SUPREME COURT OF QUEENSLAND

CITATION:	*RSL Care Limited v Wallace* [2019] QCA 23
PARTIES:	**RSL CARE LIMITED** **(appellant)** **v** **JILLIAN WALLACE** (respondent)
FILE NO/S:	Appeal No 7333 of 2017 DC No 1392 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2017] QDC 161 (Reid DCJ)
DELIVERED ON:	19 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	10 April 2018
JUDGES:	Fraser and Philippides JJA and Bond J
ORDER:	**1. The appeal is dismissed with costs.** **2. The cross-appeal is dismissed with costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – IN GENERAL – where respondent suffered injury in the course of employment – where the respondent argued there was inadequate slip resistance on the work surface in consequence of the appellant's failure to take reasonable steps to ensure the safety of its employees – where primary judge drew factual inference from expert evidence that work surface on which respondent was required to work had inadequate slip resistance – where the primary judge drew inference from expert evidence on state of floor five years after accident occurred, evidence of failure to comply with manufacturer's guidelines, lay evidence and respondent's failure to adduce any other evidence – whether the primary judge erred in drawing the inference and finding that the appellant breached its duty of care DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where the respondent contended that the quantum awarded for future economic loss was manifestly inadequate – where the primary judge rejected the

respondent's evidence as to her on-going difficulties with her injured ankle – whether the primary judge erred in rejecting the evidence of the respondent and preferring the evidence of the medical examiner

Workers' Compensation and Rehabilitation Act 2003 (Qld), s 669(2)

Inghams Enterprises Pty Ltd v Kim Yen Tat [2018] QCA 182, applied
Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361; [2011] HCA 11, applied

COUNSEL: R Douglas QC for the appellant
R C Morton with J M Sorbello for the respondent

SOLICITORS: BT Lawyers for the appellant
Morton & Morton Solicitors for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Bond J and the orders proposed by his Honour.

[2] **PHILIPPIDES JA:** I agree with the reasons of Bond J and the orders proposed by his Honour.

[3] **BOND J:**

Introduction

[4] On 27 March 2008, the respondent was employed as a residential care worker in the appellant's aged care facility. As such, she was required to shower a resident in the ensuite bathroom of that resident's room in the facility. During the course of so doing, she crouched as she was washing the resident's legs. As she attempted to get up, she slipped on the floor of the resident's shower and sustained an injury to her ankle.

[5] The respondent did not seek medical treatment immediately. For the next two years she had ongoing difficulties with the injured ankle. Those difficulties ultimately worsened and caused her to see a medical practitioner in March 2010. She was then treated by immobilizing her lower leg with a plaster backslab. One consequence was that she developed a deep vein thrombosis and subsequent embolus. She was treated with Warfarin for about 12 months, but after ceasing that treatment, she developed a second embolus. She will now require anticoagulant medication permanently. Successful surgical intervention in mid-2015 ameliorated her condition to the extent that she now has only a 3% whole person impairment.

[6] The respondent alleged, and the primary judge agreed, that her injury was caused by the appellant's breach of its duty of care in tort to take reasonable steps for the safety of its employees.[1] On 21 June 2017, the primary judge gave judgment for the

[1] The respondent's cause of action is to be analysed by reference to the common law, because the relevant statutory modifications to the common law introduced by Chapter 5, Part 8 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) did not take place until 1 July 2010, after the incident had occurred and after a health practitioner had been consulted in relation to the injury: see *Workers' Compensation and Rehabilitation Act* 2003 (Qld) s 669(2).

respondent against the appellant in the sum of $480,784 inclusive of interest. The judgment sum was calculated in the following manner:

General damages	$65,000
Interest	$9,300
Past economic loss	$201,570
Interest	$25,944
Past superannuation	$181,40
Future economic loss	$78,300
Future superannuation	$8,613
Specials	$32,460
Interest thereon	$5,676
Future pharmaceuticals	$3,868
Future GP expenses	$22,241
Past paid care	$1,680
Future care	$7,992
Total	**$480, 784**

[7] In this court, the appellant confined its case to "one core ground", namely that the primary judge "erred in finding a breach of duty on the part of the appellant upon an unsound factual foundation concerning the slip standard of the floor in the ensuite". The argument ran this way:

(a) The primary judge relied on expert opinion to conclude that the surface on which the respondent was required to work had inadequate slip resistance.

(b) But the expert opinion was founded on testing performed on 13 June 2013 - more than five years after the respondent's accident - and did not provide any adequate basis for his inference concerning the state of the floor (and the appellant's responsibility therefor) 5 years earlier.

(c) The conclusion that the appellant had been negligent amounted to speculation and conjecture.

[8] For the reasons which follow, I consider that it was open to the primary judge to draw the inference which he did, and the appeal should be dismissed.

[9] By cross-appeal, the respondent contended that the primary judge's finding that her future economic loss was $78,300 was against the evidence and was manifestly inadequate, and should have been assessed at $300,000. If that contention was accepted, it would also follow that the assessment of the respondent's future loss of superannuation entitlements should have been increased.

[10] For the reasons which follow, I consider that no appellable error has been demonstrated in the finding made by the primary judge, and the cross-appeal should also be dismissed.

The appeal

The relevant reasoning of the primary judge

[11] The primary judge accepted the respondent's evidence that the floors of the relevant ensuites in the appellant's facility were slippery when wet, particularly when there was any contamination from soap or shampoo, and that the respondent had previously had some problems with slipping.[2] He accepted her evidence that the

[2] Reasons of the primary judge at [15]-[17]: AR572-573.

accident occurred when she slipped on such a floor when she attempted to get up from her crouched position while washing a resident's legs.[3] That version of the mechanism of the accident was supported by a contemporaneous "Staff Accident Report and Investigation" document signed by the respondent and also by both the registered nurse in charge and the defendant's Workplace Health and Safety Officer.[4]

[12] Having made findings as to the mechanism of the accident, the primary judge went on to consider whether the mechanism of the accident was due to the appellant's negligence.

[13] The primary judge noted that evidence of the floor being slippery when wet in the relevant time period had been given by the plaintiff and by two other persons employed as carers by the defendant. However he explicitly stated that he was disinclined to act on the basis of that evidence. Rather, he preferred the objective nature of expert opinion evidence over the subjective evidence of whether a particular witness felt that the floor was or was not slippery. That expression of view by the primary judge should not, however, be regarded as a rejection by him of the evidence given by those lay witnesses. Indeed, it was apparent that he specifically did accept the truth of the respondent's evidence when she described the floors as slippery when wet. Whilst he made no specific finding concerning the other two lay witnesses, before this Court the appellant did not suggest that the primary judge did not accept the truth of their evidence.

[14] Before the primary judge, the respondent had argued, amongst other things, that in order to discharge its duty to take reasonable care for its employees, a person in the position of the appellant would at least:

(a) install properly and in accordance with the manufacturer's requirements a floor designed to reach an appropriate degree of slip resistance;

(b) carry out maintenance of the floor in accordance with the manufacturer's requirements; and

(c) embark upon a periodic testing regime, in order to ensure that, as installed and maintained, the floor possessed the appropriate degree of slip resistance.[5]

[15] The primary judge found that it was important that the surface of the ensuite where the accident had occurred be as slip resistant as reasonably possible so as to avoid injuries such as the one the respondent said she suffered.[6] No criticism was advanced in this Court as to this conclusion as to the content of the appellant's duty of care.

[16] It was accepted at trial that the flooring product in fact installed in the relevant ensuite was a product known as Accolade Safe Plus.[7] It had been installed in 2002. Expert opinion evidence from Mr McDougall (called by the respondent), whose

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[3] Reasons at [19]-[20]: AR573.
[4] Reasons at [20]: AR573.
[5] Plaintiff's written submissions at [4]-[5], [48]-[60] and [77]-[85]: AR483, 489-490 and 493-495.
[6] Reasons at [28]: AR576.
[7] Curiously, at one time during argument before this Court, counsel for the respondent suggested that there might have been a doubt about that conclusion, and that a different product known as Accolade Plus might have been used. I did not find that the evidence supported the suggested doubt. In any event, that submission was not pressed.

views were accepted by the primary judge, was that Accolade Safe Plus manufacturer's specifications met the requirements of relevant Australian Standards for minimum slip resistance (namely meeting classification X according to a "wet pendulum test"). However tests which he conducted in 2013 revealed that, as installed and maintained to that date, the subject floor did not achieve an adequate degree of slip resistance. As tested in 2013, Mr McDougall regarded the surface as falling into the category of providing a high to very high contribution to the risk of a person slipping when the floor was wet. In lay terms, it was very slippery when wet. And that would have been exacerbated by the presence of soap or other lubricants.

[17] Mr McDougall had not been provided with any information addressing whether the product had been installed and maintained in accordance with the manufacturer's guidelines. However, based on the outcome of his tests, he thought it appropriate to assume that the unsatisfactory state of the surface in 2013 must have been due either to the product not having been installed as per the manufacturer's guidelines or not having been maintained in accordance with the manufacturer's guidelines.

[18] The critical findings of the primary judge were these (emphasis added):

> **[35]. The evidence of Mr McDougall about the measured slip resistance of the floor is far preferable to subjective evidence of whether a particular witness felt the floor surface was, or was not, slippery. I conclude from his evidence that the floor surface represented an unacceptable risk of slipping to persons performing the tasks the plaintiff was required to perform, namely squatting to shower a patient in a wheelchair.**
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> **…**
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> [39] When Mr McDougall was cross-examined it was suggested to him that the product on the floor was in fact Armstrong Accolade Safe Plus. A brochure dealing with that product was put into evidence. It was suggested that Accolade Safe Plus was a product meeting the relevant Australian standards for use in wet areas such as the ensuite where the plaintiff slipped. **The manufacturer's specifications show that it had a classification X for a wet pendulum test. Mr McDougall accepted that was the case and accepted that it met relevant Australian standards, though he said he himself recommends something at a higher classification. He pointed out however that whatever the manufacturer's tests indicated, the reality was that the floor surface that he tested did not meet those standards. He referred to page 21 of the manufacturer's brochure, which deals with maintenance issues, and pointed out the importance of complying with those maintenance suggestions and also the importance of installing the flooring appropriately. He said that issues associated with installation and in particular whether any finish had been applied to the floor, whether there were so called detergent residues on it and wear and tear of the floor could all affect the results of the wet pendulum test. He said that the product he tested on the floor was nothing like the appropriate classification**, even if it was Accolade Safe Plus as was suggested to him.
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> [40] In his first report, Mr McDougall also said (Ex 1, To615, P022):
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> > "Had an appropriate health and safety audit been conducted of the premises (either at design stage, during construction or after) the high potential for slips and falls on vinyl floors in ensuites could have been identified".
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> [41] Similar observations are to be found in the report of Paul Stephenson, the engineer engaged by the defendant's solicitor. He observed (Ex 1, To617) that even if a manufacturer's published material indicates a material is suitable for use in a wet area, after installation it may no longer comply. I infer from Mr McDougall's evidence that can occur as a result of inadequate installation or inadequate maintenance. Mr Stephenson concluded that when he tested the floor surface it no longer complied with Australian requirements. He concluded it was unsuitable for the purpose for which it was advertised, namely, for wet commercial application.
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> **[42] Whichever is here the cause of the [test outcomes obtained by the experts], poor installation or poor maintenance, the result was that the surface where the plaintiff was required to work was inadequate and, as a result she slipped injuring her ankle as she described on 27 March 2008. That inadequacy was a clear breach of the employer's obligation**

> **to take reasonable steps for the [safety] of its employees. In my view, the plaintiff has clearly identified that the defendant ought to have had in place a system of appropriately installing or maintaining the flooring of the ensuites**. Furthermore, in my view it ought have periodically tested the surface - and by testing I mean conducting a test such as Mr McDougall and Mr Stephensen both did, and not having a lay person run his hand over the surface to check the texture. I do not think it necessary testing be done in each unit, in the absence of specific complaints but periodic testing of a sample ensuite ought to have been undertaken. Any [such] testing would have revealed the inadequacy of the flooring both of the engineers identified.
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> [43] In such circumstances, I find the defendant negligent.[8]

[19] Before the primary judge, the appellant had argued that the 2013 evidence was not indicative of the state of the floor five years earlier at the time of the 2008 accident. The appellant submits that the primary judge ought to have addressed this in his reasons, but did not do so.

[20] The question is whether there was evidence before the primary judge justifying his inference that the slip resistance of the floors in 2008 was inadequate in consequence of the appellant's failure to take reasonable steps to ensure the safety of its employees. As I observed in *Inghams Enterprises Pty Ltd v Kim Yen Tat* [2018] QCA 182 at [55] (Gotterson and Morrison JJA agreeing):

> The approach which must be taken to the process of inferential reasoning required in this case is clear: see per Gageler J in *Henderson v State of Queensland* (2014) 255 CLR 1 at [87]-[91] and Gordon J in *Re Day* (2017) 340 ALR 368 at [18], and the authorities which their Honours cite. Whether the subject of the inference is a particular fact, or the existence of a state of affairs:
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> > …where direct proof is not available it is enough [if] the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture ... But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then though the conclusion may fall short of certainty it is not to be regarded as a mere conjecture or surmise.

[21] There is some validity in the criticism of the adequacy of the reasons of the primary judge. However there is no validity in the contention that the ultimate conclusion reached was not eminently open to him on the evidence before him. On the evidence before him it was open to him to conclude that the "negligence" and "no negligence" inferences were not of equal degrees of probability, and that, on the balance of probabilities, the former was more likely.

[22] It is evident that the primary judge accepted that as at the date of the testing in 2013, reasonable steps had not been taken by the appellant so that the state of the floors in the ensuite were as slip resistant as reasonably possible so as to avoid injuries such as the respondent said she suffered. He found that was probably due either to poor installation or poor maintenance. He accepted the respondent's argument that the appellant ought to have had in place a system of appropriately installing or maintaining the flooring of the ensuites, and had it done so adequate slip resistance could have been ensured. Mr McDougall gave evidence of the multiple reasonable steps which could have been taken to remedy identified slip resistance problems.[9]

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[8] Reasons at [35], [39]-[43]: AR578-580.

[9] The potential reasonable steps identified by Mr McDougall were: using an alternative floor surface; improving the slip resistance of the existing floor surface through the use of proprietary treatments or adhesive strips; providing dedicated rubber mats on the bathroom floor; and implementing procedural controls with respect to the type of footwear worn by staff, see Exhibit 1, Tab 15: Brendan McDougall Report dated 19 July 2013 at pages 15 – 19: AR312-316; Exhibit 1, Tab 16: Brendan McDougall Supplementary Report dated 10 March 2015: AR375; T1-111 at lines 16-22: AR111.

[23] It is true that the primary judge inferred that the 2013 inadequate position must have obtained at the date of the accident. But that conclusion was not speculative. In light of the fact that there was no evidentiary basis from which to conclude inadequate installation, the competing inferences before the primary judge were these:

(a) The inadequacy of the floor surface measured in 2013 must have been a product of poor maintenance or some other event which occurred for the first time after the date of the accident in 2008 and before the testing in 2013, combined with a failure to test (and to identify and to implement remedial solutions).

(b) There must have been negligent maintenance in the period after installation and before the date of the accident which, combined with a failure to test (and to identify and to implement remedial solutions), was the probable explanation why the state of the floor was relevantly inadequate at the time of the accident.

[24] I think it is obvious that the primary judge rejected the notion of that the inadequate state of the floor surface in 2013 was to be explained by events which occurred for the first time after the incident had occurred.

[25] The appellant did not adduce any evidence as to the manner of installation of the product, or whether it complied with the manufacturer's guidelines. Nor did it explain why it did not adduce evidence of this kind. The appellant did call an employee (Mr Hyndman) who was in a position to explain whether anything was done in terms of maintenance of the floors to ensure they did not become slippery. His evidence was that the floors were cleaned on a 3-monthly cycle by a "Duplex" scrubbing machine which used two spinning hard-bristled brushes in combination with hot water and an acidic cleaner. Otherwise on a daily or weekly basis cleaners would simply sweep dust and mop the floors. Mr Hyndman's evidence as to maintenance addressed the period before and after the accident (although not in its entirety). The appellant did not adduce any other evidence concerning maintenance procedures at any time between installation and the 2013 inadequate position. Nor did it explain why it did not.

[26] The floor manufacturer's written "maintenance tips" were in evidence. Amongst other things, they suggested daily sweeping and mopping using a neutral detergent; weekly scrubbing using a machine or soft-bristled broom and a solution of neutral detergent; and that acidic cleaners should not be used at all as they would damage the floors. The use of hard-bristled brushes and 3-monthly - as opposed to weekly - scrubbing represented departures from the manufacturer's guidelines. The use of acidic cleaners represented doing something which the guidelines had specifically instructed should not be used, because they would damage the floors.

[27] In argument, the primary judge pointed out that the appellant had problems concerning the difference between what was recommended in the maintenance steps for the product and what was in fact done.[10] Counsel for the appellant conceded that the appellant was not in a position to explain why the floor surface was in the position it was when tested in 2013.[11] During that discussion, the primary judge suggested and counsel for the appellant accepted that the evidence of Mr McDougall

[10] T3-42 at lines 35-40: AR263.
[11] T3-42 at lines 46-47: AR263.

suggested three possible explanations to why a floor suitable at the time of installation may have become unsuitable, namely finishes that might be applied to the floor, detergent and other residues not being adequately removed, and wear and tear.[12] (In this view, Mr McDougall was also supported by the view of the other expert.)[13] The primary judge suggested that there was no evidence that there was any change (after the accident) in whatever system the appellant was using and that he thought he was probably entitled to conclude that the floor, suitable when installed, was not cleaned in accordance with the recommended guidelines put out by the manufacturer.[14] Counsel for the appellant concluded that that was "a hurdle".

[28] In my view the combination of:

(a) Mr McDougall's testing results in 2013 which measured the inadequacy of slip resistance;

(b) Mr McDougall's evidence concerning likely explanations for the measured inadequate slip resistance;

(c) Mr McDougall's evidence as to the importance of regular testing and the ease of remedying identified concerns with slip resistance;

(d) the positive evidence as to the appellant's failure to comply with manufacturer's guidelines both before and after the accident; and

(e) the lay evidence which described a subjective view of the floors at the time of the accident which was consistent with the respondent's case and inconsistent with the appellant's case,

was such as to render open the inference drawn by the primary judge. And, importantly, the unexplained failure by the appellant to adduce any other evidence addressing how the flooring was dealt with by it whether before or after the accident permitted the primary judge the more readily to draw that inference: *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 per Heydon, Crennan and Bell JJ at [63].

[29] The appeal must be dismissed.

The cross-appeal

[30] The primary judge assessed the respondent's future economic loss to be $78,300. The primary judge arrived at the $78,300 figure by concluding that the respondent was able to work as a nurse and that her future economic loss was no more than $100 per week. That figure was applied over a hypothesized 27 year working life, and then discounted back by reference to the appropriate discount rate, to arrive at $78,300. The respondent's future loss of superannuation entitlements was then assessed at $8,613 being 11% of the amount of the future economic loss.

[31] The respondent did not criticize the primary judge's methodology. Rather she criticized the conclusion that her loss was no more than $100 per week. On her argument, the primary judge should have concluded she was now only capable of working as a registered nurse, either in an occupational health position or in a

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[12] T3-43 at lines 3-7: AR264.
[13] Exhibit 1, Tab 17: Paul Stephenson of Kinetic Engineers Report dated 6 November 2013 at [3.1.7]: AR384.
[14] T3-43 at lines 15-18: AR264.

medical centre and at most on the basis of a three day week, being 60% of a full time wage. If that finding were made, the respondent's residual earning capacity was $660, resulting in a loss of $440 net per week. A loss of $440 net per week, for 27 years discounted by reference to the appropriate discount rate would amount to $344,520. That amount would be further discounted by 15% for contingencies resulting in an award of $292,842 rounded up to $300,000. The award for future loss of superannuation entitlements ought then have been $33,000 being 11% of the award for future economic loss.

[32] There was certainly a body of evidence which, if it had been accepted by the primary judge, would have justified that conclusion. But ultimately a pre-condition to accepting that evidence was accepting the respondent's evidence concerning the impact of the on-going difficulties she experienced in her injured ankle. The primary judge specifically did not accept the respondent's evidence in this regard. He found:

> [100] In making the findings I have I should say that whilst I have generally accepted the plaintiff's evidence about the circumstances of the accident, and of her ongoing symptoms between 2008 and 2010, I have some misgivings about her evidence. I have referred already to her implausible explanation of only being able to see her general practitioner about one complaint at a time. I also formed the view that some of her complaints were excessive. This excessive description of symptoms is, in my view, consistent also with the observations of Dr Peereboom that her symptoms were "somewhat odd" (Ex 1, Tab 14A, PNA3) and Dr Morgan's observations about her altered gait during his examination in November of 2016. In my view, it is also consistent with Dr Quinn's observations that whilst she said her ankle was swollen, he was unable to detect any such abnormality. Indeed, Dr Van Der Walt, who provided a report to her solicitors, observed on his examination no discoloration or swelling, despite her statements that there was swelling and a purplish discoloration.
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> …
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> [128] The plaintiffs claim for future economic loss is based on a notional capacity, but for the accident, of earning $1,100. 00 per week net and a residual earning capacity of $660.00. It is assumed she would work in the reduced capacity Ms Aitkin recommends and only three days per week.
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> [129] As I have said I do not accept that to be the case.
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> [130] The plaintiff is now 40 years of age. In my view her loss using the 5 per cent tables is likely to be no more than about $100 per week sum. I am confident she will be able to work at almost her full pre-accident capacity. In making the allowance I have had regard to the possibility of a recurrence of an embolus and the difficulty she will now confront in getting back to work after a significant period out of the workforce. I will thus allow future economic loss in the sum of $100 per week to age 67 (27 years, multiplier 783) amounting to $78,300. That sum already reflects a sufficient discount for the vicissitude of life, and need not be further discounted.[15]

[33] The cross-appeal cannot succeed unless there is some reason to overturn the adverse view which the primary judge took to the relevant aspect of the evidence of the respondent and the primary judge's acceptance of the evidence of Dr Morgan. The respondent did not present any argument which identified appellable error in the view taken concerning the respondent. And at best for the respondent concerning the evidence of Dr Morgan, there was an argument that Dr Morgan may have under-estimated the extent of walking which might form an inevitable part of the respondent's contemplated nursing duties. There is no reason to overturn the view taken by the primary judge.

[34] The cross-appeal must also be dismissed.

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[15] Reasons at [100], [128]-[130]: AR594, 600-601.

The orders which should be made

[35] In my view the orders which should be made are as follows:

(a) The appeal should be dismissed, and the appellant should pay the respondent's costs of the appeal to be assessed.

(b) The cross-appeal should be dismissed, and the respondent should pay the appellant's costs of the cross-appeal to be assessed.