of the relevant part of Mr Welsh's log of costs. That was admitted as a book of account under the *Evidence Act* 1977, after quite considerable argument and evidence. In my ruling on admissibility I referred to the case law to the effect that the word "matters" in s 84(a) of the *Evidence Act* includes opinions. I thought exhibit 38 was evidence of the matters stated therein: "which just so it's clear, contain opinions as to Mr Welsh's view of work related to the lateral movement of the shoring walls[;][73] Mr Welsh's view of costs, calculated in accordance with the company's costing practices, and not as evidencing payment of third party invoices." – t 5-5. Later evidence established payment of the third party invoices. However, the element of opinion as to what costs related to complying with the Superintendent's direction, and what this cost was to Delta, remain as difficulties inherent in exhibit 38.

[112] One of the reasons for allowing business records to be admitted as truth of their contents was articulated by Hope JA in *Albrighton v Royal Prince Alfred Hospital*:[74]

> "Any significant organisation in our society must depend for its efficient carrying on upon proper records made by persons who have no interest other than to record as accurately as possible matters relating to the business with which they are concerned."

[113] In this case Mr Welsh was not entirely disinterested when he recorded matters in the log of costs. Mr Welsh's role was to keep a record of costs which it was anticipated Delta would claim against someone, even if it was not at first known who would receive the claim and on what basis. In relation to the claim he compiled against Watpac, Mr Welsh said:

> "There was no contract works that Delta were performing to be able to make a claim from – really it was August through until the beginning of 2008, March 2008.
>
> Now, you were the one that made those claims?--- Yes, that's correct.
>
> And I take it you wouldn't have made them unless you regarded them as substantial claims?--- So the claims were made – my role was always to try to protect the revenue for Delta. So making a claim where we felt we were entitled to a claim was my responsibility." – t 6-49. (my underlining)

[114] It is casting no aspersions on Mr Welsh, but I interpret that he understood his role to put Delta's best foot forward. Subsequent reviews of his log of costs did reduce the amount claimed.[75] And it was evident that some parts of the attribution of costs to the log of costs was in some respects arbitrary.[76] Mr Welsh was at a disadvantage in recording

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[73] Correction to transcript.

[74] [1980] 2 NSWLR 542, pp 548-549. See also the comments made in *Timms v Commonwealth Bank* [2003] NSWSC 576, [14(8)] as to that passage, and more general rules about self-serving statements.

[75] See exhibit 80, and see tt 2-68-70 and see Mr Welsh himself at tt 4-25 l 25 – 4-27, after which review the claim was reduced by about $130,000.

[76] Eg., tt 4-47-48; 6-33-38; 6-41-42.

work which occurred before he arrived on site (last week of June 2007). In the part of exhibit 38 which pre-dated 1 July 2007 he was relying solely on documentary records, such as timesheets and invoices and the site diary to work out what he could claim on Delta's behalf. Bearing this in mind, I would not allow the whole $245,285.12 as being the actual cost to Delta of these works. I would discount categories of claim where exhibit 38 records "Delta" in the column "company". I would reduce those claims somewhat arbitrarily to account for the matters discussed. I would reduce them by 15% (ie., $167,860.43 reduced to $142,681.37). The other amounts claimed are referrable to particular invoices received by Delta and I do not see the same need to apply such a discount to them. This yields a new total cost of $220,106.

[115] However, Mecon says that even this amount is not recoverable by Delta. I think that is correct. There are two independent and sufficient reasons.

[116] **Delta not insured.** Dealing first with the clause set out at [73] above, consistently with my finding at [78] above, it seems to me that Delta cannot be described as a principal who was not otherwise insured. Delta was insured for the very loss which is now claimed against Mecon under the HSB policy – see [55] above.

[117] Further, while cl 5.03 is in Section Two of the policy, Mecon says that Delta is not an insured, in relation to cl 5.03 of the policy, under the extended definition of "you/your" that applies to Section Two of the policy. The relevant words are:

> "**For Section Two only, 'you/your' also includes:**
>
> …
>
> (b) any principal but only for the principal's liability that arises out of the work performed by you for that principal provided that:
>
> …"

[118] Mecon says that the cost of providing temporary protective repairs is not a cost that could be characterised as Delta's liability. Mecon's argument continues that the extension in the definition of "you/your" only operates in relation to (relevantly here) cl 5.00 and cl 5.01, not cl 5.03. No authority was cited by either party. As a matter of language, I think that construction is correct.

[119] **Delta has been paid.** The evidence shows that Delta has been paid for the very claim it now makes against Mecon – see [57] – [59] above. Delta was paid at least $709,143 and quite possibly $2,309,142.32, in relation to its costs of work protecting SW1 (and perhaps the site generally) incurred before 5 August 2007. If an insured has recovered its loss from one insurer, it cannot recover the same loss from another insurer.[77]

[120] **Other issues.** My conclusions mean that it is unnecessary for me to deal with the arguments the insurer advances to the effect that costs incurred after 31 October 2007 are outside the period of insurance under the policy, or with the insurer's reliance on the exclusion at cl 8.13(a) of the policy.

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[77] *Lambert Leasing,* above, at [188] – [201] and the authorities cited there.

Claims made against Mecon by Delta as Assignee

[121] **Assignment.** Mecon contends that the subject matter which TRA purported to assign to Delta was not assignable at law. The basis for this contention is the rule that "a contract of indemnity insurance is a contract of a personal indemnity and cannot, therefore, be assigned."[78] The authority for that is *Peters v General Accident Fire & Life Assurance Corp Ltd.*[79] In that case an attempt was made to argue that, on sale of a car, a policy of insurance taken out by the vendor was assigned to the purchaser of the car. This was rejected both as a matter of fact and as a matter of law. The effect would have been to foist a new insured on the insurer. Goddard J said:

> "I do not think that you can assign a policy of this nature at all. You can assign your right to receive money under it. If an accident has occurred, and you have a right to be indemnified by your insurers, or if your car has been destroyed, so that you have a right to be paid by your insurers, you can assign your right to anybody you choose, subject to the Road Traffic Act."[80]

[122] The case is clear that while the primary obligations under a policy cannot be assigned, secondary rights can be. It was argued here that because of the definition of "the Mecon claim" ([66] above), the document here purported to assign the contract of insurance and that was impermissible. I do not think that the TRA/Delta Deed did purport to assign the contract of insurance. It purported to assign TRA's beneficial interest in the policy in circumstances where the policy year had passed and a claim on the policy had been made and rejected. In *Schneideman v Barnett*[81] the Court dealt with an assignment which in its terms was an assignment of the policy.[82] However, at the time of the assignment, the policy had expired and not been renewed and, prior to expiry, a loss had occurred. The words of the assignment were construed to be an assignment of the secondary rights against the insurer under the contract. Adams J said:

> "The rights of the assured under the policy had become limited to his rights arising from the fire – that is to say, the right to have the loss adjusted, and the right to be paid the amount so assessed. Notwithstanding these facts, I am asked to treat the letter as being, not an assignment of the proceeds, but an assignment of the contract to insure. It is trite law that a document must be construed in the light of the facts as they existed when it was written, at any rate when those facts are known to all concerned. Applying that rule, the letter cannot be construed as assigning a policy of insurance in the sense that the assignee would become a person insured by the insurance company in respect of some insurable interest; and it can mean only that the policy was assigned in the sense that such rights as Phillips still possessed were transferred to the plaintiff. The most important, and perhaps the only, such right was the right to receive the proceeds, and, in my opinion, that right passed to the plaintiff by virtue of the assignment." – p 305.

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78 *Sutton on Insurance Law*, 4th ed, Vol 1, Thomson Reuters, [11.730].
79 [1937] 4 All ER 628 affirmed at [1938] 2 All ER 267.
80 p 633 of the earlier report.
81 [1951] NZLR 301.
82 "I hereby assign the fire insurance policy to the said Philip Schneideman …" (p 301).

[123] The Court proceeded on the basis that assignment of the right to receive the proceeds of the policy, rather than the contract of insurance, was valid as an assignment of an ordinary chose in action, citing *Halsbury's Laws of England* – p 306.

[124] *Schneideman* was followed in *Stewart v McKenna & Ors*[83] where there was an assignment of "the benefit of the insurance policy and the entitlement to receive any sums payable thereunder" – [3]. The assignment was held to be valid:

> "Notably, the assignment is not an assignment of the contract of insurance per se but an assignment of the benefit of the policy and the entitlement to receive and/or recover sums which are payable by the insurer thereunder." – [7].

[125] I cannot see that the deed here ought to be construed otherwise than in accordance with *Schneideman* and *Stewart.* The assignment was made well after the policy had expired and the loss incurred. Whether TRA was entitled to indemnity pursuant to the policy was, at the time of the assignment, the subject of this litigation between TRA and Mecon. It seems to me that what was assigned was assignable at law being a chose in action: the right to indemnity under the policy. It is plain that Delta had a bona fide commercial interest in that chose of action; it was not buying a bare right to litigate.

[126] I turn to consider the claims made by Delta as assignee; there were two of them.

TRA Claim for Damage to Projects

[127] Delta, as assignee from TRA, made a claim pursuant to cl 1 of the Mecon policy which provides as follows:

> "1.00 MECON will provide Indemnity for Damage to Projects, or other property specified in the Schedule to, or elsewhere in, Section One of the Policy, occurring anywhere within the Territorial Limits during the Period of Insurance. …"

[128] The plaintiff abandoned this claim in its written submissions.[84] There was good reason to do so; the claim made had no prospect of success, and I will briefly explain why.

[129] The plaintiff's pleading put its claim this way:

> "106. The Subcontract works, the Site upon which the Subcontract works were to be carried [out] by TRA and the surrounds of that Site were a Project for the purposes of the Insurance Contract.
>
> 107. The damage caused by the Wall Movement as set out in paragraph 13 herein was Damage to a Project for the purposes of the Insurance Contract, which occurred within the Territorial Limit during the Period of Insurance.

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83 [2014] IEHC 301.

84 Paragraph 2(a) on p 6 of exhibit 82.

> 108. In the premises, Mecon is required to provide indemnity to TRA for the Damage to the Project, pursuant to clause 1.00 of the Insurance Contract."

[130] Mecon admitted that the works the subject of the subcontract between Delta and TRA were a Project for the purposes of the policy.[85] However, the pleading went on to deny liability on the basis that neither the Site nor the surrounds referred to at paragraph 106 of the statement of claim were a Project within the meaning of the Mecon policy.[86]

[131] As already discussed, at paragraph 12 of the statement of claim the term Wall Movement is defined to mean the significant lateral movement of the retaining walls to the excavation caused by TRA's breaches of its subcontract. At paragraph 13 of the statement of claim it is alleged that the Wall Movement caused damage to the Site and surrounds as follows:

> "(a) settlement and cracking to laneway road surface above SW1 wall with damage to underground services (including water main and stormwater piping damage);
>
> (b) settlement and cracking of Elizabeth Street road surface above SW2; and
>
> (c) settlement and cracking of the west wall, internal walls and structure of the Regent Theatre adjacent to the Site."

[132] The definition of Project in the Mecon policy is: "Project means a project of the type and within the parameters, specified in the Schedule …" The Schedule contains the heading "Description of Projects" and then the following:

> "Construction of multistrand post tensioning, slab post tensioning, curtain grouting, hard rock drilling, drilling and grouting, epoxy injection repair. Construction and installation of fabricated building elements (beams, stairs etc)." (my underlining)

[133] Having regard to the concession noted at [73], and the general use of the term "post-tensioned anchors", see [2] above, I interpret the first of these descriptions (underlined) as apt to include the installation of ground anchors.

[134] The Schedule of Cover defines Projects as comprising work which the insured TRA was to perform pursuant to subcontracts. The project here was the work undertaken by TRA pursuant to its subcontract with Delta, viz., the construction and installation of ground anchors and their tensioning. There was no pleading that the work which TRA was to perform pursuant to its subcontract with Delta was damaged. To the contrary, the pleading is conceptually different: TRA negligently performed the work involved in the subcontract; that caused movement of something separate, the retaining walls; that in turn caused damage to three properties which lay outside the bounds of the building site where TRA was engaged to perform work.

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[85] Paragraph 115(a) of the defence.
[86] Paragraph 115(b) of the defence.

TRA Claim under cl 5.00 (Public Liability)

[135] Delta, as assignee from TRA, presses TRA's claim against Mecon pursuant to cl 5 of the Mecon policy. For convenience I will extract that clause again:

> **"5.00 in accordance with the terms, exclusions and conditions of the Policy MECON will provide indemnity for all amounts which you become legally liable to pay in compensation for Personal Injury or Property Loss that happens within the Territorial Limits during the Period of Insurance as a result of an Occurrence which arises in connection with your Business.**
>
> With MECON's prior written permission, and included within the applicable limits of Indemnity, MECON will also pay:
>
> **5.01** legal charges, expenses and costs incurred by you; and
>
> …"

[136] **TRA's liability to pay.** Delta put forward TRA's liability under the settlement deed between Delta and TRA as the source of liability in TRA to pay compensation for Property Loss. Mecon says that TRA cannot rely upon the deed to show that it has "become legally liable to pay" within the meaning of cl 5.00.[87]

[137] The current editors of *MacGillivray on Insurance Law*[88] state this proposition:

> "In order to recover under a conventional liability policy, the assured must show that it was under a legal liability to the third-party claimant; that the liability is covered by the insurance, and (in the case of a settlement) that any amount paid by way of settlement was reasonable."

[138] The case cited is *Structured Polymer Systems v Brown.*[89] I did think that counsel for Delta contended during the trial that the onus lay on the insurance company to show that a settlement was unreasonable. If he did, he had abandoned this position by the time of filing written submissions, for at paragraph 140 of the plaintiff's written submissions *BNP Paribas v Pacific Carriers Ltd*[90] was cited (correctly) as Australian authority requiring the insured to show the reasonableness of the settlement.

[139] *MacGillivray* goes on to say:

> "The general principle is that liability insurance provides an indemnity against actual established liability, as opposed to mere allegations."

[140] The same point is dealt with by Ivamy:[91]

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87 The question as to whether Delta could rely upon the settlement to establish liability did not arise here as the settlement was made after Mecon had denied liability to TRA – cf. [101] above.

88 Birds, Lynch, & Milnes, 12th ed, Sweet & Maxwell, [29-006].

89 [2000] Ll Rep IR 64, 67.

90 [2005] NSWCA 72, [17]; following the High Court decision in *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603.

91 *Personal Accident, Life and Other Insurances*, 2nd ed, Butterworths, p 238.

> "The right of the insured to be indemnified under the policy depends, therefore, upon the existence of a third person's right to be paid compensation by the insured. The insurers do not bind themselves to pay any sum which the insured may think fit to pay, irrespective of his liability to pay it. Their contract is a contract of indemnity, and the insured can claim no indemnity against a liability which he has voluntarily incurred.
>
> The policy may restrict the indemnity to sums which the insured is legally liable to pay. But this is not, strictly speaking, necessary, since, to give rise to a valid claim under the policy, the liability of the insured must be a legal liability, capable of being enforced against him by legal proceedings." (footnotes omitted and my underlining)

[141] *Sutton on Insurance Law*[92] says:

> "The insured will be entitled to an indemnity from the insurer if and after the client or third party has obtained a judgment in an action, an award in an arbitration or bona fide settlement of the claim against the insured."

[142] To establish a liability, a settlement "must not only be reasonable but also bona fide".[93] The question of reasonableness is to be determined, "based on a reasonable assessment of the risk faced by [the insurer] if the [third party] claims were to proceed to trial and judgment".[94] The settlement "must reflect the plaintiff's true prospects of success if the proceedings had been conducted with care and skill …".[95] The insured is "required to have regard to the proper interests of the insurer and [can] not claim indemnity under the policy in respect of amounts payable under a settlement which [does] not reflect, by its terms, a reasonable evaluation of the prospects of a successful defence to a third party's claim."[96] Monies paid for an ulterior purpose, that is a purpose "extraneous to the risks insured against", will mean that there is not such a bona fide settlement of a liability.[97] In the *Distillers Bio-Chemicals* case, Gibbs J gave examples of extraneous reasons which might motivate an insured to settle: monies paid to avoid adverse publicity or to relieve a parent company of its part in liability for a dangerous product.[98] It is not that such matters make the settlement unreasonable generally: they may provide sensible commercial reasons to settle. But in terms of the rule currently under discussion, these extraneous motives mean that the settlement is not reasonable because it is not a bona fide or accurate measure of liability in the action.

[143] It is against this background that the rule that a reasonable settlement may establish liability is to be understood. That there is a settlement, and that the settlement is reasonable, may be two aspects of the rule, but in truth there is only one rule – see *Sutton* at [141] above. The majority in *BNP Paribas* state the rule this way:

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92 Enright & Merkin, 4th ed, Thomson Reuters, Vol 2, [23.500].
93 *Vero Insurance Ltd v Baycorp Advantage Ltd* [2004] NSWCA 390, [68].
94 *CGU Insurance Limited v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1, [24].
95 *BNP Paribas,* above, [17].
96 *The Distillers Company Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd* (1973-1974) 130 CLR 1, 32.
97 *Distillers Bio-Chemicals,* above, pp 32-33.
98 *Distillers Bio-Chemicals,* above, p 32.

> "At least where the insurer has breached the contract by denying liability, the weight of authority in the indemnity cases is that the insured can recover the amount of a reasonable settlement from the insurer …"[99]

Handley JA also recognises this in his statement of the rule in *BNP Paribas:*

> "Where a contract of indemnity is repudiated the innocent party, who is faced with an adverse claim, is in the difficult position having to litigate the issues on two fronts instead of none. In such circumstances a settlement of the adverse claim, if reasonable, will crystallise the loss for which the innocent party is entitled to indemnity."[100]

[144] Consistently with this Handley JA found that, "Where a plaintiff relies on a settlement to quantify his damages but fails to establish that it was reasonable he is left with the onus of proving his damages".[101] By that Justice Handley meant proving the case for damages, in the ordinary way, not relying on the fact of settlement at all. That is, if there is no reasonable settlement proved, liability and quantum must be proved in the ordinary way. The reasonable and bona fide nature of the settlement sum are what makes settlement a source of liability within the meaning of the policy, rather than just a sum the insured sees fit to bind itself to pay, to paraphrase Ivamy, above.

[145] While recognising that there is only one rule, in my view there are two independent reasons why Delta fails to establish liability within the meaning of cl 5.00 of the policy. The first reason relates to the aspect of the rule concerning the need for a binding obligation to pay; and the second reason relates to the reasonableness of the sum it is said TRA became liable to pay. I deal with each reason in turn.

[146] **Liability to pay.** Mecon says that cl 2.1(a) of the settlement deed between TRA and Delta ([63] above) provided that TRA would become liable to pay only on demand, and no demand was proved by Delta. At first blush this seems a technical point, but in fact I think there is substance behind it. There will never be a demand by Delta on TRA for what is defined as the "Settlement Amount" under the deed. That is because, by cl 2.2 of the deed, the only liability TRA has is for any amount "actually recovered by Delta under the Mecon policy as assignee of TRA". If Delta recovers any amount under the Mecon policy as assignee of TRA, it will be as a result of a judgment in this proceeding. The judgment sum will be payable, and paid, to Delta, not TRA; there will never be any funds in the hands of TRA, and it will never become liable to pay those funds to Delta.[102] The language of cl 2.2 of the deed is that TRA's liability is limited, but in fact no liability will ever arise.[103]

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[99] *BNP Paribas,* above, [187].
[100] *BNP Paribas,* above, [13].
[101] *BNP Paribas,* above, [63].
[102] Even (most unrealistically) were Mecon to pay any amount otherwise than pursuant to a judgment, it would pay that amount to Delta, not TRA. There has been an assignment of TRA's right to receive the money to Delta, and Mecon has been given notice of that assignment.
[103] The point is inherent in the plaintiff's written submission. At paragraph 52 it is submitted: "Under the Deed of Settlement, Team Rock is required to pay the settlement sum of $2,581,179.18 upon demand and receipt of that sum (or any part thereof) from its insurer Mecon." (my underlining).

[147] The plaintiff referred to an article written by the Honourable Justice DK Derrington, The Damron Assignment[104] and a quite significant passage in Derrington & Ashton, *The Law of Liability Insurance*.[105] No Australian or other common law authority was cited by the plaintiff one way or the other on the point, nor are any referred to in the article or textbook.[106]

[148] While the Damron Assignment may sound like something concerning Philip Marlowe, it is in truth more prosaic. It is described in the opening sentence of the article as follows:

> "The Damron Assignment is one where, the insurer having wrongly rejected the insured's claim to indemnity against liability to a third party claimant, the insured compromises the third party claim by assigning to the claimant the insured's rights against the insurer in full discharge of the claim. The agreement to discharge the claim in consideration of the assignment may be part of a single transaction in which the parties will also have compromised the issue of liability and quantum of damages; or the latter compromise may be distinct from and antecedent to the discharge agreement." (footnotes omitted)

[149] Justice Derrington's article discusses cases in the United States of America and Canada where insurance companies have argued that while such an assignment might produce a liability in the insured (for the purpose of a liability policy), the contract of assignment also discharges that very same liability, so that there is no loss for the insurer to indemnify. The author states:

> "Understandably this argument has been rejected in both the United States of America and Canada, but the theoretical justification used in those cases is of doubtful quality …"[107]

[150] I think on analysis the insurer's position here is different to the position apparently taken by American and Canadian insurers in cases such as *Damron*. Mecon does not say that any liability which TRA had to Delta has been extinguished. It relies upon an anterior proposition, viz., that there is no evidence in this case of TRA's liability: the settlement deed does not establish any liability, and the plaintiff has not otherwise proved that TRA has "become legally liable" in terms of cl 5.00 of the policy.[108] I think this is right. For the reasons explained at [146] above, I do not think the settlement deed in reality establishes any liability in TRA.

[151] Further, I do not think that the alternative basis to sustain a Damron Assignment suggested by Justice Derrington assists Delta in this case. In the article referred to above, Justice Derrington suggests a justification for the result reached in the American cases based on the common intention of the parties to the contract of assignment:

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[104] (1995) 7 Insurance Law Journal 65.
[105] Lexis Nexis, 3rd ed, [13-119].
[106] t 10-27.
[107] Above, p 65, footnotes omitted.
[108] Counsel for the plaintiff made it very clear at numerous points in the trial that he sought to establish nothing more than that there had been a settlement which was reasonable as the basis for this liability.

> "In this way, it is found that the parties intended that there be agreement as to the extent of liability of the insured to the claimant as a necessary antecedent to the next step, that is, the discharge of that liability in consideration of the grant of the assignment. This is both logical and consistent with the result intended by the parties."[109]

[152] The deed between Delta and TRA distinctly did not discharge TRA (cf the clear discharge given to Mr Jones). Nor did it discharge or limit TRA's liability in consideration for the assignment – there was separate consideration for the assignment of TRA's action against Mecon. One can speculate that the parties here intended to fix the amount of liability as between them, Delta at least, with an eye to this litigation, and to make it appear that TRA assumed a liability in that amount. However, as explained, I do not think the deed created any real liability in TRA. In construing it, I bear in mind that it was prepared by Delta's lawyers and entered into by two commercial parties, each with legal advice.

[153] **Settlement not shown to be reasonable.** Separately, I do not think the plaintiff has established that the settlement sum agreed with TRA was reasonable in the sense that it represented a reasonable evaluation of the prospects TRA had in the action Delta brought against it. There was no evidence led by Delta as to the legal advice, process of reasoning, or process of negotiation which led to the settlement. Mr Jones was called by Delta but was coy about these topics – t 6-64. No-one was called on Delta's behalf to explain the negotiation with TRA or the thinking which led Delta to settle. This in itself is not fatal.[110] However, it became incumbent on Delta to prove by some other evidence that the settlement sum was reasonable in the sense discussed in the cases. Delta relied upon its having proved enough factual material to show that it had sufficiently good prospects of success in its action against TRA to make the settlement sum a reasonable one.

[154] The amount of the settlement was the entire Delta claim against TRA, less the amount of a TRA counterclaim for payment for work on another (unrelated) job – see [64] above.

[155] In this proceeding the liability of TRA to Delta was admitted by Mecon, see paragraphs 13, 14, 15, 16 and 18 of the defence. Quantum was in issue – see paragraph 19 of the defence. Mr Welsh was an impressive witness and he had, as carefully as he could, compiled a log of costs which in his opinion reflected the cost to Delta of TRA's breach of contract. That accounted for around $1.885 million of the claim Delta made against TRA.[111] The other substantial part of the claim made by Delta against TRA was the claim for a shortfall in payment from Watpac to Delta. At the time of the settlement, that claim was in an amount of $1 million. By the time of the hearing before me that claim had been recast as one for $720,755, presumably because that was the mathematical result of the equation which I have found was unrealistic – [86] above. On the evidence before me there was no basis established for this part of the claim Delta

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[109] Above, p 67.

[110] *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd*, above, and the discussion in *BNP Paribas,* above, at [13]-[17], and the cases cited there.

[111] See [68] above.

made against TRA, yet the amount in which liability is fixed under the settlement deed assumes that TRA is liable for all of it.

[156] It is true that the settlement figure made no allowance for interest or costs of the proceedings. It is true that the costs of running the claim against TRA might have been considerable. However, the settlement also makes no allowance for TRA's claim for payment under the rock anchor contract on Albert Street.[112] TRA's defence (Court Document 17) includes a counterclaim to the effect that an amount of $550,286 was owing on that account, and was the subject of an adjudication decision under the *Building and Construction Industry Payments Act* 2004. The settlement makes no allowance for interest on this amount, calculated at $292,902 in the TRA defence. The Answer pleads that the adjudication was void. I have no evidence to enable me to assess the merits of this claim for payment (and interest) by TRA against Delta. Further, the settlement goes against TRA in the sense that it gives Delta the right to keep more than $64,000 of bank guarantees which it had pursuant to its subcontract with TRA.[113]

[157] The settlement deed was drafted by Delta's lawyers and I think it is a fair inference that the footnote against the settlement sum – see [64] above – was drawn with an eye to advancing Delta's case in this proceeding against Mecon. Nothing is said in the footnote about the matters I have canvassed at [156] above. The deed, and particularly the footnote to it, are no substitute for a proper explanation of the reasoning or negotiated process which led to the settlement of the claims. On the face of it, the settlement amount was $1 million higher than any loss Delta has managed to prove in this proceeding and real questions arise, but cannot be resolved, as to the counterclaim for payment by TRA.

[158] Compounding these difficulties, it seems to me that there were what Gibbs J called extraneous reasons which likely influenced the settlement, and were likely to incline TRA to agree to a higher settlement amount than the merits of the litigation alone warranted. The first is recorded in cl 2.3 of the deed – TRA lacked financial capacity to meet Delta's claim. TRA was faced with a claim from Delta on the one hand, and a refusal by Mecon to indemnify it on the other. It attempted to sue Mecon in these proceedings but, because TRA could not provide security for costs, those proceedings were dismissed – t 6-68. TRA could not afford to keep paying "legal fees day by day" – t 6-64. By the settlement deed TRA effectively rid itself of Delta's claim, leaving Delta to pursue Mecon.

[159] Second, Mr Jones was involved in negotiating the settlement between TRA and Delta – t 6-64. By that time he was no longer a director – t 6-64. He was removed as a director because it was thought that his remaining as a director would "jeopardise the overall group of companies, were I to be involved in litigation in court and lose my BSA licence as a result of any verdict that came about." – t 6-67. His wife, Julie Jones, became TRA's director in his stead. Mr Jones was of course sued personally as the second defendant. He did not have the financial resources to meet the claim – t 6-68.

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[112] TRA convinced Delta to allow it to stay on site and re-do the work under supervision "free of charge effectively" – t 6-62.

[113] See paragraph 12 of the counterclaim in Court Document 17, and the prayer for relief, and see cl 7.1 of the settlement deed, exhibit 14.

Not only that, but his honesty and professionalism would certainly have been in issue in any proceedings,[114] perhaps that is what he meant by saying that it was feared he would lose his BSA licence. Mr Jones' liability to Delta was extinguished by the deed, and this proceeding discontinued against him. There must have been potential for these matters to have intruded in the settlement.

[160] There was little evidence about how these two extraneous matters influenced the settlement negotiation. And there was little evidence about the TRA counterclaim. There was no evidence of the negotiation process, and this is not just a result of Mr Jones claiming legal professional privilege. He could have given significant evidence about the negotiation and the matters which informed it, without divulging his legal advice, but he was not asked to do so. Further, Delta employees could have given evidence about these matters. As Handley JA said in *BNP Paribas,* "this state of the evidence is not the result of a forensic accident but reflects a deliberate election by", in this case, Delta and its advisors.[115] Nor was it a matter for Mecon to elicit these things by cross-examination.[116] Delta bore the onus of proof. Enough doubt was cast on the reasonableness of the settlement to call for these matters to be explained. They were not. I cannot make definitive findings about them, for lack of evidence. However, the doubts raised contribute to my not being actually persuaded that the settlement was reasonable.

[161] I am not convinced on all the evidence that the settlement was reasonable in the sense that it reflected a reasonable evaluation of TRA's prospects in this proceeding. Therefore I am not convinced that it established a liability to pay within the meaning of cl 5.00 of the policy.

[162] **No alternative assessment by Court.** The plaintiff contended that if it did not demonstrate that the settlement between Delta and TRA was reasonable, it was entitled to the amount of a reasonable settlement as assessed by the Court. The plaintiff particularly relied upon *BNP Paribas* (above) in that regard. In that case the New South Wales Court of Appeal found that a settlement relied upon to assess loss under a contract of indemnity was not reasonable. Giles JA thought that in those circumstances

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[114] TRA was very tardy in submitting quality assurance records to Delta as required under the contract. The situation reached the point where, after numerous written requests of increasing directness, Delta informed TRA that it would no longer pay it unless the quality assurance records were submitted. Shortly after a very large number of quality assurance records, all dated 19 April 2007, were produced by TRA. They were signed by Mr Jones. They contained the facts and figures which indicated that they had been falsely completed – see [17] above. During the trial, Mr Jones was given the quality assurance records to take home overnight so that he could look at this point. When he returned in the morning the evidence he gave about it was, in my opinion, dishonestly minimising as to the falsity involved in these records – tt 7-5-6. The quality assurance records also, remarkably enough, contained Mr Jones' corrections to show that the rock anchors were tested with a mono-strand jack, rather than the type of jack which the workers on site had recorded as having been used. A mono-strand jack was inappropriate to test the multistrand anchors on site. Mr Jones acknowledged that in his evidence but provided no explanation for his behaviour – tt 7-14 and 16. There were other issues about the quality assurance records, eg., t 7-13. There were also issues as to TRA's disclosure of documents –tt 7-19, 7-37, 7-50-51, and t 9-10. There were also questions about the role of Julie Jones. She sat in Court for the entire time of the trial, in the public gallery, taking notes. I am inclined not to believe Mr Jones' protestations that she did not discuss what was happening in Court with him – tt 7-26-27, and Mr Sandford gave evidence that she had retrieved documents which assisted him in giving evidence and discussed at least those with him – tt 7-51, 7-62, and 7-74. The documents had not been disclosed – t 7-75.

[115] *BNP Paribas* above, [21].

[116] *BNP Paribas* above, [22].

the Court should assess the loss on the evidence available. He relied on cases to the effect that, "There being a loss, the court must do its best" – [258] – [263]. Sheller JA agreed with this approach, albeit with no discussion of the principles involved – [91]. Handley JA did not agree. His view was that if the plaintiff could not prove either a reasonable settlement, or damages in the conventional way, it had failed to prove its case – [61] – [65].

[163] Fortunately I need not decide between these two competing views,[117] for the *Paribas* case, on this point at least, is not applicable here. It was not an insurance case; the Court was not looking to see whether or not an insured had established liability for the purpose of an insurance policy by proof of a reasonable settlement. The case was a shipping case and the framework for the analysis of liability was contained in a letter of indemnity in which the bank promised:

> "To indemnify you, your servants and agents and to hold all of you harmless in respect of <u>any liability loss or damage of whatsoever nature</u> which you may sustain by reason of delivering the goods to receivers." – [108]. (my underlining)

That is, the plaintiff in *BNP Paribas* had only to prove loss or damage; it did not have to prove a liability to pay.[118] Here, by contrast, Delta had to prove that TRA became liable to pay within the meaning of cl 5.00 of the Mecon policy. It attempted to do that by proving a reasonable settlement. In my view, having failed to do so, it fails in its claim. To adapt the words of Handley JA from *BNP Paribas,* it is not for the Court to determine what might have been a reasonable settlement and impose a liability where none existed before.[119]

[164] **No liability to pay compensation for Property Loss.** Assuming, contrary to my findings above, that the TRA/Delta Deed is a source of liability, within the meaning of cl 5.00, it is not a source of liability to pay compensation for Property Loss, as defined. Delta did not lose any property by reason of the defective installation of the ground anchors. No property belonging to Delta was damaged or destroyed. It suffered economic loss, the starting point for assessment of which is Mr Welsh's schedule of loss: costs and expenses. It was not the pleaded case that Delta suffered Property Loss, as defined, and no attempt was made either to characterise the Delta claim against TRA in this way or to dissect out parts of it which could be characterised in this way. My conclusions in relation to Delta's claim (in its own right) under cl 5.00 apply here too – see [91] – [101] above.

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[117] Certainly the second sentence of [263], "The burden was on BNP to prove the level at which it became unreasonable for PCL to fail to settle the London arbitration …" is not correct in the insurance context.

[118] The same distinction applies to *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd,* above. Despite the fact that the subject matter of the claim in that case was whether a fire insurance policy responded to a loss of property, the question for the Court was whether loss had been proved, not whether a liability had been established so as to trigger an insurer's obligation to indemnify. The other case relied upon by the plaintiff – *Rail Corporation New South Wales v Fluor Australia Pty Ltd & Anor* [2009] NSWCA 344 – is the same. There were questions of insurance in the case, but not the question that arises here. The clause in that case was a clause promising to indemnify against loss, not liability – it is set out at [24] of the judgments. The very point of distinction – between a promise to indemnify against loss, and a promise to indemnify against liability – is made at [101] of the judgment of Macfarlan JA, with which the other members of the New South Wales Court of Appeal agreed.

[119] [65] of *BNP Paribas,* above.

[165] **Other issues.** My conclusions mean that there is no need to decide Mecon's arguments concerning cll 8.13 and 10.08 of the policy or to determine whether the Property Loss was the result of an Occurrence as defined, having regard to an expectation on the part of TRA or its employees that the walls would move due to its deficient installation of anchors.

TRA Claim under cl 5.01

[166] Delta agitates TRA's claim for costs (incurred defending Delta's claim against it) pursuant to this clause of the Mecon policy. There are several sufficient and independent reasons why this claim must fail.

[167] Consistently with the view expressed at [102] above, I think this claim is misconceived: it is not a claim for legal costs incurred in relation to a legal liability for which Mecon is obliged to pay under the policy.

[168] I reject Mecon's contention that a claim for these costs was not comprehended by the words of the assignment to Delta. I think the words, "and in respect of the Delta claim" are wide enough to encompass the claim under cl 5.01 of the policy – see [66] above. However, I do think that Delta has failed to demonstrate any bona fide commercial interest in the claim TRA had against Delta for costs TRA incurred in defending Delta's claim against it. For this reason I do not regard the claim as having been validly assigned to Delta.

[169] Lastly, Mecon submitted that these costs were not recoverable because they were dealt with by my order of 23 March 2016. However, this seems to be a misconception of Delta's claim. Delta is claiming costs which TRA incurred in defending the Delta proceeding, and my order of 23 March 2016 did not deal with these. However, it is conceded at paragraph 142 of the written outline for the plaintiff that these costs are dealt with by cl 2.1(b) of the settlement deed between TRA and Delta. That was a provision that there be no order as to costs as between these parties. The concession appears to be that in those circumstances, Delta's claim for these same costs must fail.

Disposition

[170] I give judgment for the third defendant against the plaintiff. I will hear the parties about costs, and about what orders should be made regarding the first defendant.