# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Delta Pty Ltd v Mechanical and Construction Insurance Pty Ltd* [2019] QCA 62 |
| PARTIES: | **DELTA PTY LTD**<br>ACN 007 069 794<br>(appellant)<br>**v**<br>**MECHANICAL AND CONSTRUCTION INSURANCE PTY LTD**<br>ACN 106 907 055<br>(respondent) |
| FILE NO: | Appeal No 8520 of 2017<br>SC No 8800 of 2012 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane – [2018] 1 Qd R 564 (Dalton J) |
| DELIVERED ON: | 12 April 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATES: | 21 March 2018; 22 March 2018 |
| JUDGES: | Fraser and McMurdo JJA and Flanagan J |
| ORDERS: | **The appeal is dismissed with costs.** |
| CATCHWORDS: | INSURANCE – THE POLICY – CLAIMS GENERALLY – REFUSAL – OTHER MATTERS – where the appellant and a third party subcontractor settled claims between them concerning breaches of subcontract by way of an assignment by the subcontractor to the appellant of rights under a policy of insurance issued by the respondent – where the appellant as the assignee insured claimed indemnification from the respondent for losses suffered in connection with breaches of subcontract by the subcontractor – whether the subcontractor was legally liable so as to engage the insurance policy – whether the settlement between the appellant and the subcontractor was reasonable – whether the losses claimed by the appellant were insured by the policy<br><br>INSURANCE – THE POLICY – THE INSURED – where the appellant claimed as an insured in its own right an indemnity under a policy of insurance issued by the respondent – whether the appellant was insured under the relevant policy – whether the losses claimed by the appellant |

were insured by the policy

*Civil Proceedings Act* 2011 (Qld), s 58
*Insurance Contracts Act* 1984 (Cth), s 54
*Limitation of Actions Act* 1974 (Qld), s 10(1)(a)
*Uniform Civil Procedure Rules* 1999 (Qld), r 150(1)(k)

*Allianz Australia Insurance Ltd v BlueScope Steel Ltd* (2014) 87 NSWLR 332; [2014] NSWCA 276, cited
*Associated Forest Holdings Pty Ltd v Gordian Runoff Ltd* [2015] TASFC 6, followed
*Australasian Correctional Services Pty Ltd v AIG Australia Ltd* [2018] FCA 2043, cited
*Barrie Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd* [2016] NSWCA 67, applied
*Bayer Australia Pty Ltd v Kemcon Pty Ltd* (1991) 6 ANZ Ins Cas 61-026, cited
*Blakeley & Ors v CGU Insurance Ltd* (2017) 53 VR 733; [2017] VSCA 378, cited
*BNP Paribas v Pacific Carriers Ltd* [2005] NSWCA 72, distinguished
*Cacciolla v Fire & All Risks Insurance Co Ltd* [1971] 1 NSWLR 691, applied
*Campbell v Director of Prosecutions for the Commonwealth of Australia* [1995] 2 VR 654; [1995] VicRp 82, cited
*CGU Insurance Ltd v One.Tel Ltd (In liq)* (2014) 242 CLR 174; [2010] HCA 26, cited
*Cigna Insurance Asia Pacific Ltd v Packer* (2000) 23 WAR 159; [2000] WASCA 415, followed
*Corti v Rodwell* [1985] VR 287; [1985] VicRp 26, applied
*Distillers Co Bio-Chemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1; [1974] HCA 3, applied
*Globe Church Incorporated v Allianz Australia Insurance Ltd* [2019] NSWCA 27, followed
*Graham Evans & Co (Qld) Pty Ltd v Vanguard Insurance Co Ltd* (1986) 4 ANZ Ins Cas 60-689, cited
*Guardian Assurance Co Ltd v Underwood Constructions Pty Ltd* (1974) 48 ALJR 307, distinguished
*Keeley v Horton* [2016] QCA 253, explained
*Hunter v Stronghold Insurance (Australia) Ltd* [1995] VicSC 5, not followed
*Maxwell v Highway Hauliers Pty Ltd* (2014) 252 CLR 590; [2014] HCA 33, cited
*McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579; [2000] HCA 65, applied
*Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37, applied
*Penrith City Council v Government Insurance Office of New South Wales* (1991) 24 NSWLR 564, not followed
*Rail Corporation New South Wales v Fluor Australia Pty Ltd* [2009] NSWCA 344, cited
*Ranicar v Frigmobile Pty Ltd* [1983] Tas R 113; (1983)

2 ANZ Ins Cas 60-525; [1983] TASRp 13, cited
*Vero Insurance Ltd v Baycorp Advantage Ltd* (2005)
13 ANZ Ins Cas 61-630; [2004] NSWCA 390, cited
*Wallaby Grip Ltd v QBE Insurance (Australia) Ltd* (2010)
240 CLR 444; [2010] HCA 9, applied

COUNSEL: J Gleeson QC, with B Jellis, for the appellant
D A Savage QC, with S R Lumb, for the respondent

SOLICITORS: Thomson Geer for the appellant
TurksLegal for the respondent

[1] **FRASER JA:** The issues in this appeal concern the question whether a policy of insurance issued by the respondent ("Mecon") covers claims made by the appellant ("Delta") arising out of breach of contract by Delta's subcontractor, Team Rock Anchors Pty Ltd ("TRA").

[2] In May 2006 the Queensland Investment Corporation contracted with Delta for it to undertake an excavation on the Corporation's land at 175 Albert Street, Brisbane, in preparation for the construction of a high rise building. In or about September 2006 Watpac contracted with Queensland Investment Corporation to carry out the construction work, the contract between Queensland Investment Corporation and Delta was replaced by a contract between Watpac and Delta, and Delta entered into a subcontract with TRA for it to complete that part of Delta's contract work which comprised the installation of rock anchors.

[3] The function of the rock anchors installed by TRA was to secure the four retaining walls (designated as SW1, SW2, SW3 and SW4) constructed in the excavation, thereby protecting workers and material within the excavation and neighbouring buildings and roads. The rock anchors' design included bundles of thick wire strands, varying in length up to 20 metres. They were to be placed in holes drilled through concrete piles around the perimeter of the construction site and fixed in place by injections of grout to bind the last few metres of the strands to the subsoil. The trial judge described TRA's work as "woeful"; the great majority of the rock anchors were not in accordance with the shop drawings, there were insufficient strands in the bundles, the strands were not long enough, they were not grouted into position properly at their ends, and they were not capable of performing as designed.[1]

[4] Delta argues that TRA's defective work impacted upon all four retaining walls in a way that amounted to property loss, liability for which is insured under the Mecon policy. That is in issue. It is sufficient at this point to refer to the trial judge's description of consequences of TRA's breaches:

> "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

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1 *Delta Pty Ltd v Team Rock Anchors Pty Ltd & Anor* [2018] 1 Qd R 564 ("Reasons") at [6].

> 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."[2]

[5] In 2012 Delta sued TRA for damages for, inter alia, breach of subcontract. TRA brought a third party claim against Mecon claiming an indemnity pursuant to the insurance policy under which TRA was a named insured. That claim was discontinued when TRA could not supply security for Mecon's costs. In May 2016 Delta compromised its claim against TRA by a settlement deed, which included an assignment to Delta of TRA's rights under the policy.

[6] The proceedings thereafter involved only claims by Delta against Mecon. The claims which remain in issue are:

(a) A claim by Delta as assignee of TRA's claimed right to an indemnity of the "Settlement Amount" under the settlement deed of $2,581,179.18 or, alternatively, an amount assessed by the court.

(b) In the alternative to (a), a claim by Delta as an insured under the policy for the costs incurred in undertaking temporary protective repairs, in an amount of $1,478,000.

[7] After a trial, judgment was given for Mecon against Delta.

**The claim by Delta as assignee of TRA**

[8] Delta, as assignee of TRA, claimed an indemnity against TRA's liability to Delta under the public liability cover in cl 5 of s 2 of the policy. Clause 5 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 of 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
>
> 5.02 legal costs for your representation at any coroner's inquest; and
>
> 5.03 costs incurred by you for temporary protective repairs undertaken to prevent any immediate threat of Property Loss or Personal Injury."

"Occurrence" is defined to mean "an event, including the continued or repeated exposure of persons or property to conditions that are generally the same, which you could not have expected and did not intend to happen". The word "Event" is defined to mean "a single event of loss or damage".

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2 Reasons at [7].

[9] It is not in issue that TRA assigned its claim for an indemnity under the Mecon policy to Delta. What is in issue is whether TRA was entitled to such an indemnity. Delta's case upon that issue is that the settlement deed rendered TRA "legally liable" to pay the Settlement Amount "in compensation of … Property Loss" that happened as a result of an Occurrence.

[10] The settlement deed commences with recitals which include reference to TRA being entitled to a grant of indemnity and Mecon having improperly declined to grant indemnity to TRA under the policy in connection with the "Delta Claim". ("Delta Claim" is defined to mean "Delta's claims against TRA which are the subject of the Proceeding and which are more particularly described in the pleadings in the Proceeding".) Recital F states that, "Delta TRA and Jones[3] have agreed to enter into this Deed under which … TRA agrees to assign to Delta certain of TRA's rights under the Mecon Policy on the terms set out below."

[11] Clauses 2 and 3 provide:

> "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.
>
> 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.
>
> …
>
> 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."

"Mecon Claim" is defined to mean "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."

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[3] Mr Jones, a former director of TRA, was the second defendant in the proceeding, but Delta released and discharged him and consented to the claim against him being dismissed.

[12] A footnote referred to in cl 2.1(a) of the settlement deed after the Settlement Amount figure of $2,581,179.18 states:

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

[13] I understood it to be common ground that, in circumstances in which Mecon had denied liability to indemnify TRA, TRA was entitled to an indemnity if it proved that the settlement deed rendered TRA legally liable to pay the Settlement Amount, TRA's assumption of that liability was reasonable,[4] and TRA was liable to pay that amount "in compensation of … Property Loss" and otherwise satisfied the terms of cl 5.00.[5] During the hearing of the appeal, senior counsel for Delta argued that it was sufficient for Delta to prove in this proceeding that TRA was liable for damages for breach of its subcontract. Upon that premise Delta argued that, in circumstances in which Delta clearly proved that TRA breached its subcontract in ways that caused Delta loss and the real issue concerned only the quantum of that loss, it was not necessary for Delta to prove that the settlement deed rendered TRA liable to pay the Settlement Amount; the only relevance of the settlement deed was submitted to be that it crystallised the amount of TRA's liability for its breach of the subcontract.[6] That argument is inconsistent with the way in which Delta argued its case at trial. Mecon did not contend that the new argument should not be considered in this appeal, presumably upon the footing that it involves only the proper construction of the policy.

[14] The trial judge referred to the general rule articulated in *BNP Paribas v Pacific Carriers Ltd*[7] by Giles JA (Sheller JA agreeing)[8]:

> "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; prominent cases are *Edwards v Insurance Office of Australia Ltd* (1933) 34 SR 88; *General Omnibus Co Ltd v London General Insurance Co Ltd* (1936) IR 596; and *Distillers Co Biochemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1. This is consistent with the reasoning in *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* in that, on the application of principles concerning causation and remoteness in assessment of damages,

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4 There was no challenge to the trial judges' statement of the test of reasonableness quoted in [36] of these reasons.

5 The evidence at the trial established that TRA was liable to Delta and that does not seem to have been in issue. For that reason, and because of the way in which the appeal was conducted, it is not necessary to consider the question whether an insured in TRA's position who claims an indemnity (rather than damages for breach of the policy) is obliged to prove that it was liable to the plaintiff where the insurer has not repudiated the policy: see *Hurlock v Council of the Shire of Johnstone* [2002] QCA 256 at [28] – [31], but note the reference to competing views in *Vero Insurance Ltd v Baycorp Advantage Ltd* (2005) 13 ANZ Ins Cas 61-630; [2004] NSWCA 390 at [48]. Many other decisions on the point are discussed in K Sutherland "An Uneasy Compromise; An Analysis of the Effect of a Settlement Reached by an Insured with a Third Party Claimant vis-a-vis his or her Insurer" (1998) 9 ILJ 1 and Traves "In what circumstances is an insurer bound by a judgment or settlement against its insured?" (2015) 26 ILJ 209. See also *Weir Services Australia v AXA Corporate Solutions Assurance* [2018] NSWCA 100 at [2] (Meagher JA), [17] – [22] (White JA), [62] – [64] (Barratt AJA).

6 Transcript 21 March 2018 at T1-57 to T1-58.

7 [2005] NSWCA 72 at [187].

8 [2005] NSWCA 72 at [88].

> settlement will commonly be causally related to the insurer's breach and a natural and reasonably contemplated result of the breach. As McHugh J said in *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* at [33], "As a general rule, a contract breaker must be taken to have reasonably contemplated that its breach may force the innocent party into litigation with third parties and that the innocent party may conclude that it is in its best interest to compromise the third party's claim"."

The trial judge also referred to the following passage in Handley JA's reasons:[9]

> "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. See *Edwards v Insurance Office of Australia Ltd* (1933) 34 SR (NSW) 88. Such settlement is within the notional reasonable contemplation of the parties and a result of the breach. As I read *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 (*Unity Brokers)* all judgments support this conclusion. McHugh J (612-4) and Gummow J (625) refer to *Edwards v Insurance Office of Australia Ltd* with approval."

[15] Delta's argument is not inconsistent with those passages, but the present point was not in issue in *BNP Paribas v Pacific Carriers Ltd*. The reasoning in that case is not applicable for two reasons. First, Handley JA and Giles JA analysed the issues with reference to principles applicable in a claim for damages for the insurer's breach of the insurance contract, whereas Delta's claim as assignee is for an indemnity to which, at the time of the assignment, TRA is alleged to have been entitled pursuant to the policy terms. Secondly, the contractual indemnity in *BNP Paribas v Pacific Carriers Ltd* was in respect of any "liability loss or damage of whatsoever nature",[10] the scope of which is markedly broader than the indemnity in cl 5.00 of the Mecon policy for "all amounts which you become legally liable to pay in compensation of … Property Loss".

[16] In an English case reported in 1928, *Hood's Trustees v Southern Union General Insurance Company of Australasia Ltd*,[11] the Court of Appeal (Lord Hanworth MR, Lawrence and Russell LJJ agreeing) approved Tomlin J's conclusions that the right to indemnity under a policy covering "any liability for compensation … for accidental bodily injury …"[12] arose upon the happening of an accident and was a chose in action that vested in the insured's trustee in bankruptcy before judgment was given against the insured.[13] Tomlin J considered that there was no substantial difference between that case and another case in which a judgment against the insured had been obtained before an insured went into liquidation.

[17] That decision might have supplied some support for Delta's new argument (although it did not concern the expression "legally liable"), but forty years later in

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9 [2005] NSWCA 72 at [13].
10 [2005] NSWCA 72 at [108].
11 [1928] Ch 793.
12 [1928] Ch 793 at 794.
13 [1928] Ch 793 at 801-802.

*Post Office v Norwich Union*,[14] the majority of the Court of Appeal reached the opposite conclusion with reference to a policy which obliged the insurer to "indemnify the insured against all sums which the insured shall become legally liable to pay as compensation in respect of loss of or damage to property". Clause 5.00 of the Mecon policy expresses the indemnity more narrowly, but the difference is not material for the point under discussion. Denning MR concluded that the insured acquired a right to sue for the money only when his liability to the plaintiff had been "ascertained and determined to exist, either by judgment of the court or by an award in arbitration or by agreement" and until that was done, the right to indemnity did not arise.[15] Similarly, Salmon LJ observed:[16]

> "It is quite true that if Potters in the end are shown to have been legally liable for the damage resulting from the accident to the cable, their liability in law dates from the moment when the accident occurred and the damage was suffered. But whether or not there is any legal liability and, if so, the amount due from Potters to the Post Office can, in my view, only be finally ascertained either by agreement between Potters and the Post Office or by an action or arbitration between Potters and the Post Office. It is quite unheard of in practice for any assured to sue his insurers in a money claim when the actual loss against which he wishes to be indemnified has not been ascertained. I have never heard of such an action and there is nothing in law that makes such an action possible."

[18] The same construction of the expression "legally liable" in materially indistinguishable policy provisions has repeatedly been adopted: *Cacciola v Fire & All Risks Insurance Co Ltd*,[17] *Distillers Co Bio-Chemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd,*[18] *Corti v Rodwell*,[19] *Vero Insurance Ltd v Baycorp Advantage Ltd*,[20] *Allianz Australia Insurance Ltd v Bluescope Steel Ltd*,[21] and *Australasian Correctional Services Pty Ltd v AIG Australia Ltd*.[22] Thus, for example:

(a) In *Distillers Co*,[23] Stephen J adopted Salmon LJ's analysis in *Post Office v Norwich Union* and accepted that the insured had not become "legally liable for any sum by way of damages" for the purposes of the policy. Menzies J's reasons proceeded upon the same premise that liability to indemnify the insured would arise only upon judgment or, in the case of an insurer breaching the contract by denying liability and refusing to defend or settle, the insured making a reasonable settlement.[24]

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14 [1967] 2 QB 363.
15 [1967] 2 QB 363 at 373-374.
16 [1967] 2 QB 363 at 377-378.
17 [1971] 1 NSWLR 691 at 695.
18 (1974) 130 CLR 1 at 25-26.
19 [1985] VR 287 at 289.
20 (2005) 13 ANZ Ins Cas 61-630; [2004] NSWCA 390 at [1], [48], [89].
21 (2014) 87 NSWLR 332; [2014] NSWCA 276 at [78], [267]-[270].
22 [2018] FCA 2043 at [15].
23 (1974) 130 CLR 1 at 25-26.
24 (1974) 130 CLR 1 at 9, in the course of a discussion about *General Omnibus Co v London General Insurance Co* [1936] IR 596. The present point was not considered by the third member of the Court, Gibbs CJ.

(b) In *Cacciola*, Jacobs JA (Moffitt JA and Taylor AJA agreeing) observed of a similar policy that it "does not indemnify against a possible future liability, but against an ascertained enforceable liability... In the circumstances of this case, it seems to me that nothing before the signing of the judgment results in what could be described as a legal liability by way of damages within the meaning of the policy."[25]

(c) In *Corti v Rodwell*,[26] Tadgell J discussed a policy providing an indemnity "in respect of all sums which the said Associations … might become legally liable to pay for compensation in respect of bodily injury …":

> "There is certainly authority for the view, which cannot now be doubted, that under a policy of insurance providing indemnity to the insured in respect of all sums for which the insured becomes legally liable by way of compensation (or damages) no obligation can arise before a legal liability of the insured is established. The expression "legally liable" in this context means, in broad terms, "held liable". Such a legal liability might be established by judgment, arbitral award or agreement, including an agreement of compromise. Counsel for the company relied on *The Distillers Company Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1, esp. at pp. 25-6, in the judgment of Stephen J, and cases there cited; and *Cacciola v Fire & All Risks Insurance Co Ltd* [1971] 1 NSWLR 691, at p. 695."

[19] Different forms of liability cover may indemnify the insured against a liability for breach of contract proved for the first time in proceedings against the insurer for the indemnity, but the cases I have mentioned are powerful support for the view that, upon the proper construction of the Mecon policy, cl 5.00 comprehends only a liability under a judgment, an award, or an agreement of the kind I have mentioned.

[20] Under appeal ground 11, Delta also argues that if TRA's assumption of liability under the settlement deed for the Settlement Amount was not reasonable Delta as assignee was entitled to recover the amount which the Court finds would have been a reasonable settlement. That argument is submitted to find support in Giles JA's conclusion in *BNP Paribas v Pacific Carriers Ltd* that, if the settlement amount was unreasonably high the plaintiff could recover the amount for which the third party's claim could have been settled. The trial judge distinguished that case upon the ground that it did not concern insurance against a liability to pay, but a letter of indemnity under which the plaintiff was required to prove only loss or damage.[27] Delta argued that Giles JA's analysis was referrable to a legal liability arising by way of a settlement even though the indemnity extended beyond that. My conclusion that the trial judge correctly distinguished *BNP Paribas v Pacific Carriers Ltd* is explained in [15] of these reasons.

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25 [1971] 1 NSWLR 691 at 695.

26 [1985] VR 287 at 289.

27 Reasons at [163]. The trial judge distinguished *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 and *Rail Corporation New South Wales v Fluor Australia Pty Ltd & Anor* [2009] NSWCA 344 upon the same ground.

[21] Upon the proper construction of the Mecon policy, Delta as assignee could not succeed in its claim for an indemnity if it did not establish that the settlement deed rendered TRA liable to pay the Settlement Amount.

**Did the settlement deed render TRA legally liable to pay the Settlement Amount?**

[22] Grounds 1 and 2 of Delta's notice of appeal contend that the trial judge's conclusion that the settlement deed did not render TRA "legally liable" for the Settlement Amount was based upon an erroneous construction of the settlement deed.

[23] The trial judge considered that there was substance behind Mecon's argument that the demand required by cl 2.1(a) was not proved; there never would be such a demand because under cl 2.2 TRA's only liability was for any amount actually recovered by Delta as assignee of TRA, any such recovery would result from a judgment in the proceeding, the judgment sum would be payable and paid to Delta rather than TRA, so that there would never be any funds in TRA's hands and it would never become liable to pay those funds to Delta. The trial judge considered that although cl 2.2, to which cl 2.1(a) is subject, purports only to limit the liability of TRA, in fact no liability would ever arise. The trial judge accepted Mecon's argument that the only legal liability in terms of cl 5 of s 2 of the policy upon which Delta relied was the liability said to be established by the settlement deed, but that the settlement deed did not establish any such liability.

[24] An assignment with an associated compromise in a settlement deed made after an insurer has wrongly rejected an insured's claim under a liability policy has been described in the United States of America as a "Damron Assignment".[28] Former Justice Derrington referred to this kind of agreement in an article: [29]

> "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)

[25] After noting that cases in the United States of America and Canada had rejected arguments that, although the Damron Assignment might produce a liability in the insured for the purposes of a liability policy, there was no loss for the insurer to indemnify because the contract assignment discharged the same liability,[30] Derrington J articulated a justification for that result based in the common intention of the parties to the contract of assignment:

> "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

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28 Named after *Damron v Sledge* (1969) 460 P.2d 997.

29 See Derrington, "The Damron Assignment", (1995) 7 *Insurance Law Journal* 65.

30 Ibid, p 65.

> that liability in consideration of the grant of the assignment. This is both logical and consistent with the result intended by the parties."[31]

The trial judge considered that this justification was unavailable to Delta because the settlement deed did not discharge or limit TRA's liability in consideration for the assignment.[32]

[26] The trial judge concluded that although it might be speculated that the parties intended to fix the amount of liability as between them and make it appear that TRA assumed a liability in that amount, the deed did not create any liability in TRA.[33]

[27] Delta contends and Mecon disputes that: cl 2.1(a) created an immediate and continuing liability to pay and cl 2.2 operated only upon recovery by Delta under the policy and, at that time, it limited TRA's liability for any shortfall below the Settlement Amount; alternatively, the limit imposed in the second part of cl 2.2 should be regarded as being practically ineffective and as preserving the liability created by cl 2.1, thereby giving effect to the purpose of the settlement deed that TRA is and shall remain liable to Delta; notwithstanding the absence of demand by Delta, the deed created an existing liability; and, alternatively, even if the obligation crystallised only upon the contingency of Delta recovering under the policy pursuant to cl 2.2, the deed created a liability to pay the Settlement Amount, being a liability falling within the expression "liable to pay" in cl 5 of s 2 of the policy. In the course of oral argument Delta submitted that the second part of cl 2.2 should be construed only as a limit upon Delta's entitlement to enforce TRA's liability.

[28] Considered in isolation, the literal meaning of the second part of cl 2.2 justifies Mecon's construction of the deed. That construction would give effect to the expectation that cognate words have congruent meanings, which is particularly significant here because the words "liable" and "liability" are used in the same sentence in a short deed drawn with legal assistance.

[29] Other considerations support a different construction of the deed. The introductory part of cl 2.1 is so expressed as to render TRA's agreement in cl 2.1(a) subject to both its liability for the Settlement Amount in the first part of cl 2.2 and the limitation in the second part of that clause. An ambiguity arises from the conflict within cl 2.2 between TRA's present and future liability to pay the Settlement Amount and that same liability being limited in the way described in that clause. In contradistinction to the expression "subject to" in the introductory part of cl 2.1, the second part of cl 2.2 is introduced by the word "but". That does not require the limitation to be construed as detracting from TRA's liability, particularly in light of the emphatic expression in cl 2.2 that TRA "remains, and shall remain, liable for the Settlement Amount" and the acknowledgment in the immediately following provision, cl 2.3, of TRA's "liability to pay the Settlement Amount".

[30] Importantly, recital F, cl 3.1, and the definition of "Mecon claim" reveal that a fundamental object of the settlement deed was the assignment by TRA to Delta of TRA's right to an indemnity under the Mecon policy in respect of TRA's liability to Delta for the "Delta Claim". It would defeat that fundamental object to construe the second part of cl 2.2 as qualifying out of existence the liability which is so

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31 Ibid, p 67.
32 Reasons [152].
33 Ibid.

emphatically expressed in the first part of cl 2.2 and acknowledged in cl 2.3. In *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*[34] French CJ, Nettle and Gordon JJ referred to principles applied in construing commercial contracts, including that the meaning of the contract is to be determined objectively by reference to its text, context and purpose, it is necessary to ask what a reasonable business person would have understood the terms to mean, and that requires consideration of the contractual language, the circumstances addressed by it, and the commercial purposes or objects to be secured by it. Their honours confirmed that:

> "Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption "that the parties … intended to produce a commercial result". Put another way, a commercial contract should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience.""[35]

[31] Mecon submitted that TRA may have wished to avoid being rendered legally liable for the Settlement Amount so as to avoid any risk to the maintenance of its building licence on account of potential insolvency. That is not a significant consideration in circumstances in which Mecon did not develop an argument that such a risk in fact existed in the particular circumstances of this case and it did not refer to any evidence that either party knew of or adverted to such a risk. As to the reference in cl 2.1(a) of the settlement deed to TRA agreeing to pay the Settlement Amount "upon demand", the matters already mentioned, particularly the first part of cl 2.2, justify Delta's submission that TRA's liability arose immediately upon execution of the deed without the necessity for any demand.[36]

[32] Giving effect to the expressed objects of the deed, the repeated acknowledgments in it of TRA's liability to pay the Settlement Amount, and the reference in cl 2.3 to TRA's represented lack of financial capacity to meet any substantial part of that liability as the explanation for Delta's agreement to cl 2.2, the deed should be construed as rendering TRA unconditionally liable to Delta for the Settlement Amount and as precluding Delta from enforcing that liability except by and to the extent of any recovery by Delta as the assignee of TRA's right to an indemnity under the Mecon policy.

[33] In principle an insured may be legally liable to pay a sum of money for the purposes of a claim by the insured's assignee upon the liability insurance even though the liability is not enforceable against the insured: see *CGU Insurance Ltd v One.Tel Ltd (In liq)*[37] and *Blakeley & Ors v CGU Insurance Ltd*.[38] As Mecon submitted, those decisions were concerned with liability under a consent judgment rather than under a contract, but the principle is applicable in both kinds of cases. My conclusion is that upon the proper construction of cl 5.00 in s 2 of the Mecon Policy, the settlement deed rendered TRA "legally liable" to pay Delta the Settlement Amount of $2,581,179.18.

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34 (2015) 256 CLR 104 at [46]-[51].

35 (2015) 256 CLR 104 at [51]. Citations omitted.

36 In this respect, TRA's liability is analogous with the liability of a debtor under a loan payable on request: *Leveraged Equities Ltd v Goodridge* (2011) 274 ALR 655 at [221]; *Ogilvie v Adams* [1981] VR 1041 at 1043.

37 (2010) 242 CLR 174 at [42]-[46].

38 (2017) 53 VR 733; [2017] VSCA 378 at [183]-[197].

[34] Finally in this respect, I note that application of conventional principles of contractual construction produces a result that is broadly analogous to the justification for upholding the Damron Assignment described earlier in these reasons. However the American jurisprudence differs in important respects from Australian law and I have not taken it into account.

**Did Delta prove that the Settlement Amount was reasonable?**

[35] Appeal ground 6 contends that the trial judge erred in finding that the Settlement Amount was not reasonable.

[36] The trial judge explained the content of the reasonableness requirement in terms that are not controversial in this appeal:

> "To establish a liability, a settlement "must not only be reasonable but also bona fide". [*Vero Insurance Ltd v Baycorp Advantage Ltd* [2004] NSWCA 390, [68]]. 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" [*CGU Insurance Limited v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1, [24]]. The settlement "must reflect the plaintiff's true prospects of success if the proceedings had been conducted with care and skill … ." [*BNP Paribas*, above, [17]] 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." [*The Distillers Company Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd* (1973-1974) 130 CLR 1, 32]. 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 [*Distillers Bio-Chemicals,* above, pp 32-33]. 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 [*Distillers Bio-Chemicals,* above, p 32]. 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."[39]

[37] Delta led no evidence about the legal advice, process, reasoning or negotiation which led Delta to agree to the settlement. TRA did not waive legal professional privilege. Mr Jones gave evidence in Delta's case that he was closely involved in the process of settlement,[40] but the trial judge found that he was "coy" about those topics.[41] The trial judge accepted that the dearth of evidence upon those matters was not fatal and went on to consider Delta's case that the proved facts showed that it

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39 Reasons at [142].
40 T6-64.
41 Reasons at [153].

had sufficiently good prospects of success in its action against TRA to make the Settlement Amount reasonable.

[38] As to TRA's liability, Mecon's own case was that "TRA made no attempt to comply with the Subcontract".[42] It gave detailed particulars of the deficiencies in TRA's work in support of a defence that Delta's claim as assignee was excluded by general condition 10.08 of the policy, which required TRA and its employees to take all reasonable steps to prevent incurring any loss, damage or liability. Each of the two directors of TRA gave evidence which made it plain that, once "short anchors" were extracted during the engineering investigation commenced as a result of the movement of SW1, they knew that TRA's work had been seriously deficient.[43] It was put to the directors during cross-examination (but denied) that they knew of the deficiencies in TRA's work at a much earlier time. The brief outline of the trial judge's findings in [3] – [4] of these reasons also suggests that when the settlement deed was executed Delta and TRA must have understood that TRA had breached its subcontract in ways that caused Delta substantial loss. Other findings made by the trial judge[44] support the same view: there were serious deficiencies in TRA's work of installing the rock anchors; TRA falsified many of the required quality assurance records; it was almost inconceivable that the workers installing anchors would not have realised it was probable that they would not be able to perform the design function; and TRA's work was so bad that it might have endangered the life of workers within the excavation and in adjacent properties. Mr Jones' accepted evidence was that, in circumstances in which the excavation of "short anchors" made it clear that TRA "had clearly not done the right thing, and I wanted our first major project not to be the one where our reputation was destroyed", TRA stayed on the job and assisted in the installation of remedial rock anchors for the next year or so working free of charge under strict direction and supervision of Delta and others on site.[45]

[39] Mecon referred to allegations TRA pleaded when it was a defendant to the effect that there were other causes of the movement in SW1, for which TRA was not responsible and for which TRA was entitled to make a claim under the subcontract with Delta[46] and that Delta contributed to the claimed loss in various ways.[47] Mecon argued that, particularly having regard to Delta's failure to adduce evidence upon those matters in circumstances in which it is to be expected that Delta easily could adduce such evidence, Delta failed to prove that $1.837 million was a reasonable amount for that part of Delta's claim against TRA for the purposes of the settlement deed.[48] Those pleas are expressed in very general terms, with repeated references to further particulars being provided once disclosure has been completed and TRA and Mr Jones had obtained expert advice. Notwithstanding TRA's pleas, the evidence and findings adverted to in [38] of these reasons made it reasonable for TRA to settle upon the basis that it would be found solely responsible for Delta's losses.

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42 Defence, para 13.
43 Mr Jones at T6-62–64; Mr Sandford T7-32-34.
44 Reasons at [16].
45 T6-62; Reasons at [156] and footnote 12.
46 Defence, para 22: AB 2173.
47 Defence para 23: AB 2173-2175.
48 Transcript 22 March 2018 at 1-4 to 1-8.

[40] In these circumstances, TRA's assumption of liability for the Settlement Amount should be assessed upon the footing that it was reasonable for TRA to settle upon the basis that it inevitably would be found liable for serious and extensive breaches of subcontract which caused Delta substantial loss. Understandably, the trial judge's discussion of the reasonableness of the settlement focussed upon the evidence relating to the quantum of Delta's claim.

[41] When the settlement deed was executed, paragraph 16 of Delta's statement of claim against TRA claimed $2,831,179.18 for damages for breach of the subcontract. In summary, the components of that claim comprised:

(a) An "incidental costs claim" of about $162,000, comprising $142,012.83 for "flight, travel and accommodation expenses of Delta staff engaged in performing rectification works" and $20,000.00 for "Direct cost of experts engaged to investigate and advise in relation to remedial works".

(b) A "log of costs claim" of $1,885,218.39 for "direct unrecovered cost for rectification works undertaken by Delta".

(c) The "Watpac claim" of about $1 million, for "Shortfall in payments under Contract due to TRA's breaches…" This was claimed to be an amount paid by Delta to Watpac on account of Delta's liability arising out of TRA's breach of subcontract (after the deduction of $168,717.82, described as the proportion of the subcontract sum not paid by Delta to TRA). (In Delta's claim against Mecon, the amount of the Watpac claim was reduced to $720,577.70.)

[42] In final submissions at trial Delta contended, and appeal ground 7 contends, that the reasonableness of TRA's agreement in the settlement deed to assume liability for the Settlement Amount could be demonstrated with reference to the following table:

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|---|---|
| Total claim by Delta against TRA as at the date of settlement | $2,831,179.18 |
| Interest accrued on the claim from the accrual of the cause of action to date of settlement<br><br>(alternatively, from date of the issue of Delta's proceedings against TRA to the date of settlement ($731,040.60) | $2,379,390.90 |
| Delta's legal costs payable by TRA as at the date of settlement (approx.) | $500,000 |
| SUB-TOTAL | $5,710,570.08 |
| Likely further costs of TRA if it proceeded to trial | $500,000 |
| Likely further costs of Delta, payable by TRA if it proceeded to trial and Delta's claim substantially succeeded | $500,000 |
| TOTAL | $6,710,570.08 |

**TRA's counterclaim, interest on Delta's claim and costs**

[43] In light of the lengthy period that elapsed from when the subcontract work was done until TRA and Delta entered into the settlement deed, TRA's exposure to costs and

especially interest is a very significant factor in the assessment of the reasonableness of the settlement. The trial judge acknowledged that the Settlement Amount made no allowance for interest or costs and that the costs of running the claim against TRA might have been considerable, but as against those matters the trial judge took into account that the settlement also made no allowance for TRA's claim for payment under the rock anchor contract on Albert Street in circumstances in which TRA had convinced Delta to allow it to stay on site and redo the work under supervision without cost.[49] The trial judge referred to TRA's counterclaim for $550,286 on that ground, the insufficiency of the evidence to enable an assessment of the merits of the counterclaim and interest on it, and mentioned that the settlement went against TRA in that Delta was left with the right to keep more than $64,000 of bank guarantees under the subcontract.[50] The trial judge also observed that nothing was said in the footnote to the deed about those matters.[51]

[44] Mecon relied upon the doubts expressed by the trial judge about the reasonableness of the amount allowed in the settlement deed for TRA's counterclaim. It emphasised that the settlement deed made an allowance of only $250,000 for the counterclaim[52] and that TRA otherwise paid the entirety of Delta's claim (excluding interest and costs). It developed detailed arguments in support of its contention that the amounts allowed for TRA's counterclaims were inadequate or not proved to be adequate.[53] It argued that Delta had no right to be compensated for its claimed loss and to refuse to pay TRA in circumstances in which Delta ultimately received what TRA contracted to provide.

[45] If TRA accepted an unreasonably small amount on account of its counterclaim that might support an inference that it was in a relatively weak bargaining position. But this aspect of the trial judge's analysis proceeded upon the different premise that, for the purpose of assessing the reasonableness of the settlement of Delta's claim, TRA's counterclaim could be offset against its exposure to an award of interest and costs. That approach may have been suggested by the fact that the settlement deed allowed a set-off against Delta's claim of $250,000 for one aspect of TRA's counterclaim. Unfortunately, Delta did not submit at the trial, as it did in this appeal, that the $250,000 set-off was relevant only in so far as it reduced the amount for which TRA assumed a legal liability for the purposes of cl 5.00 of the policy.

[46] Subject to the terms of the policy TRA was entitled to an indemnity from Mecon for the reasonable amount which TRA became legally liable to pay Delta as compensation of Property Loss, whether or not TRA was entitled to payments from Delta for the subcontract price or under a contract on a different project. TRA's counterclaim was unrelated to its alleged liability for Property Loss in relation to which Delta claimed as assignee to be entitled to an indemnity. It follows that any inadequacy in the set-off for the counterclaim in the deed is not relevant to the issue whether the settlement amount is reasonable. As between Mecon and TRA (and thus Delta claiming as the assignee of TRA), if at the time of the settlement the Settlement Amount was a reasonable estimate of the measure of TRA's liability to Delta for damages, interest and costs, the settlement could not be rendered unreasonable by the

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49 Reasons at [156] and footnote 112.
50 Reasons at [156].
51 Reasons at [157].
52 This was for a claim by TRA on a different project. No allowance was made for the counterclaim for payment under the sub-contact.
53 Respondent's outline of submissions paras 29-32.

circumstance that TRA might have made a better bargain in its own interests in relation to its counterclaim.

**The log of costs and incidental costs claims**

[47] In relation to the log of costs claim, the trial judge observed that the evidence adduced by Delta "accounted for around $1.885 million of the claim Delta made against TRA".[54] The relevant evidence was given by an engineer employed by Delta, Mr Welsh, who, the trial judge accepted, had carefully compiled a log of those costs which he considered reflected the cost to Delta of TRA's breach of contract.[55] The trial judge accepted that Mr Welsh was "responsible, honest and intelligent".[56] The log of costs tallied the costs Delta incurred from when it became evident that issues with the SW1 wall would take the job outside budget parameters.[57] Mr Welsh wrote it up daily; it recorded Delta's costs in complying with the Superintendent's directions to stabilise SW1 and later to backfill the entire site and to re-excavate, test and replace the anchors; the process lasted from May 2007 until about April 2008 and the total amount of costs in the schedule was about $4.1 million.[58]

[48] Delta made a claim against its insurer, HSB Engineering Insurance Ltd, for the amount in the log of costs and the amount of a claim of nearly $2.5 million made by Watpac against Delta. Ultimately, after Delta sued HSB, they reached a compromise in December 2010 by which HSB was to pay Delta $2,309,143.32, all of which was referrable to the log of costs.[59] Delta claimed against Mecon the same loss it had claimed against TRA. The log of costs claim was for the total amount of the log of costs after deduction of the amount recovered from HSB,[60] but the trial judge noted that the resulting amount is $1,837,826.43 rather than the claimed amount of $1,885,218.[61] After the trial judge analysed the Watpac Claim and found that it was not supported by the evidence, the trial judge concluded that 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."[62]

[49] Mecon submitted that Delta had not proved an entitlement to recover about $1.837 million from TRA on account of the log of costs claim.[63] It was not obliged to do so. The present issue instead concerns the reasonableness of that amount as a measurement of the quantum of this claim in the settlement. Mecon argued that a basis for discounting the costs was that Delta charged the costs of its machinery, as well as external costs of subcontractors and the like, and no account was taken of the fact whether the workers or the machinery would have been otherwise employed in a different capacity.[64] Mecon did not refer the court to any evidence supporting such a contention or any particularisation of it by TRA in its defence to Delta's

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54 Reasons at [155].
55 Ibid.
56 Reasons at [8].
57 Reasons at [9].
58 Reasons at [10].
59 Reasons at [59].
60 The appropriateness of this deduction is not in issue.
61 Reasons at [68]. No explanation was given for the difference. These reasons proceed upon the footing that the correct figure is $1,837,826.43.
62 Reasons at [157].
63 Transcript 21 March 2018 at 1-80.
64 Transcript 22 March 2018 at 1-10.

claim. Mecon also did not seek to contradict the submission for Delta that no question about this was asked of Mr Welsh.

[50] That and other possible arguments suggest theoretical bases for challenging Delta's claim. It does not follow that TRA failed to prove that it was reasonable for it to settle upon the basis that $1.837 million was a reasonable estimate of the measure of TRA's liability for Delta's log of costs claim. A legitimate purpose of the settlement was to avoid the very considerable expense of a thorough investigation into Delta's claim (including an audit of the log of costs) which TRA would incur if it continued to litigate. Upon the evidence and the trial judge's findings already mentioned - particularly the findings that Delta incurred unrecovered rectification costs of about $1.8 million as a result of serious deficiencies in its subcontract work, Delta's evidence accounted for about that amount of its claim against TRA, and the Settlement Amount was $1 million higher than any loss Delta "managed to prove"[65] - $1.837 million was a reasonable estimate of the measure of TRA's liability for Delta's log of costs claim for the purposes of TRA entering into the settlement deed. The appeal should be considered upon that footing.

[51] The trial judge did not mention what I have called "the incidental costs claim" in the course of discussing the question whether the settlement was shown to be reasonable, presumably because of the relatively modest amount of that claim, but the trial judge found in a different section of her reasons that the incidental costs claim was conceptually the same as the log of costs claim and could have been included within it.[66]

[52] Accordingly, I would accept that Delta proved that, for the purpose of settling with TRA, about $2 million was a reasonable measure of TRA's liability for the total amount of Delta's log of costs claim (about $1.837 million) and its incidental costs claim ($162,000).

**Extraneous circumstances may have influenced the settlement**

[53] Mecon referred to the trial judge's remarks about the possibility that extraneous circumstances might have inclined TRA to agree to a higher Settlement Amount than the merits of the litigation alone warranted[67] and the absence of evidence that Mr Jones of TRA and employees of Delta could have given about such matters.

[54] Under appeal grounds 10(a) and (b), Delta argued that to the extent that the trial judge's conclusion was influenced by the finding that extraneous factors likely influenced the settlement, that was an error because Mecon did not plead any such point, as would have been required by the *Uniform Civil Procedure Rules* 1999 (Qld), r 150(1)(k), and it was not suggested to Mr Jones in cross-examination. Under appeal ground 10(c), Delta also argued that the Settlement Amount is objectively reasonable in any event. Delta argues that the prospects of success in its claim were so high, and that there was such a significant compromise by Delta in abandoning any claim for interest and costs, that the Settlement Amount was demonstrably reasonable for those reasons alone. Under appeal ground 10(d), Delta submitted that upon that case the extraneous circumstances were irrelevant and it

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65 Reasons at [157].
66 Reasons at [69] – [70].
67 Reasons at [158]-[160].

was unnecessary for it to adduce evidence of the negotiations for the settlement or the legal advice TRA received.[68]

[55] The extraneous reasons which the trial judge considered likely inclined TRA to agree to a higher Settlement Amount than was warranted by the merits of litigation were that: firstly, in circumstances in which TRA lacked financial capacity to meet Delta's claim, it was faced with a claim by Delta and Mecon refused to indemnify it, TRA's attempt to sue Mecon was defeated because TRA could not provide security for costs, it could not afford to pay its daily legal fees, and by the settlement deed TRA effectively rid itself of Delta's claim against it;[69] and secondly, Mr Jones, who was involved in negotiating the settlement gave evidence of his concern that he might lose his BSA licence as a result of any verdict in the litigation, he was sued personally as a second defendant, he did not have the financial resources to meet the claim and his honesty and professionalism would certainly have been in issue in any proceedings, but his liability to Delta was extinguished by the deed and the proceeding was discontinued against him.[70]

[56] The trial judge noted that Delta bore the onus of proof but it adduced little evidence about how those extraneous matters influenced the settlement negotiation, little evidence about TRA's counterclaim, and no evidence of the negotiation process. The trial judge could not make definitive findings about these matters for lack of evidence but doubt raised about those matters contributed to the trial judge not being persuaded that the settlement was reasonable.[71]

[57] There are a number of reasons why the extraneous matters to which the trial judge referred are not significant in relation to the log of costs and incidental costs claims. First, the trial judge did not find that there were in fact any such extraneous matters which influenced the Settlement Amount. Secondly, although the trial judge did not in terms confine the relevance of those remarks to the assessment of the Watpac claim, that may be what the trial judge had in mind. In that respect, the trial judge referred to the extraneous circumstances immediately after finding that the Settlement Amount was $1 million higher than any loss Delta had managed to prove in this proceeding (a reference to Delta's log of costs claim of about $1.837 million) and the reasons do not convey that a paucity of evidence about the possible influence of the extraneous circumstances detracted from that or the other findings in favour of Delta upon that claim. Thirdly, the extraneous circumstances and the absence of evidence of the reasoning and negotiation process were potentially relevant in the trial judge's analysis only because, in the trial judge's view, Delta proved a total loss of only about $1.837 million as against the Settlement Amount of $2,581,179.18; but that conclusion resulted from the trial judge not including any allowance for interest or costs because of a possible inadequacy in the amount allowed for TRA's counterclaim, reasoning which I respectfully do not adopt.

[58] The trial judge's conclusions upon this topic were that, "Enough doubt was cast on the reasonableness of the settlement to call for these matters to be explained" and in the absence of an explanation "the doubts raised contribute to my not being actually persuaded that the settlement was reasonable".[72] Those doubts are not relevant

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68 Delta could not adduce TRA's legal advice in any event because TRA did not waive privilege.
69 Reasons at [158].
70 Reasons at [159].
71 Reasons at [160].
72 Reasons at [160].

upon Delta's case that the Settlement Amount was proved to be much less than an objectively reasonable estimate of the measure of TRA's liability for the log of costs and incidental costs claims alone: *Rail Corporation New South Wales v Fluor Australia Pty Ltd*.[73]

**Reasonableness of the Settlement Amount**

[59] Delta argued that the objective reasonableness of the settlement amount was established by the evidence and findings about the log of costs claim and the incidental expenses claim when regard is had to the amount of interest on those claims and costs likely to be awarded in favour of Delta.

[60] For those claims, interest should be calculated upon the total amount of about $2 million up to the date of the settlement deed of 24 May 2016. Delta explained that the figures for interest in the table upon which it relies (see [39] of these reasons) were calculated using the "interest calculator" on the "Queensland Courts" website, which uses the pre-judgment interest rates applied by the Registrar when giving default judgments, such rates being set by practice directions under s 47 of the *Supreme Court Act* 1995 (Qld) (prior to 1 September 2012) and s 58 of the *Civil Proceedings Act* 2011(Qld) (from 1 September 2012). When exercising the discretionary power to grant pre-judgment interest under s 58 of the *Civil Proceedings Act* 2011 (Qld), judges commonly use those interest rates, although particular considerations might result in the use of other rates in some circumstances. It would seem reasonable for TRA to have assessed its exposure to interest using the "interest calculator".

[61] Section 58 of the *Civil Proceedings Act* empowers the court to order the inclusion of interest in a judgment at the rate the court considers appropriate for all or part of the amount of the judgment, and for all and part of the period between the date when the cause of action arose and the date of judgment. Delta submitted that the discretion was commonly exercised to award interest from the date of accrual of the cause of action. The discretion is exercised in that way in some cases, but the case cited by Delta, *Keeley v Horton*,[74] does not suggest that a plaintiff has a prima facie entitlement to interest from that date in a case of this kind, where the cause of action accrues before any loss is incurred by the plaintiff. Interest might instead be awarded from the date when the plaintiff sustained the loss where that date is subsequent to the accrual to the cause of action. That accords with the underlying philosophy that interest is awarded by way of compensation for a plaintiff being kept out of the plaintiff's money.[75] Another approach, which is less generous to plaintiffs, is to award interest from the date of commencement of proceedings; that approach might be adopted, for example, where the plaintiff unreasonably delays in the prosecution of the claim. In relation to those three different starting points for the calculation of interest:

(a) Delta's calculation ([42] of these reasons) adopts a date in November 2006 as the date when Delta's cause of action against TRA accrued. Mecon contended that this date was not correct. I will adopt as the date of accrual of the cause of action 3 May 2007, when the superintendent directed Delta to backfill against the SW1 wall and install a further two rows of

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73 [2009] NSWCA 344 at [109]-[110].
74 [2016] QCA 253 at [7].
75 *Haines v Bendall* (1991) 172 CLR 60 at 66.

rock anchors in it.[76] Interest calculated from that date is about $1.587 million, resulting in an amount for claim and interest (about $3.587 million) which exceeds the Settlement Amount by more than $1 million.

(b) According to the log of costs, Delta incurred the total cost of about $4.1 million between 11 April 2007 and 4 April 2008. Adopting 1 April 2008 as the date from which interest is calculated[77] the amount for interest is about $1.41 million, resulting in a claim with interest (about $3.41 million) which exceeds the Settlement Amount by about $900,000.

(c) Interest from the date of commencement of Delta's claim against TRA (21 September 2012) amounts to $513,470 making the total amount for the claim and interest (about $2.51 million) which is about $70,000 less than the Settlement Amount.

[62] As to costs, Delta adduced evidence that up to the date of the settlement deed it had incurred costs of about $450,000 to $500,000.[78] Mecon made two points in response to Delta's argument that a reasonable amount for Delta's legal costs up to the date of the settlement was about $500,000. First, Mecon argued that a reasonable settlement would have contemplated costs on the standard basis rather than the indemnity basis, and a "broad-brush allowance" for costs on the standard basis would be in a range of $225,000 to $250,000. For present purposes that may be accepted as a guide. Secondly, Mecon argued that it could not be assumed that all of the costs were attributable to Delta's claim against TRA. That is so but, as Delta submitted, a party in TRA's position would not be required or able to carry out some precise calculation of Delta's costs. Given the nature of Delta's claim and the period of the litigation, it may readily be concluded that a reasonable compromise of Delta's claim would include an amount for costs which exceeded at least $150,000.

[63] Upon each of the three bases of calculating interest in [61] of these reasons, the total amount for the log of costs claim, interest, and costs, exceeds the Settlement Amount of $2,581,179.18. Upon the first and second bases for calculating interest, the total amount for the log of costs claim, interests, and costs exceeds the settlement amount by more than $1 million.

[64] From the perspective of a reasonable insured at the time of the settlement deed, it was foreseeable that after a trial a less generous basis of calculating interest might be adopted and that Delta might not recover costs on all parts of its claim. On the other hand, it was also foreseeable that it would recover much more than $150,000 for costs up to the date of the settlement deed. The appropriate conclusion is that when the settlement deed was negotiated the Settlement Amount was a reasonable

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76 This date seems likely to be much too favourable to Mecon. Many of the breaches of contract involved in the installation of the variety of deficient rock anchors occurred long before the first instruction was issued.

77 Interest might instead be calculated, more generously to Delta, upon items or groups of items from the dates between 11 April 2007 and 4 April 2008 when the costs for such items were incurred. I note also that Delta did not argue that interest should be calculated (in relation to the log of costs claim) upon about $4.1 million until 23 November 2009, about $3.3 million from 24 November 2009 until 1 December 2010, about $1.83 million from 1 December 2010 until 18 April 2013: see [47] and [48] of these reasons.

78 T6-7 (Welsh).

compromise even if regard is had only to the log of costs claim, the incidental costs claim, interest and costs. One factor in particular weighs heavily in favour of that conclusion; there was a real prospect that TRA would be held liable for the log of costs claim alone in an amount which, with interest and costs, would exceed the Settlement Amount by more than a million dollars.[79] It is also relevant that the future costs of defending Delta's claims and Delta's costs of running them inevitably would be very substantial. As the trial judge noted, Delta's costs of running its claim against TRA "might have been considerable".[80] Upon the current hypothesis that Mecon is liable to indemnify TRA, that is another factor which suggests that a settlement upon the terms of the deed was reasonable from Mecon's perspective.

[65] I conclude that, even if no allowance is made for the Watpac claim, the Settlement Amount was an objectively reasonable amount for the purposes of a settlement that rendered TRA legally liable to Delta such as to attract the indemnity in cl 5.00 of the Mecon policy. That conclusion assumes, of course, that TRA's legal liability for the total amount of the log of costs and incidental costs claims is insured as compensation of Property Loss under cl 5.00: that issue is considered separately.

**The Watpac claim**

[66] In light of that conclusion it is not strictly necessary to consider TRA's potential liability for the Watpac claim, but I will explain my conclusion that it was reasonable for TRA to take into account when settling with Delta at least that TRA was exposed to a potentially significant liability for the Watpac claim.

[67] The trial judge found that there was no basis in the evidence for the Watpac claim, which Delta ultimately quantified at $720,755.[81] The trial judge recorded that Delta's case at trial was that, were it not for TRA's defective installation of ground anchors, Watpac would have paid Delta $720,557 under their contract. That figure was calculated by deducting the amounts which QIC and Watpac paid Delta during the course of the job and under a 2010 settlement deed from the contract price shown on the original contract between Delta and QIC.[82] The trial judge considered that to be "a most unrealistic equation",[83] having regard to the existence of claims under that contract which had no relationship with TRA's work. The trial judge summarised the evidence on that topic as follows:

> "[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. There were variations to the work that affected the amount that was to be paid under the contract. 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,

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79 Mecon did not submit that there had been unexplained and significant delay by Delta in prosecuting its claim against TRA of a kind which might justify a deferral of the commencement date for interest until the commencement of proceedings: See *Interchase Corporation Limited (in Liq) v Grosvenor Hill (Qld) Pty Ltd (No 3)* [2003] 1 Qd R 26; [2001] QCA 191 at [61]-[63] (McPherson JA, McMurdo P and Thomas JA agreeing).

80 Reasons at [156].

81 Reasons at [155].

82 Reasons at [85].

83 Reasons at [86].

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.

[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. The date of practical completion for Delta's works was originally 22 January 2007. Liquidated damages were in the amount of $7,500 per day up to a maximum of $200,000. The rock anchors were a relatively small part of the work Delta contracted to do; the rock anchor contract was worth only $450,000. 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. 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).

[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. There were claims made by Delta against Watpac, including for payment for works done under the contract at that point."[84]

[68] The December 2010 settlement deed between Watpac and Delta referred to Watpac's claims against Delta in the recitals and also recited that Watpac and Delta had agreed to settle the rectification ground anchor claim and the final sum payable under the excavation contract on the terms of the deed. Relevantly, by the deed: Delta and Watpac released each other from liability in relation to the rectification ground anchor claim (cl 1.1), Delta and Watpac agreed that the total sum payable by Watpac to Delta under the excavation contract was $3,773,020.60 [plus GST] and that Watpac had to the date of the deed paid Delta $3,326,021.36 [plus GST] of that total sum (cl 2.1.1 and cl 2.1.2), Watpac was obliged to pay Delta the balance amount of $446,999.24 [plus GST] within 14 days of Delta executing the deed (cl 2.2), and Watpac and Delta agreed that the deed contained everything the parties had agreed in relation to the subject matter it dealt with (cl 3.3). The deed also recited that Watpac had notified Delta of claims against Delta described as "the Regent building damage claim" and the "the Regent building ground anchor compensation claim". Under the deed Delta agreed that it indemnified and must continue to indemnify Watpac from any liability in relation to those claims (cl 1.5), which were originated in claims by the owners and occupants of the Regent Theatre building adjacent to the project made against QIC, and then by QIC against Watpac (cl 4.1, definitions).

[69] There is no suggestion that Delta had any claim against Watpac in relation to the rectification ground anchor claim. Watpac's release of Delta from liability in

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84 Reasons at [41]. Footnotes omitted.

relation to that claim would not preclude Delta from contending in proceedings against TRA that the amount Delta received from Watpac under their contract had been reduced by a substantial amount attributable to Watpac's rectification ground anchor claim against Delta.

[70] Mr Welsh gave evidence that the sum of about $1.2 million "is the balance of the amount of contract works that otherwise would have been paid to Delta, had it not been for the ground anchor issue and the prolongation of the works on the project … 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 [to Delta] under the Watpac settlement in 2010."[85] The trial judge accepted Delta's submission that Mr Welsh was not challenged upon that evidence, but observed that he was cross-examined to elicit the matters summarised in [41] – [43] of the reasons. The trial judge also noted that Delta did not attempt to adduce any evidence about how the disputes and agreements between Delta and Watpac during the course of their contract affected the amount to be paid under it.[86] The trial judge also referred to concessions and other evidence about the same matters and held that Mr Welsh's evidence was not 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."[87]

[71] Appeal ground 9(b) challenges that finding upon the grounds that the trial judge accepted that Mr Welsh was a reasonable, honest and intelligent witness, there was no direct challenge to this evidence in cross-examination, and the trial judge erroneously refused to admit evidence of the payment claims and schedules between Delta and Watpac that corroborated his evidence.[88] Appeal grounds 8 and 9(c) contend that the trial judge applied the wrong test in finding that "the Settlement Amount was $1 million higher than any loss Delta has managed to prove in this proceeding"[89] and in finding that the settlement between Delta and TRA was unreasonable in relation to Delta's claim for $720,555, because the test required an assessment of the reasonableness of the settlement on the material available at the time for settlement rather than proof of the actual loss that would have been established at the trial of the settled claim.[90] Appeal ground 9(a) contends that the trial judge should have given more weight to Mr Welsh's evidence.[91]

[72] The matters mentioned in [67] of these reasons justified the trial judge in being sceptical about the manner in which the Watpac claim was pleaded in Delta's claim against TRA. On the other hand, the trial judge found that Watpac did suffer costs and delay because of TRA's breaches of its subcontract with Delta[92] and that Watpac made claims against Delta for the claimed extra costs:[93]

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85 Reasons at [86].
86 Reasons at [44].
87 Reasons at [87].
88 Appeal ground 9(b).
89 Reasons at [157].
90 Appeal grounds 8, 9(c).
91 Appeal ground 9(a).
92 Reasons at [35].
93 T6-7 referred to in reasons [45]-[48].

(a) In October 2007 Watpac claimed $737,615 against Delta "for the costs associated with the rectification works of the damaged shoring walls, which included, about $75,000 for "repair to services Regent Laneway", about $95,000 for Additional Two Rows of Anchors", and about $580,000 for "Fill Site and Retest Anchors".

In relation to the last item, the trial judge referred to the following evidence given by Mr Welsh. Watpac incurred part of those costs to a contractor, Queensland Pre-Stressing, Watpac engaged to test TRA's ground anchors. Part of those costs were for Watpac's own site personnel for whom there was no productive work because Watpac could not progress its work whilst the excavation was being back filled.[94] (That evidence is consistent with the narrative in Watpac's claim,[95] which includes hundreds of supporting documents, including invoices by Queensland Pre-Stressing to Watpac and Queensland Pre-Stressing daily site reports.[96]) Mr Welsh verified substantial components of the claim, said that Watpac would not have incurred the costs but for Delta's late completion which was attributable to the lateral wall movement caused by the defective ground anchors, and said that Watpac had no responsibility for the ground anchors being faulty.[97]

(b) In May 2008 Watpac delivered a revised claim against Delta,[98] increasing the claim to $2,477,259.78, of which $1,775,920.23 was for "fill site and retest anchors". Supporting documentation for the claim was again included.[99] Mr Welsh also supported this claim.

(c) Watpac's final claim of that kind against Delta was dated 1 August 2008 and it claimed $2,480,998.43, of which the claim for "fill site and retest anchors" comprised $1,779,171.23. Mr Welsh did not give evidence about this claim, which made only a relatively slight adjustment to the May 2008 claim.

[73] In the context of the findings mentioned in [3], [4] and [38] of these reasons, those findings are themselves sufficient to suggest that, from the perspective of TRA at the time when it settled with Delta, TRA was exposed to an apparently credible and substantial claim by Delta that it was liable to Watpac as a result of TRA's breaches of its subcontract. Upon the trial judge's findings, Delta did not prove enough to enable a reliable estimate to be made of the measure of Delta's liability to Watpac, but it nonetheless must have appeared to TRA that it was potentially substantial.

[74] The prospect that, after the completion of interlocutory steps and a trial, TRA would be held liable for a substantial amount in relation to the Watpac claim is an additional ground for finding that the Settlement Amount was objectively reasonable, notwithstanding the trial judge's inability to estimate the potential amount of that liability. In view of that conclusion and my conclusions in relation

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94 T5-46, Reasons at [45].
95 Ex 10 AB 1158 at 1159(4), 1225.
96 AB 1262-1324.
97 T5-46 - 5-48.
98 Ex 52 AB 1326.
99 AB 1327-1438.

to the log of costs and incidental costs claims, it is not necessary further to consider Delta's grounds of appeal relating to the Watpac claim.

**Was TRA liable to pay an amount in compensation of Property Loss?**

[75] The trial judge rejected Delta's claim for the additional reason that TRA's claimed legal liability under the settlement deed to pay the Settlement Amount was not a legal liability to pay "in compensation of …. Property Loss" as a result of an Occurrence within the meaning of cl 5 of s 2 of the policy. "Property Loss" is defined to mean:

> "(a) physical loss, damage or destruction of tangible property including resultant loss of use of such property and/or,
>
> (b) loss of use of tangible property that arises from an Occurrence, provided that this loss of use does not result from:
>
> (i) delay or lack of performance of any contract or agreement by you or by others on your behalf, or
>
> (ii) a design defect or your failure to comply with a Project specification."

[76] The trial judge held that there was no such "Property Loss":

> "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."[100]

[77] Appeal grounds 3 and 4 contend that the trial judge erroneously construed the definition of Property Loss as concerning property belonging to Delta and by making the finding that Delta did not own the property when that was not pleaded or contended for by Mecon and as a result Delta was denied the opportunity to address the court on that matter. Appeal ground 5 contends that the trial judge erred in holding that the wall movement was not Property Loss, and in particular that the trial judge did not give sufficient weight to the evidence of Mr Ervin (a civil engineer called by Mecon) that SW1 was failing to perform its function of limiting deflections of adjoining land, the trial judge should have held that there was property loss in the form of a physical alteration or change that impaired the value or usefulness of the thing said to have been damaged, the trial judge did not give sufficient weight to evidence of Dr Baigent whose evidence was not challenged by Mecon in cross-examination or in submissions, and the trial judge erroneously relied on an irrelevant finding that QIC was the owner of the retaining walls.

[78] Delta argues that the lateral movement of the retaining walls of the excavation (the "Wall Movement") pleaded by Delta and admitted by Mecon falls within paragraph (a) of the definition of Property Loss, upon the basis that "physical loss" or "damage" comprehends a physical alteration or change that impairs the value or usefulness of

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100 Reasons at [164].

the thing said to have been damaged: *Ranicar v Frigmobile Pty Ltd*,[101] *Graham Evans & Co (Qld) Pty Ltd v Vanguard Insurance Co Ltd*,[102] *Bayer Australia Pty Ltd v Kemcon Pty Ltd*,[103] and *Guardian Assurance Co Ltd v Underwood Constructions Pty Ltd*.[104] Mr Ervin gave evidence that the purpose or utility of the retaining wall is to support the excavation until the permanent structure is completed so as to prevent collapse and to limit deflections to avoid adjacent facilities being impacted by the construction. The retaining walls failed because they failed to sustain the required load. Unchallenged evidence by Dr Baigent (a civil engineer called by Delta) was to similar effect. Dr Baigent gave evidence that by May 2007 the retaining walls had suffered significant lateral movement, and he described the retaining walls as having failed and said that there was "no alternative" but to backfill the entire excavation to protect against collapse.

[79] Mr Ervin agreed that retaining wall SW1 was "not performing as it should" and he gave evidence that SW1 continued to fulfil its primary function of preventing collapse of excavation although it failed to perform its secondary function of limiting deflections of adjoining land. Delta argued that the trial judge's reasons did not explain why the loss of functionality of SW1, which threatened the integrity of the excavation, was not property damage, whether the function was characterised as a primary or secondary. Delta argued that the trial judge erred in holding[105] that the failure of SW1 to prevent adjoining earth moving itself was not damage of tangible property. In reliance upon *Guardian Assurance Co Ltd v Underwood Constructions Pty Ltd*[106] Delta also argued that the excavation itself amounted to property, so that damage to it resulting from the loss of functionality in SW1 would amount to Property Loss, and that costs incurred in fulfilling a contractual obligation to prevent liability to a third party might fall within an indemnity against liability. Delta submits that the trial judge did not take into account the fact that the entire excavation had to be refilled because of a concern that the retaining walls would suffer further lateral movement.

[80] Delta submits that during the period of nearly 12 months when the excavation was backfilled and then re-excavated there was a loss of the "use of" the Retaining Walls falling within the definition of Property Loss. Mecon's argument is submitted to be inconsistent with its admission of Delta's allegation that "the Retaining Walls" underwent significant lateral movement and with Dr Baigent's evidence that the whole of the remedial works were required to ensure the excavation was stable and safe. Delta argued that the only reason the retaining walls needed to be saved by the work, the cost of which was claimed from TRA, was because they were impaired in a way which amounted to Property Loss.

[81] Mecon objected that Delta should not be permitted on appeal to depart from its pleaded case: Delta did not plead that the Property Loss was the loss of functionality of the retaining walls, or one or more of them, but that the Wall Movement (defined as "significant lateral movement" of the Retaining Walls) was the Property Loss, and it pleaded only that SW1 and SW2, rather than all four retaining walls, underwent "the Wall Movement" as a result of TRA's breach of contract. Mecon

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101 (1983) 2 ANZ Ins Cas 60-525.
102 (1986) 4 ANZ Ins Cas 60-689.
103 (1991) 6 ANZ Ins Cas 61-026.
104 (1974) 48 ALJR 307.
105 Reasons at [98].
106 (1974) 48 ALJR 307 at 309.

argued that upon the evidence there was no loss of functionality in relation to any of the four walls. The design of the retaining walls catered for movement, which therefore could not amount to physical loss, damage or destruction of tangible property. Delta's relevant claim was for costs of, amongst other things, backfilling against each of the four walls and removing the backfill. Most of that work could not be related to the claimed loss of functionality of SW1 and SW2, and the trial judge found that only SW1 moved unacceptably. Delta failed to establish that TRA was legally liable to pay to Delta the Settlement Amount "in compensation of" the pleaded wall movement (or the argued loss of functionality) of SW1.

[82] The trial judge did not find that it is a condition of cl 5.00 that the legal liability be owed to the owner of the property alleged to have been damaged. The trial judge merely referred to the fact that Delta did not own the allegedly damaged property, thereby excluding ownership of the property by Delta as a ground upon which it could be concluded that TRA was liable to pay Delta an amount "in compensation of" the allegedly damaged property.

[83] There is substance in Mecon's pleading points. Delta did not seek to amend its pleading and it did not argue that Mecon had acquiesced in the litigation of issues outside the pleadings. Of the four "Retaining Walls" mentioned in Delta's statement of claim only SW1 and SW2 are alleged to have undergone "significant lateral movement" ("the Wall Movement") as a result of TRA's breach of contract.[107] Mecon admitted that allegation. Delta did not plead and Mecon did not admit that the claimed Property Loss was a loss of use or functionality in any retaining wall, that the "significant lateral movement" caused any damage to the Retaining Walls themselves, or that they were lost or damaged in any other way, or that the Property Loss comprised the movement of retained soil or a threat to the excavation.

[84] Delta's statement of claim against TRA relevantly pleaded as follows:

(a) Delta engaged TRA to install anchors and whalers to secure "the Retaining Walls".[108]

(b) In breach of the terms of the subcontract, TRA failed to install anchors fit for the purpose of securing the Retaining Walls.[109]

(c) TRA's breaches of the subcontract caused the Retaining Walls (SW1 and SW2) to undergo significant lateral movement ("the Wall Movement").

(d) The Wall Movement (SW1 and SW2) caused damage to the Site (175 Albert Street, Brisbane) and surrounds (described as damage to a road surface above SW1 wall with damage to underground services, settlement and cracking of Elizabeth Street road surface above SW2 wall, and settlement and cracking of parts of the Regent Theatre adjacent to the Site).[110]

(e) As a result of that Wall Movement, on 3 May 2007 Delta was directed by the contract superintendent to backfill against the SW1 wall and

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107 Third amended statement of claim, para 12; Further and Better Particulars of the statement of claim, para 2(a): AB 1997.

108 Third amended statement of claim para 7: AB 1913.

109 Third amended statement of claim para 11(a): AB 1915.

110 Third amended statement of claim para 13: AB 1916.

install a further two rows of rock anchors in it, on 28 June 2007 to undertake emergency works to secure the stabilising beam to wall SW1, and on 23 and 24 July 2007 to backfill the entire excavation to permit all anchors to be tested and defective anchors to be replaced while preventing further wall movement.[111]

(f) That work delayed practical completion under Delta's contract with Watpac.[112]

(g) As a result of TRA's breach of the subcontract, Delta suffered loss and damage, particulars of which are set out in schedule to paragraph 16 of Delta's statement of claim.

Mecon admitted (a) – (c).

[85] In relation to (d) of [84], paragraph 13 of Delta's statement of claim pleads that the "Wall Movement caused damage to the Site[113] and surrounds as follows –

"(a) Settlement and cracking to laneway roads surface above SW1 wall with damage to underground surfaces (including water main and stormwater piping damage);

(b) Settlement and cracking of Elizabeth Street road surface above SW2 wall;

(c) Settlement and cracking of the west wall, internal walls and structure of the Regent Theatre adjacent to the Site."

Contrary to a submission by Delta, that plea did not put Mecon on notice of a claim that, in addition to the specifically pleaded movement of SW1 and SW2 and whatever damage at the Site is comprehended within (a) – (c), there was some unidentified damage at the "Site" of a kind which Delta described in argument in this appeal. Ultimately, Delta did not rely upon a case that (a) – (c) comprehended any significant damage at the Site apart from the pleaded movement of SW1 and SW2.

[86] After TRA and Delta settled, Delta pleaded against Mecon that the Wall Movement (by definition confined to SW1 and SW 2) and damage to the Site and surrounds was both an "Occurrence" and "Property Loss" in terms of cl 5.00.[114] As to the surrounds, Delta submitted that its log of costs included some (but not many) items of costs for damage to adjacent structures, but Delta did not litigate a case that distinguished those items from the mass of the items in the log of costs and it did not contend that the Settlement Amount could be regarded as reasonable if its claim was confined to the total cost of those items. As to the Site, for the reasons given in the preceding paragraph, Delta's pleaded case was ultimately confined to the contention that the movement of SW1 and SW2 itself amounted to damage and Property Loss.

[87] Some of Delta's arguments assumed that the "Retaining Walls" comprehended the whole retaining system, including the retaining walls and the rock anchors.[115]

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111 Third amended statement of claim para 14: AB 1916.

112 Third amended statement of claim para 15: AB 1917.

113 The "Site" is defined by reference to the address at which Delta contracted to undertake excavation works: Third amended statement of claim para 4: AB 1912.

114 Third amended statement of claim paras 77, 78 and 79(c): AB 1926.

115 Transcript 21 March 2018 at 1-38.

Understandably, the experts' evidence did not always draw the distinction between the retaining walls and the rock anchors which were designed to secure the retaining walls, but Delta's pleading clearly made that distinction. The trial judge cannot be said to have erred by analysing Delta's claim upon that basis.

[88] The grounds of appeal do not challenge the trial judge's findings that some movement of the retaining walls was acceptable and only SW1 moved unacceptably.[116] Upon the findings, the movement of SW1 (and the unpleaded movement of retained soil and threat to the excavation) resulted directly from the failure of the anchors to fulfil their design function. The postulated threat to the excavation was not in truth that a failure in the retaining wall would damage the excavation; it was that the deficiencies in the ground anchors would result in damage to the retaining wall and the excavation. The only defect was in the construction of the rock anchors. There was no physical change in the retaining wall that impaired its value or usefulness such as occurred in the cases cited by Delta. It was not pleaded or found that SW1 or any wall did not itself remain wholly intact and capable of fulfilling its designed purpose. The trial judge's findings to the contrary are not susceptible of challenge: after the unacceptable movement was detected in SW1, the retaining walls were buttressed and supported by the backfilling of soil and then with properly installed rock anchors, after which the walls fulfilled their function; although at some point the walls "may have been imperilled or stressed",[117] the walls were saved by timely steps being taken and they were not lost; and there was no evidence that the walls were damaged in the process of backfilling and re-excavation.[118] As the trial judge concluded, movement of any retaining wall was not damage independently of damage to the wall or some other tangible property, and the "significant lateral movement" caused by TRA's breaches of the subcontract was not of itself capable of amounting to Property Loss within (a) of the definition in the policy.[119]

[89] Furthermore, cl 5.00 of the policy applies in relation to Property Loss "as a result of an Occurrence". As the trial judge observed,[120] a case that the Wall Movement of SW1 was itself property damage would require Delta to postulate a different Occurrence, such as its installation of the deficient SW1 ground anchors, but that was not Delta's pleaded case.

[90] Delta's argument fails for another reason. It is not necessary to attempt a comprehensive exposition of the meaning of the expression "compensation of…Property Loss" in cl 5.00, but in relation to damage to property which is repaired the compensation would appear not to extend beyond the cost of the repair and perhaps any residual loss in the value of the damaged property. The buttressing and supporting of the four retaining walls by the backfilling of soil and proper installation of rock anchors was required to compensate Delta for the consequence of TRA's breach of contract that in relation to all four retaining walls the rock anchors did not meet the specification. The damages claimed by Delta were for the economic loss it suffered as a result of that breach of contract. Even if, contrary to my conclusion, the movement of SW1 itself amounts to damage to property or Delta can rely upon the

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116 Reasons at [19].

117 The trial judge did not find that the walls were in fact imperilled or stressed and the findings mentioned in [91] of these reasons are to the contrary in relation to the walls other than SW1.

118 Reasons at [96].

119 Reasons at [93].

120 Reasons at [99].

argued loss of function in SW1, the vast majority of the claimed damages could not be regarded as compensation of any such damage to SW1 alone. The trial judge was not asked to determine and did not determine what amount would be a reasonable estimate of the measure of TRA's liability to Delta for such compensation. Unsurprisingly, Delta did not contend that the Settlement Amount was a reasonable estimate of the measure of TRA's liability upon that basis.

[91] Delta argued that there was a causal nexus between that functional impairment of SW1 and TRA's liability to Delta for the log of costs claim. A causal nexus is insufficient to justify a conclusion that the claimed costs are compensation of Property Loss within the meaning of cl 5.00. Delta also argued that upon the expert evidence and the evidence of Mr Welsh to the effect that it was necessary to fill the whole excavation as a result of what was found upon investigation of the four retaining walls, TRA's liability arose from an impairment in the function of all four retaining walls. This case was not pleaded and, as I have mentioned, the notice of appeal does not challenge the trial judge's finding that the only unacceptable movement was in SW1; and such findings as were made about SW3 and SW4 do not support a conclusion that there was such a loss of functionality in those walls (as well as in SW1 and SW2 or in the retaining system considered as a whole) as to suggest that TRA's liability for the cost of filling the whole excavation could be regarded as compensation of that postulated loss of functionality. The trial judge generally preferred Mr Ervin's evidence to Dr Baigent's evidence.[121] The trial judge recorded Mr Ervin's evidence about SW3 and SW4 that, "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."[122] He explained the instruction to backfill against SW1 on 3 May 2007 as resulting from the observed increasing movement of SW1, in circumstances in which the consequences of a collapse of part or all of that wall would have been considerable.[123] Although Dr Baigent noted that the possibility of failure of SW1 "and the other walls" would have been of great concern if the defective nature of the anchors had been known, that remark was made in the context of a reference to the support of SW1 being "severely compromised by the defective anchor installation" and he also noted that SW2, SW3 and SW4 did **not** fail although they did have defective anchors.[124] In relation to the 24 July 2007 direction which required backfilling of the whole site, the trial judge referred to Mr Welsh's evidence that, following investigations which revealed that the TRA anchors were short, testing of SW2, SW3 and SW4 also produced anomalies and Delta did not have the confidence of Watpac or QIC.[125] The trial judge referred also to Mr Welsh's evidence that the filling of the site was occasioned by concern about the SW1 wall and not any proved instability in SW3 or SW4.[126] The evidence which the trial judge accepted justified the finding that the only unacceptable movement was in SW1.

[92] In summary:

(a) Upon the pleaded case that the Occurrence and the Property Loss was the excessive movement of SW1 and SW2 and damage to the Site and

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121 Reasons at [13].
122 Reasons at [20].
123 Reasons at [21].
124 Reasons at [22].
125 Reasons at [29].
126 Reasons at [31].

surrounds resulting from that movement, Delta's claim under cl 5.00 fails because:

(i) The movement in those walls was not Property Loss within the meaning of the policy.

(ii) The notice of appeal does not challenge the finding that only SW1 moved unacceptably and Delta's unpleaded challenge to that finding would not succeed.

(iii) The postulated Property Loss did not result from the Occurrence but from conduct not alleged to be an Occurrence, namely, TRA's breach of contract in installing rock anchors for all four retaining walls that were not in accordance with the specification and were incapable of securing SW1.

(iv) Delta did not prove that the Settlement Amount was reasonable as compensation of that Property Loss.

(b) Delta did not plead that a loss in functionality of a retaining wall, movement in retained soil, or a threat to the excavation, was the Property Loss.

(c) If, contrary to my conclusion, Delta should be permitted to argue such a case, then its case in that respect is confined by the pleadings to SW1 and SW2 and it fails for the reasons given in sub-paragraphs (ii) – (iv) of paragraph (a).

**Delta's claim as an insured**

[93] The claim by Delta as an insured which remains in issue in this appeal is its claim for the costs of temporary protective repairs under cl 5.03 in s 2 of the policy. Clause 5.03 is reproduced in [8] of these reasons. This claim by Delta was for the cost of complying with the superintendent's directions, firstly, to place fill beside SW1, and thereafter to backfill the whole site and subsequently to remove that backfill. The total amount of the claim is $1.478 million.[127] Taking into account the situation of cl 5.03 in s 2 of the policy and in cl 5 (concerning liability), the trial judge construed cl 5.03 as relating only to costs incurred to prevent or minimise Property Loss for which an insured could have become legally liable.[128] The trial judge observed that the fact that Delta never became legally liable to pay any compensation for Property Loss was not conclusive, because the relevant costs would be incurred in cases of an immediate threat before it would be possible to determine who might be legally liable for the costs, the aim of incurring the costs under cl 5.03 being to prevent the occurrence of Property Loss.

[94] The trial judge accepted submissions that the only works undertaken by Delta to prevent "immediate threat of Property Loss" were the works of placing earth against SW1, the subsequent works resulting not from an immediate threat, but because the testing of rock anchors after SW1 was buttressed revealed that the anchors had not been installed in accordance with the shop drawings and Watpac lost faith in TRA's work.[129] The subsequent re-excavation was not undertaken to prevent an immediate threat of property loss and was not the removal of work installed to prevent such

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127 Reasons at [11], [104].

128 Reasons at [105], referring to [102] and *Astrazeneca Insurance Co v XL Insurance* [2013] 1 Ll Rep 290 (see [144]).

129 Reasons at [110].

a threat; that work was an integral part of the work required by the terms of the Delta and TRA contracts.[130] The trial judge concluded that the amount of any claim available to Delta under cl 5.03 would be the costs incurred before 24 July 2007, which were claimed in an amount of $245,285.12.[131] Taking into account a finding that Mr Welsh "understood his role to put Delta's best foot forward",[132] that subsequent reviews of his log of costs reduced the amount claimed, some parts of the attribution of costs were in some respect arbitrary, Mr Welsh was at a disadvantage in recording work before he arrived on site in the last week of June 2007 and for the period before he arrived he relied solely on documentary records, the trial judge discounted the categories of claim for which the costs were incurred by Delta itself rather than invoices received by Delta by 15 per cent, yielding total costs assessed by the trial judge of $220,106.[133]

[95] Delta submitted that it was an insured covered by cl 5.03. The submission requires reference to two provisions:

(a) In the schedule of cover the "insured" is described as follows:

> "Team Post Tensioning Pty Ltd[134]
> principals and subcontractors who are not
> otherwise insured"

(b) A glossary of terms in the policy defines "you/your" as meaning "anyone insured by the Policy". That is followed by a provision applicable "For Section Two only", that ""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". That is followed by a proviso which it is not relevant for present purposes.

**Is Delta an insured under the schedule of cover?**

[96] The trial judge accepted that Delta was TRA's "principal" within the description of an insured in the schedule of cover[135] and rejected Delta's submission that s 45(1) of the *Insurance Contracts Act* 1984 (Cth) would operate to render void the requirement that a principal or subcontractor did not otherwise have insurance.[136] In relation to the phrase "who are not otherwise insured" the trial judge found that Delta had at least two insurance policies relevant to the loss it suffered on the Albert Street project and that Delta had failed to satisfy the onus, which the trial judge held lay upon Delta, of proving it had no other insurance.[137] None of those conclusions are challenged by the notice of appeal.

[97] Ground 12 of the notice of appeal challenges the trial judge's construction that the phrase "who are not otherwise insured" applies both to principals who are not otherwise insured and to subcontractors who are not otherwise insured. The trial judge considered that there was no sensible reason why the phrase would only apply to subcontractors and the application of the phrase to both principals and

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130 Ibid.
131 Ibid.
132 Reasons at [114].
133 Ibid.
134 The trial proceeded upon the agreed basis that TRA was to be treated as though it were a named insured.
135 Reasons at [74].
136 Reasons at [76], citing *Lambert Leasing Inc v QBE Insurance (Australia) Ltd* [2016] NSWCA 254 and referring to s 45(2) of that Act.
137 Reasons at [77]-[78].

subcontractors fulfilled a sensible purpose of extending cover to losses related to the contractor's work which otherwise were not covered by insurance.[138]

[98] Delta contends that the trial judge should have held that upon the proper construction of the definition of "insured" in the policy, the phrase "not otherwise insured" related only to subcontractors and not to principals. It argues that the description of the insured in the schedule of cover is ambiguous because of the absence of punctuation and the ambiguity should be construed *contra proferentem* against Mecon. In addition, Delta cites *Campbell v Director of Prosecutions for the Commonwealth of Australia*[139] as support for the application of what was submitted to be an ordinary rule of grammar that words of relation prima facie refer to their nearest antecedent (in this case, "subcontractors"). Mecon submits that the trial judge's construction is correct for the reasons given by the trial judge and because Delta's construction would make the extended definition of "you/your" redundant in so far as it applies to principals. Delta replies that little weight should be given to the redundancy because it results from a contrast between a memorandum of insurance adapted for the particular case and the standard form policy wording.

[99] The schedule of cover does not wear the appearance of a document that would be expected to apply grammatical conventions of the kind identified by Delta. In *Campbell v Director of Prosecutions for the Commonwealth of Australia*[140] McDonald J referred to *in Re Godfrey*,[141] in which Poole J quoted a statement by Pollock CB in *Eastern Counties and London and Blackwall Railway Co v Marriage*[142] that "…the antecedent really referred to is often to be made out by good sense of the hearer or reader, rather than by the position of a word in the sentence" and "[the] judicial exposition of any document ought to be the reasonable one, and not emphatically the grammatical one." McDonald J also referred to Lord Chelmsford's statement in *Eastern Counties and London and Blackwall Railway Co*[143] that "[E]very relative ought to be referred, not perhaps to the next antecedent, "which will make sense with the context," but to that to which the context appears properly to attract it." In deciding whether the words "who are not otherwise insured" properly refer to "principals and sub-contractors" or only to "sub-contractors" it is necessary to bear in mind that the Mecon policy is a commercial contract and should be given a businesslike interpretation: *McCann v Switzerland Insurance Australia Ltd*.[144] Even allowing for a "liberal approach" in favour of insureds in a case of ambiguity,[145] Delta's arguments do not suggest any error in the commercial construction of the policy preferred by the trial judge, a construction which derives additional support from Mecon's argument from redundancy.

[100] In relation to the extended definition of "you/your" in the glossary of terms, the trial judge found that Delta was a principal within the phrase "any principal" at the beginning of (b).[146] The trial judge therefore accepted that Delta was covered by that extended definition of insured, "but only for the principal's liability that arises

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138 Reasons at [75].
139 [1995] 2 VR 654.
140 [1995] 2 VR 654 at 665-666.
141 [1921] SASR 148 at 152.
142 (1860) 9 HLC 32 at 37.
143 (1860) 9 HLC 32 at 74.
144 (2000) 203 CLR 579 at [22].
145 Ibid, at 602, citing *Johnston v American Home Assurance Co* (1998) 192 CLR 266 at 274 [19].
146 Reasons at [81].

out of the work performed by you for that principal".[147] The trial judge concluded that the cost of providing temporary protective repairs could not be characterised as Delta's liability so that the extended definition of "you/your" relevantly operated only in relation to cl 5.00 and cl 5.01 and not cl 5.03.[148]

[101] That conclusion is challenged by ground 13 of the notice of appeal. It contends that the trial judge failed to determine whether or not Delta was entitled to the costs of temporary protective repairs pursuant to cl 5.03 of the Policy and, having regard to the matters set out in the paragraphs [104]-[105] of the trial judges' reasons (see [93] of these reasons) ought to have held that Delta was entitled to the costs of temporary protective repairs. The first contention is incorrect. The trial judge determined that Delta was not entitled to the costs of temporary protective repairs pursuant to cl 5.03.

[102] As to the second contention, Delta argues that the trial judge adopted an unreasonable construction of the policy, at odds with its purpose, in concluding that the costs incurred by Delta for temporary protective works were not the "principal's liability" within the meaning of cl 5.03.[149] It submits that it is commercially absurd to construe the policy so that Delta should be covered under cl 5.01 but not under cl 5.03 in the event that it acted reasonably and proactively incurred costs in preventing Property Loss or Personal Injury. Delta relies upon the purposive approach adopted in *Guardian Assurance Co Ltd v Underwood Constructions Pty Ltd*.[150] Mecon submits that the trial judge's construction is correct, that cl 5.03 concerns costs incurred by the named insured rather a liability, and in any event costs incurred by Delta cannot be characterised as a liability.

[103] I would affirm the trial judge's conclusion. Clause 5.03 provides an indemnity for certain costs incurred by the insured to prevent "any" immediate threat of Property Loss or Personal Injury. Upon one view that involves no reference to any legal liability. The trial judge preferred a different construction; taking into account the contextual influence of cl 5.00, the trial judge construed cl 5.03 as applying only where an insured could subsequently become legally liable for the described costs. On either construction cl 5.03 covers costs in respect of which the insured has no legal liability when the costs are incurred and is never rendered legally liable for them. That describes the position of Delta upon findings not challenged on appeal.[151] Whichever construction is preferred the language of the subordinate clause in (b) of the extended definition is inapt to extend an indemnity under cl 5.03 to Delta as a principal. As Mecon submitted, the costs it incurred could not be characterised as a liability.

[104] The insurance policy considered in *Guardian Assurance Co Ltd v Underwood Constructions Pty Ltd* named the plaintiff as the insured. Its entitlement to an indemnity was not governed by a provision similar to the extended definition in the Mecon policy. Even if TRA, as a named insured, would be entitled to an indemnity upon the reasoning in *Guardian* if it carried out the described work to avoid threatened damage that would result in it incurring an insured liability, it does not follow that it is uncommercial for the indemnity under the extension of the insurance to TRA's principal to be construed in accordance with the terms of that extension. The

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147 Ibid.
148 Reasons at [118].
149 Delta's outline of submissions, para 57 and Delta's outline of submissions in reply, para 34.
150 (1974) 48 ALJR 307.
151 Reasons at [90].

presence of the subordinate clause in (b) in a definition which applies only for s 2 might itself be thought to be antithetical to an assumption that its purpose is to extend to principals the same breadth of coverage under s 2 of the policy as that section provides to the named insured.

**Notice of contention**

[105] Against the possibility that Delta might establish one of its grounds of appeal Mecon filed a notice contending that the trial judge should have made other findings that support the rejection of each of Delta's claims.

***Delta's claim as assignee under cl 5.00 of the policy***

[106] In relation to Delta's claim as assignee under cl 5.00 of the policy, Mecon advances four contentions in relation to matters which the trial judge found it not necessary to decide.

[107] First, Mecon contends that Delta failed to establish that any Property Loss happened as a result of an "Occurrence". The policy definitions of "Occurrence" and "Event" are set out in paragraph [8] of these reasons. I earlier mentioned that Delta's statement of claim characterised the Wall Movement as both the Occurrence and the Property Loss. It also characterised the Wall Movement as the "Event (as defined)".[152] In Delta's final submissions at the trial, however, it submitted that the word "event" in the definition of "Occurrence" was not the "Event" defined in the policy.[153] It submitted that the Occurrence was TRA's breach of the subcontract causing the Wall Movement.[154] Bearing in mind the requirement in cl 5.00 that the Property Loss be caused by the Occurrence, the contention that the Wall Movement was caused by TRA's breach could not form part of an "Occurrence" as defined (see [8] of these reasons).

[108] Mecon contended that the Wall Movement could not be an Occurrence because the evidence established that TRA's employees could have expected it to happen. This argument invoked the provision in the extended definition of "you/your" in the policy that, "For Section Two only, "you/your" also includes … (a) any of your directors, executive officers or Employees while acting within the scope of their duties in such capacity".

[109] As Delta submitted, however, another paragraph of the same definition provides:

> "For Section Two, where "you" comprises more than one entity or person, each of the entities or persons shall be considered as a separate and distinct insured and the word "you" shall be considered as applying to each entity or person in the same manner as if a separate policy, with the exception of any limit of indemnity, had been issued to each."

[110] The definitions are in a glossary which contains definitions of terms that are used in different parts of the policy. The extended definition of "you/your" applies only for s 2. It does not allow the word "you" in the definition of "Occurrence" to be read as encompassing, not only the named insured, but also the named insured's employees. There is also substance in Delta's argument that Mecon's construction would

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152 Third amended statement of claim para 77.
153 Plaintiff's closing submissions para 41.
154 Plaintiff's closing submissions para 39.

deprive the policy of much of its utility as insurance against negligent breaches of contract. Mecon's contention should be rejected for those reasons. It is not necessary to consider Delta's additional arguments upon this issue.[155]

[111] Mecon's second contention is that the settlement deed did not assign to Delta any right of indemnity in favour of TRA to recover the Settlement Amount under the policy. Mecon did not advance written or oral argument in support of this contention and the appeal was argued upon the assumption that there was such an assignment.

[112] Mecon's third contention is that it was not liable to indemnify TRA by reason of its breach of or non-compliance with cl 10.08 of the policy. The policy relevantly provides:

> "10.00 Each condition reflects a reasonable requirement of you as a condition or precedent to receiving Insurance under the Policy. If you fail to observe these conditions, and such failure increases Mecon's exposure to a claim or directly or indirectly exacerbates or causes loss, damage or legal liability, Mecon may reduce, or avoid paying, any claim submitted by you.
>
> …
>
> 10.08 Risk Management
>
> Without exception, you and your Employees must:
>
> …
>
> (d) take all reasonable steps to prevent incurring any loss, damage or liability."

[113] Mecon argued that upon the proper construction of cl 10 Delta bore the onus of establishing that it satisfied cl 10.08(d).

[114] In *Wallaby Grip Ltd v QBE Insurance (Australia) Ltd*[156] the High Court referred with approval to the statement by Jordan CJ (delivering the judgment of the court) in *Kodak (Australasia) Pty Ltd v Retail Traders Mutual Indemnity Insurance Association*[157] that "the question of where the onus lies must in every case depend primarily upon the nature of the condition and the provisions of the policy". In *Kodak*, a policy regulating employers' rights of indemnity against workers' claims conferred a right of indemnity against the insurer for sums for which it shall be liable to pay compensation, subject to the due and proper observance and fulfilment by the employer of various conditions including a reasonable precautions clause. Chief Justice Jordan stated that the clause was "expressed as a condition to which the existence of an obligation to indemnity is made subject" and "must therefore be presumed to be intended to operate as a condition unless it is incapable of so operating."[158] Because the condition was not capable of operating as a condition precedent to the existence of the policy or as a condition concurrent with the accrual of a liability to indemnify, it could operate as a condition of the existence of liability only as a condition precedent to the liability being accrued or as a condition

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155 Appellant's outline of submissions in reply paras 46 – 49.
156 (2010) 240 CLR 444 at 457 [28].
157 (1942) SR (NSW) 231 at 237.
158 Ibid at 234-238.

subsequent which discharged an accrued liability.[159] Chief Justice Jordan reasoned that because the reasonable precautions clause referred to a want of care referrable to an act or omission by the insured antecedent to the injury, it must be treated "as a condition to be fulfilled by the insured which is precedent to the accrual of liability to indemnify on the part of the insurer".[160] Chief Justice Jordan thereafter applied "the ordinary rule" that, "as to any provisions which are merely conditions precedent to the accrual of liability of the insurer according to the terms of the policy treated as a binding document … the insured must allege, and if the matter is put in issue prove, the performance by him of all conditions precedent … a plaintiff seeking to enforce an obligation qualified by a general exception which is applicable to all cases must negative the exception; but if the obligation is general and qualified only by particular exceptions, a person seeking to rely on an exception must prove himself within it."[161] Accordingly, it was held in *Kodak* that, because the reasonable precautions clause was a condition precedent, the plaintiff was obliged to prove compliance with it.

[115] In *Barrie Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd*[162] Meagher JA (Ward JA and Sackville AJA agreeing) referred to *Kodak* and *Wallaby Grip* in the course of holding that the insurers were obliged to allege and prove a breach of a reasonable precautions clause and causation. In that case, the general insuring clause provided that, "Subject to the terms conditions and exclusions of this policy … We agree to provide indemnity …". An introductory clause to conditions, which included a reasonable precautions clause, provided that the insurer "may refuse to pay a claim, or may reduce the amount payable under a claim to the extent that Your breach of any condition of this policy causes or contributes to loss, damage or liability or prejudices Our interest or rights, in respect of that claim." Meagher JA observed that the right to refuse to pay or to reduce a claim arose where there was "loss, damage or liability" to which the policy would otherwise entitle the insured to an indemnity.[163] After referring to the statement by the High Court in *Wallaby Grip*[164] that the difference between an exception and a limitation as to the amount payable under an indemnity was that "an exception may prevent an insurer's liability from arising, whereas a limitation … operates after the obligation to indemnify has arisen and upon the amount payable pursuant to it" and that the "legal burden of proof arises from the principle: [h]e who alleges must prove" so that the "incidence of the legal burden of proof can therefore be tested by answering the question: [w]hat does each party need to allege?",[165] Meagher JA observed that the insurer's liability to indemnify arose upon the insured's claim that its liability to a third party was caused by the use of its motor vehicle; it followed that, subject to the application of an exclusion or a breach of a condition which was causative or all or part of that liability, the insurer's liability to indemnify arose. Meagher JA therefore concluded that to justify a refusal to pay all or part of the claim by reference to the reasonable precautions clause the insurers were obliged to allege and prove breach of the condition and causation.[166]

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159 Ibid at 235.
160 Ibid.
161 Ibid. Citations omitted.
162 [2016] NSWCA 67 at [37] – [50].
163 [2016] NSWCA 67 at [48].
164 (2010) 240 CLR 444 at 459 [35].
165 Ibid at [35] and [36] (quoting observations by Hobhouse J in *The Torenia* [1983] 2 Lloyd's Rep 210).
166 [2016] NSWCA 67 at [50].

[116] The first sentence of cl 10.00 of the Mecon policy, if considered alone, is similar to the condition considered in *Kodak*, to which the existence of an obligation to indemnify was made subject. The second sentence of cl 10.00, read in the context of the general insuring provision in cl 5.00, is not materially distinguishable from the provisions construed by Meagher JA in *Barrie Toepfer Earthmoving and Land Management*. Reading cl 10.00 as a whole, and particularly having regard to the directly operative provision that "Mecon may reduce, or avoid paying, any claims submitted by you", I construe cl 10.00 not as imposing a condition precedent to the accrual of liability to indemnify or as a general exception to such a liability applicable to all cases, but as a particular exception to Mecon's liability to indemnify under the general insuring clauses. It follows that the onus lay upon Mecon to plead and prove the breach of the reasonable precautions clause upon which Mecon relied to deny an indemnity. That conclusion accords with many decisions which, so far as the reasons reveal, concerned reasonable precautions clauses that were not expressed as conditions to which the obligation to indemnify was made subject.[167]

[117] Upon the question whether Mecon had proved a breach of the reasonable precautions clause, Mecon relied upon its written submissions at the trial. Mecon contended at trial, and again on appeal, both that TRA by its directors and TRA's "Employees" (a reference to the employees on site) did not comply with cl 10.08(d). It also submitted that, because of the impact of oral evidence in relation to this issue, if the Court upheld Delta's grounds of appeal and rejected Mecon's other grounds in the notice of contention the court might find it necessary to remit the matter to the trial judge to make findings and give a consequential judgment. Delta argued that no remitter was required because, taking into account Mecon's failure to put necessary propositions to the witnesses called by Delta, Mecon had not established an arguable case for the application of the reasonable precautions clause.

[118] As to the employees, Delta argues that the expression "you" in cl 10.00 does not comprehend employees. The definition for s 2 of "you/your", which includes "(a) any of your directors, executive officers or Employees while acting within the scope of their duties in such capacity", is submitted to be "self-defeating" for the purposes of Mecon's argument. It is submitted that cl 10.00 should be understood in the context of a commercial purpose that the insured not lose cover because of unknown and unauthorised conduct by its employees. Delta argues that the clause is at least ambiguous and should be construed *contra proferentum*.

[119] It is not necessary for Mecon's purposes that the word "you" in cl 10.00 should be construed as comprehending Delta's employees. Clause 10.08 unambiguously obliged both TRA and its employees to comply with the obligations described in the sub-paragraphs. If the employees did not comply and the non-compliance increased Mecon's exposure to a claim or directly or indirectly exacerbated or caused loss damage or legal liability, cl 10.00 entitled Mecon to reduce or avoid paying any claim by TRA.

[120] Delta argued[168] that Mecon did not comply with its obligations[169] to plead as against the employees the subjective knowledge necessary to establish the defence in cl 10.08.

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167 See, for example, *Legal and General Assurance Society Ltd v Commonwealth and Precision Cranes and Hoists Pty Ltd* [1985] 3 ANZ Ins Cas 60 – 621 and *Bedford v James* [1986] 2 Qd R 300 at 308.

168 Plaintiff's closing submissions paras 100 – 101.

169 *Uniform Civil Procedure Rules* 1999 (Qld), r 150(1)(k).

[121] To establish a breach of cl 10.08(d) Mecon was obliged to prove that TRA (or its employee) deliberately did or omitted to do an act knowing that it exposed TRA to a risk of incurring loss, damage or liability by a resulting danger that was recognised by the person (TRA or the employee) who knowingly did or omitted to do the act, such that the conduct of TRA (or its employee) should be characterised as reckless.[170]

[122] In this respect, Mecon pleaded:[171]

(a) The risk of a lateral wall movement and consequential damage to property at the Site and at its surrounds if the ground anchors were not installed in accordance with the design requirements, including anchor length and load capacity ("the Risk") was "an obvious risk to any person experienced in drilling and installing temporary or permanent rock anchors".

(b) TRA caused to be installed ground anchors at the Site during the relevant period.

(c) Numerous of the original anchors were shorter (many substantially shorter) than their design length and did not perform as designed.

(d) For a period of time there was made available to TRA's drilling team on Site only 14 metres of rod for drilling holes for the original anchors, that limited the drilling depth to approximately 13 metres notwithstanding that the design length was 18 metres and greater.

(e) One of the drilling supervisors, Mr Mogg, informed TRA by Mr Sanford that only 14 metres of rod were on the Site at the relevant time and the workmen could only drill to about 13 metres, and TRA by Mr Sanford was also informed by Mr Mogg that about 10 holes were short and anchors had been installed.

(f) TRA took no action in relation to either of those matters.

(g) The employees knew that the original anchors which were shorter than the design length were in fact shorter than their design length. Particulars of that alleged knowledge were given, including that the installed length was a matter of observable fact to the installer of the anchors, the design provided for the length of the cable to be installed, and the installer's job was to cut the coil of cable to the design length.

(h) Quality Assurance records were not compiled by TRA or its employees in relation to the installation of the anchors in the initial construction period and were first prepared in about April 2007 after movement of the SW1 wall at the Site had been reported and numerous of those records did not record actual details but were reconstructed having regard to the plans.

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170 *Fraser v BN Furnman Productions (Ltd)* [1967] 3 All ER 57 at 60 – 61; the act or omission "must be at least reckless, that is to say, made with actual recognition by the insured … that a danger exists, and not caring whether or not it is averted"; *Albion Insurance Co Pty Ltd v Body Corporate Strata Plan No 430* [1983] 2 VR 339 at 342 – 3; *Gold Coast Bakeries (Queensland) Pty Ltd v Heat & Control Pty Ltd* [1992] 1 Qd R 162 at 172 (approving *Fraser v BN Furnman* and referring to the need for the insurer to prove that the insured was "negligent towards the insurer by courting the risk").

171 Further amended defence paras 124 – 145, 158 – 159.

(i) By reason of the pleaded matters, TRA and the Employees failed to take all reasonable steps to prevent the incurring of the loss, damage and liability alleged by Delta and failed to comply with or satisfy cl 10.08(d).

[123] Mecon did not prove (e). For present purposes the significant allegations are summarised in (a), (c), (g) and (i). Although (a) does not use the word "knew", in context it conveys a case that TRA's employees knew of the risk of the alleged wall movement and consequential damage. Mecon sufficiently pleaded its argued case that the employees failed to comply with cl 10.08(d) because they knowingly installed numerous rock anchors which were shorter (many substantially shorter) than the design length, in circumstances in which they knew of the resulting risk of lateral wall movement and consequential damage from the installation of ground anchors not being installed in accordance with the design requirement for anchor length.

[124] Mecon proved that case. As Delta submitted in a different context (concerning the alleged breach of a clause by the conduct of TRA's directors, Mr Jones and Mr Sanford) there was unchallenged evidence that TRA's employees on the site, including Mr Mogg, were experienced in installing rock anchors.[172] Mr Ervin gave evidence[173] that it was "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", and that TRA's installation of the anchors was "extremely poor practice … which might have endangered the lives of workers within the excavation and in adjacent properties". At the trial Delta argued that this was speculation which had no factual basis in the evidence. However the trial judge accepted evidence of the remarkably extensive and gross character of TRA's breaches of contract; "[I]n the top two rows of anchors on SW1, 18 failed when tested, including nine of which anchors were part of the initial remedial works … 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 30-40% of their design length".[174]

[125] Delta argued that the subjective knowledge of a worker at the base of an excavation at a particular time was not an area of specialised knowledge. It was not suggested to Mr Ervin, however, that his expertise did not extend to knowledge of the competencies of employees, such as Mr Mogg, who were responsible for supervising the installation of rock anchors. But even if Mr Ervin's opinion is put to one side, the findings about the extent and character of the breaches of the subcontract readily justify an inference that the experienced employees responsible for the installation of the rock anchors, particularly Mr Mogg, must have appreciated that the very extensive departure from the design of the rock anchors resulted in risk that they would not perform their design function of restraining the retaining walls against the loads placed upon them by the retained soil.

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172 Mr Jones at T7-26, Mr Sanford at T7-28 to T7-29, T7-38 to T7-39 (in which Mr Sanford made it clear that Mr Mogg must have known that the anchors the installation of which he supervised were "short anchors", including "6-metre anchors out of a so called 20-metre anchor hole".

173 Reasons at [18].

174 Reasons at [16].

[126] Delta argued that the subjective knowledge of the employees required to establish that they recklessly courted the risk could not be determined on the basis of inferences. The seriousness of such a finding does require a court to be satisfied that it is clearly proved, and it is not sufficient to produce "inexact proofs in definite testimony, or indirect inferences".[175] That does not exclude a strong circumstantial case. There is no evidence to rebut the inference I have described, which directly arises from the trial judge's findings and uncontentious evidence.

[127] Delta argues that Mecon did not sufficiently plead or prove that the alleged breach of cl 10.08(d) increased Mecon's exposure to a claim or directly or indirectly exacerbated or caused loss, damage or legal liability, as required by cl 10.00. It was not in issue that TRA's breaches of the subcontract caused the SW1 wall to undergo significant lateral movement and consequential damage to the Site and surrounds. It was Delta's own case that this was Property Loss for which TRA became legally liable to compensate Delta, in respect of which Mecon was required to indemnify TRA under cl 5.00. Acceptance of Mecon's case that TRA's employee courted the risk of that same Property Loss therefore establishes that the breach of cl 10.08(d) exposed Mecon to TRA's claim under the policy.

[128] For these reasons I would hold that Mecon established an entitlement to avoid paying TRA's claim.

[129] In relation to TRA's directors, Mecon pleaded (in addition to the matters in [122] of these reasons) that:[176]

(a) Each of Mr Sanford and Mr Jones was aware of the Risk.

(b) Mr Sanford and Mr Jones did not supervise the drilling and installation of the anchors or engage a qualified engineer to supervise the installation and tensioning of the anchors or verify the anchor load capacities, and TRA knew that Delta had not engaged a qualified engineer for those purposes.

(c) TRA did not perform a lift-off test of the anchors after seven days as required by the engineering drawings.

[130] In cross-examination Mr Jones accepted a series of propositions. He was a qualified engineer. It was obvious to him that a consequence of incorrect installation of ground anchors would be the lateral movement of the wall. There was a clear risk that the lateral movement of the wall would damage surrounding sites, property and people. It was important to take precautions against such an obvious risk. One such precaution was paying attention to the design engineers. TRA's primary function was to install the rock anchors, the purpose of which, was noted on the design engineer's drawings, as being to hold up the retaining wall. TRA's function included providing the shop drawings to achieve the design engineer's design. It was part of TRA's role to have a system that adequately supervised the installation, to keep adequate records, to have adequate equipment and to have adequate supervision. Adequate equipment was necessary to test the functionality of the ground anchors when installed and a monojack was not adequate for that purpose. A system which did not preserve the records of actual drilling was inadequate. A system under which Mr Jones signed the quality assurance records on a single day,

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175 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 – 362.

176 Further amended defence paras 124 – 145, 158 – 159.

9 April 2007, in the face of a demand and without referring to relevant documents was insufficient. That potentially fell far short of what might be expected of a prudent rock anchor specialist to perform.

[131] Contrary to the submission for Mecon, that evidence did not prove that TRA contravened cl 10.08(d). The admissions of negligence by Mr Jones were not accompanied by any admission that he knew of the conduct of TRA's employees amounting to serious and extensive breaches of the subcontract. Mecon did not submit that the evidence at the trial proved the pleaded allegations that Mr Mogg informed Mr Sanford of the alleged facts that the drilling rods on site at the relevant times were too short, that workmen could only drill to about 13 metres, and that anchors had been installed in about 10 holes that were too short. Mecon otherwise did not plead that Mr Sanford or Mr Jones knew of any of the breaches of the subcontract which TRA had committed by its on-site employees. Mecon argued that there was a question not determined by the trial judge whether Mr Jones signed the records knowing that they were false, but no such contention was pleaded or put to him. Mecon also referred to its pleaded allegation that the equipment on site was inapt to permit the installation of the required lengths of rock anchors, but Mecon did not adduce evidence which proves that allegation or that either of TRA's directors knew it to be so.

[132] In short, the directors lacked the knowledge of the breaches of the subcontract which was a critical element of proof that they deliberately adopted a course of action or inaction whilst realising the risks of lateral wall movement and consequential damage resulting from such breaches. Mecon's claim that TRA, by its directors, breached cl 10.08(d) could not succeed for that reason.

[133] Mecon's fourth contention in relation to Delta's claim as assignee is that Mecon is not liable to indemnify TRA because of the operation of cl 8.13 of the policy. In s 2 of the policy, cl 8 provides (under the heading "Section Two Exclusions") that:

> "8.00 The Policy does not insure any legal liability for:
>
> …
>
> 8.13 Specific Types of Project
>
> Personal Injury or Property Loss directly or indirectly resulting from:
>
> (a) excavations deeper than 10 metres;
>
> …
>
> unless specified to the contrary in the Schedule and then solely to the extent specified.
>
> *(Note: The Proposal Form contains questions relating to the foregoing types of project and/or risk.)*"

[134] Mecon argued that, having regard to the context supplied by cl 5.00, the expression "legal liability" in cl 8.00 should be construed as a reference to "all amounts which you become legally liable to pay in compensation of … Property Loss". Mecon argued that, because the work at the Site required an excavation deeper than 10 metres, the insurance in cl 5.00 did not comprehend TRA's liability to Delta which was the subject of Delta's claim as assignee. Mecon argued that cl 8.13 was concerned with the nature of the project or work undertaken by the insured in respect of which the relevant Property Loss directly or indirectly results, rather than a stage which the

work had reached. Mecon submitted that this construction was suggested by the "Note", which indicated that the scope of indemnity did not apply where an insured undertook a project or work of the kind described in cl 8.13 and the content of the items set out in subclauses (a) to (k) of that clause, and in particular:

> "(f) jetty, pier, wharf, marina or breakwater construction or work in, on or over a permanent body of water;
>
> (g) demolition over 10 metres in height, other than internal non-structural demolition;
>
> …
>
> (i) work in or around an airport or aircraft landing area;"

It is submitted that the obvious intent of the clause was to exclude the insurer's liability where any claimed Property Loss occurred in the undertaking of the particular work or identified project.

[135] Delta's argument is to the effect that there must be a causal relationship between the depth of the excavation and the Property Loss.

[136] There is no ambiguity in the requirement in cl 8.13(a) that the Property Loss directly or indirectly result from excavation deeper than 10 metres. There is no requirement that the Property Loss be directly or indirectly caused by the depth of the excavation exceeding 10 metres. The described relationship is instead between an excavation of the specified depth and the Property Loss; the policy does not insure any legal liability for Property Loss directly or indirectly resulting from an excavation deeper than 10 metres.

[137] Mecon argued that it had established the necessary causal link between an excavation deeper than 10 metres and the claimed Property Loss: the failure of the SW1 retaining wall to limit deflections of adjoining land – the argued loss of functionality of that wall – continued after that wall exceeded the 10 metre depth and all of the directions to rectify, and the costs claimed for rectifications, occurred after that time.

[138] Delta argued that those facts did not detract from a conclusion that the failure of SW1 occurred before the excavation reached a depth of 10 metres. Delta relied upon Dr Baigent's evidence that his review of Mr Ervin's further supplementary report resulted in an opinion that "the depth of excavation, and whether or not it exceeded 10m in depth, did not have any effect on the integrity and stability of the SW1 wall."[177] Delta also relied upon statements by Mr Ervin that the wall was being compromised at times before early March 2007, it was failing by 1 March 2007 when the depth was in the region of 4.7-7.9 metres, and there was what Delta characterised as "clear evidence that the retaining wall was damaged before the excavation reached 10 metres and that the depth of excavation had no direct or indirect cause on the fact that the Property Loss occurred"; Delta quoted Mr Ervin's evidence that because the retaining wall "has moved more than you would've expected at this point in time, the wall is behaving in an unexpected manner" and that upon a model of the progressive excavation "you would not expect, by a depth of 8 metres or 7 metres or whatever it was at that point in time, to be indicating displacements of this order."[178]

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177 Plaintiff's closing submissions para 111.

178 Plaintiff's closing submissions para 113.

[139] As I have mentioned, the trial judge preferred Mr Ervin's evidence to the evidence of Dr Baigent. The quoted part of Mr Ervin's evidence was to the effect that the movement of the wall at depths before 10 metres was unexpected and a cause for serious concern in an excavation the depth of which was to exceed 18 metres. However Mr Ervin did not express any conclusion to the effect that the increasing depth of the excavation to and beyond 10 metres was not causally related to the threat to the excavation posed by the deficiencies in TRA's rock anchors.

[140] The proximate cause of the alleged Property Loss was TRA's breach of contract in installing rock anchors that did not comply with the subcontract, but it is obvious enough (and it was confirmed by the engineers' evidence[179]) that the excavation was an indirect cause of that Property Loss. If the SW1 wall moved laterally before the depth of the excavation reached 10 metres it may be concluded that Property Loss then indirectly resulted from an excavation that was not 10 metres deep. But that does not deny that once the excavation reached that depth TRA's legal liability was to pay compensation "of" the alleged Property Loss that indirectly resulted from excavation deeper than 10 metres. Delta's argument to the contrary is simply another way of putting the argument, which I do not accept, that the clause requires a causal relation between the Property Loss and the depth of the excavation.

[141] In any event, uncontentious evidence demonstrates that the Property Loss in relation to which TRA became legally liable to Delta was incurred after the excavation exceeded 10 metres. The depth of the excavation at SW1 exceeded 10 metres no later than 27 March 2007.[180] The earliest date of rectification work claimed by Delta was 11 April 2007. The earliest direction by the superintendent for Delta to carry out work was made on 3 May 2007. It follows that the excavation deeper than 10 metres indirectly resulted in the relevant Property Loss. That conclusion is not falsified by the circumstance that some Property Loss of similar character might have occurred before the excavation reached a depth of 10 metres.

[142] Delta relies upon a defence under s 54 of the *Insurance Contracts Act* 1984 (Cth). Section 54 provides:

> "**54 Insurer may not refuse to pay claims in certain circumstances**
>
> (1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.
>
> (2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.

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179 For example, in Mr Ervin's supplementary Report paras 6.0 – 6.9.

180 Second report of Mr Ervin para 5.3. AB1910.5.

(3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act.

(4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.

(5) Where:

(a) the act was necessary to protect the safety of a person or to preserve property; or

(b) it was not reasonably possible for the insured or other person not to do the act;

the insurer may not refuse to pay the claim by reason only of the act.

(6) A reference in this section to an act includes a reference to:

(a) an omission; and

(b) an act or omission that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter."

[143] For the proposition that s 54(1) was engaged in this case Delta relied upon *Maxwell v Highway Hauliers Pty Ltd*.[181] In that case, a provision in the policy that no indemnity was provided for vehicle accidents unless the vehicle was being operated by a driver who had a prescribed profile score in a psychology test approved by the insurers. The High Court concluded that the fact that relevant vehicles were operated at the time of accident by an untested driver was "by reason of some act … that occurred after the contract was entered into" within s 54(1), being an omission of the insured to ensure that each vehicle was operated by a driver who had undertaken the prescribed test. In this case, the equivalent act occurring after the policy was entered into was the creation of an excavation deeper than 10 metres.

[144] It is therefore necessary to address the question whether that act was one in respect of which s 54(2) applied. That was not an issue in *Maxwell v Highway Hauliers Pty Ltd*. For the reasons in [139] – [141], the excavation to beyond 10 metres depth "could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract". Section 52(2) therefore permitted the insurer to refuse the claim. Delta did not plead the elements of s 54(3) or s 54(4) and it did not contend that it had satisfied its onus of proving those elements.

***Delta's claim as insured under cl 5.03***

[145] In relation to Delta's claim as insured under cl 5.03, Mecon advanced five contentions.

[146] First, Mecon contended that Delta's claim under cl 5.03 was time barred under s 10(1)(a) of the *Limitation of Actions Act* 1974 (Qld). Under s 10(1)(a) an action

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[181] (2014) 252 CLR 590.

founded on a simple contract (which includes the Mecon policy) should not be brought after the expiration of six years from the date on which the cause of action arose. It is not an issue that all of the costs claimed by Delta under cl 5.03 were incurred more than six years before the commencement of the proceeding. The issue is whether the cause of action arose when Delta incurred those costs or at the later time (within the six year period) when Mecon refused to indemnify Delta.

[147] The trial judge referred to a difference amongst the authorities as to whether a cause of action against an insurer arose when loss within the policy was suffered (*Callaghan v Dominion Insurance Co Ltd*,[182] *Cigna Insurance Asia Pacific Ltd v Packer*,[183] and *Commonwealth v Vero Insurance Ltd*[184]) or whether a refusal by the insurer to indemnify is a prerequisite to the accrual of a cause of action (*Hunter v Stronghold Insurance (Australia) Ltd*[185]and *Penrith City Council v Government Insurance Office of New South Wales*[186]). The trial judge referred also to observations of Professor Carter in *Indemnities against Breach of Contract*[187] which supported the first view: "… the promise of the insurer is to indemnify against loss … it is, therefore, the suffering of a loss which puts the insurer in breach of contract". The trial judge considered that reasoning was contrary to accepted principles of contract law; the insured was entitled to an indemnity when loss was suffered, but the insurer was not in breach at that time.[188] Delta relied upon the trial judge's reasoning. Mecon submitted that the authorities compelled the contrary conclusion.

[148] In my respectful opinion, Professor Carter's analysis is persuasive. Mecon's obligation under the relevant part of cl 5 was to pay costs incurred by Delta for the repairs described in cl 5.03. Delta did not plead or submit that any other provision of the policy, express or implied, qualified or imposed any condition upon that obligation to indemnify Delta. It follows that Mecon's obligation to pay Delta the costs described in cl 5.03 arose at the time when Delta incurred those costs, so that Delta's cause of action arose at that time. It is not necessary to elaborate upon that brief analysis: reasoning and conclusions to much the same effect were reached in materially indistinguishable circumstances in two decisions of intermediate appellant courts, *Cigna Insurance Asia Pacific Ltd v Packer*[189] and *Associated Forest Holdings Pty Ltd v Gordian Runoff Ltd*.[190] Delta did not argue that those decisions were plainly wrong or identify any basis for such an argument. That being so, it is sufficient that I express my conclusion that I am not persuaded that either decision is plainly wrong.

[149] I note also that since the appeal was argued the New South Wales Court of Appeal, by majority, has followed *Cigna* and *Associated Forest Holdings* in relation to a policy provision which is also materially indistinguishable from the present case: *Globe Church Incorporated v Allianz Australia Insurance Ltd*.[191] The policy in issue in that case included an obligation by the insurer, in circumstances giving rise

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182 [1997] 2 Lloyd's Rep 541 and the cases there cited.
183 (2000) 23 WAR 159.
184 (2012) 291 ALR 563 (obiter).
185 [1995] VicSC 5.
186 (1991) 24 NSWLR 564 (Giles J).
187 Paper presented at the 25th Annual Banking and Financial Services Law and Practice Conference, p 435.
188 Reasons at [107] – [108].
189 (2000) 23 WAR 159.
190 [2015] TASFC 6.
191 [2019] NSWCA 27 (Bathurst CJ, Beazley P and Ward JA; Meagher and Leeming JJA, dissenting).

to an indemnity under the main cover, to pay certain additional costs including (in cl 3.1.3) costs necessarily and reasonably incurred in respect of the temporary protection and safety of Property insured pending repair or replacement.[192] The question of principle as to the accrual of a cause of action proved to be determinative for the majority's conclusion that those costs fell outside the limitation period.[193]

[150] I would uphold Mecon's contention that Delta's claim under cl 5.03 was time barred.

[151] Mecon's second contention in relation to Delta's claim as insured under cl 5.03 is that Mecon was not liable to indemnify Delta because of the operation of cl 8.13 of the policy. Clause 8.13 must be read together with cl 8.00 (see [133] of these reasons). I have concluded that cl 8.13(a) is engaged, but Delta's claim under cl 5.03 is not a claim for insurance against "any legal liability for … Property Loss". If, however, the indemnity in cl 5.03 is promised only where an insured could subsequently become entitled to an indemnity under cl 5.00 against a legal liability for the described costs (see [103] of these reasons), then the effect of cl 8.00 and cl 8.13 would be that Delta could not make a claim under cl 5.03. I am inclined to prefer the alternative view that, the policy being ambiguous in this respect, the indemnity under cl 5.03 does not depend upon proof of that additional element. In circumstances in which it is not strictly necessary to decide this point and the parties did not make submissions about the proper construction of cl 8.00 and cl 8.13 in this respect, I refrain from expressing any conclusion about the issue.

[152] Mecon's third contention under the present heading is that Delta was compensated for the claimed costs by its receipt of $2,309,142.32 from its insurer, HSB Engineering Insurance Ltd in respect of costs subsequently claimed by Delta in the proceeding. In this respect, the trial judge concluded that Delta had been paid for the claim under cl 5.03 that it now made against Mecon; the trial judge added that 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."[194]

[153] Delta accepted that it could not now recover the sum of $709,143 from Mecon because that was specifically addressed to part of the costs of the temporary protective works, but it argued that there was no basis for a finding that the further payment from HSB was attributable to that cost as distinct from other losses sustained by Delta as recorded in the log of costs.[195] Mecon replied that Delta's submissions were based on the incorrect premise that Mecon had the burden of establishing both that Delta received further insurance monies and that they were attributable to what Delta claimed as temporary protective repairs. In Mecon's submission, Delta had the onus of proving its loss, which included proof that the monies it received from HSB were not attributable to temporary protective repairs. Mecon also argues, in the alternative, that the balance of any proven amount of temporary protective repairs over and above the specified sum of $709,143.32 (the balance being claimed by Delta to be $768,551.00) should be reduced by about 46.5 per cent (being the proportion that the sum of $1.6 million bears to the total sum claimed against HSB of $4,146,969.75 less the first payment by HSB to Delta of

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192 Ibid at [38].
193 See [2019] NSWCA 27 at [120], [122] – [125].
194 Reasons at [119].
195 Appellant's outline of submissions para 61.

$709,143.32.) Delta made submissions in reply[196] but it did not contradict Mecon's submissions.

[154] It is not necessary to consider those arguments. Delta's concession that it cannot claim again the $709,143 it received from HSB has the consequence that, if Mecon is liable to Delta for the claim under cl 5.03, Delta is not entitled to recover anything for that claim in light of the trial judge's finding that the quantum of any claim Delta might have under cl 5.03 is $220,106.[197] As noted earlier, no ground of appeal challenges that finding.

[155] Mecon's fourth contention is that any claimed costs incurred after 31 October 2007 were not recoverable because they were incurred outside the period of insurance. In Mecon's written submissions in support of this contention, it extended the relevant date; it submitted that Delta had no entitlement to recover costs after 3 November 2007.[198] Delta did not contest the submission that the period of insurance expired at that time. The issue is whether, as Mecon submits, Delta had no entitlement to recover costs incurred after that date. Delta argued that under cl 5.03 it is the immediate threat of Property Loss rather than the "costs incurred" that must occur during the period of insurance. It submitted that Mecon's construction was commercially absurd because it would mean that the more significant was an event of Property Loss the less likely it was that the insured would be indemnified for all of the costs of preventing the threat. Delta's argument has the effect of treating the insurance in cl 5.03 as an insurance against a liability which has arisen within the period of insurance albeit that the liability is met after the period of insurance. The fact that Mecon's obligations under that clause is to pay costs incurred, not to meet a liability, favours Mecon's construction. However I refrain from deciding this point because it is not strictly necessary to do so and the parties' arguments about it were not developed in any detail.

[156] Mecon's final contention is that any costs claimed in respect of Delta's employees and its machinery were not recoverable because such costs would have been incurred in any event and were not "costs incurred by" Delta pursuant to cl 5.03. The effect of Mecon's argument is that Delta did not prove that it incurred the claimed costs because of its failure to prove that the employees and machinery could have been engaged in remunerative work were they not required to be engaged in the rectification work.

[157] However, the effect of the trial judge's findings[199] is that $220,106 was the amount of "the actual cost to Delta of these works". Mecon did not identify a basis for setting aside that finding of fact and it did not contradict Delta's contention that Mecon did not plead that "internal costs" expended on the temporary protective works were not recoverable under cl 5.03. This contention should not be accepted.

**Proposed order**

[158] The appeal should be dismissed with costs.

[159] **McMURDO JA:** I agree with Fraser JA that the appeal should be dismissed with costs and, subject to one question, I agree with his reasons.

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196 Appellant's outline of submissions in reply paras 83 – 84.
197 Reasons at [114].
198 Respondent's outline of submissions of support of notice of contention para 44 (last sentence).
199 Reasons at [114].

[160] That question arose under Delta's alternative claim for payment as an insured, rather than as an assignee of the insured. The trial judge said that there were two independent reasons for rejecting a claim on this basis. The first was that Delta was a principal who was "otherwise insured", so that it was not an "insured" as that term was defined for the policy in the schedule of cover. I agree with the trial judge and Fraser JA that the words "who are not otherwise insured" applied to both subcontractors and principals of TRA. For that reason, the trial judge was correct in dismissing the alternative claim.

[161] The second reason came from the definition of "you/your" in a glossary of terms in the policy. The term was there defined to mean "anyone insured by the Policy" with the further definition that "you/your" also included "… (b) any principal but only for the principal's liability that arises out of the work performed by you for that principal".

[162] I agree, as the primary judge said,[200] that having regard to the location of cl 5.03 within the policy, the clause related only to costs incurred to prevent or minimise Property Loss for which Delta could have become legally liable. However, in the context of cl 5.03, I would interpret "the principal's liability" in paragraph (b) of the definition of "you/your", as a reference to the principal's potential liability, the prevention or minimisation of which was the purpose of temporary protective repairs undertaken by the principal. In that way I respectfully disagree with the trial judge[201] and with Fraser JA.[202]

[163] **FLANAGAN J:** I agree with the orders proposed by Fraser JA and with his Honour's reasons.

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200 Reasons at [105].
201 Reasons at [118].
202 At [103] above.