SUPREME COURT OF QUEENSLAND

CITATION:	*Mitchell Ogilvie Menswear Pty Ltd v Rapid Edge Pty Ltd* [2019] QSC 136
PARTIES:	**MITCHELL OGILVIE MENSWEAR PTY LTD** **ACN 010 162 222** (plaintiff) **v** **RAPID EDGE PTY LTD** **ACN 120 248 968** (defendant)
FILE NO:	2178 of 2014
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	20, 21 and 22 May 2019
JUDGE:	Applegarth J
ORDERS:	**Judgment for the plaintiff for:** **(a) damages in the sum of $1,278,708;** **(b) interest thereon from 29 September 2010 to 31 May 2019 in the sum of $795,799**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – DAMAGE TO CHATTELS – where suits and other items were damaged by smoke and soot from a fire in a basement tenancy close to the plaintiff's menswear store – where the defendant admits liability in tort for property damage or economic loss caused to the plaintiff as a result of the fire - where the plaintiff claims the diminution in the wholesale value of the stock – whether the plaintiff's proposed measure of damages is appropriate - whether the salvage value of the stock contended for by the plaintiff is established *Civil Proceedings Act* 2011 (Qld), s 58 *Boland v Yates Property Corporation Pty Ltd* (1999) 167 ALR 575;

[1999] HCA 64, cited
British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No 2) [1912] AC 673, cited
Cerutti v Crestside Pty Ltd [2016] 1 Qd R 89; [2014] QCA 33, cited
Davidson v J S Gilbert Fabrications Pty Ltd [1986] 1 Qd R 1, cited
Franke v CIC General Insurance Ltd (1994) 33 NSWLR 373, cited
Hadzigeorgiou v O'Sullivan [1983] 1 Qd R 55, cited
Interchase Corporation Ltd v Grosvenor Hill (Qld) Pty Ltd (No 3) [2003] 1 Qd R 26; [2001] QCA 191, cited
Johnson v Perez (1988) 166 CLR 351; [1988] HCA 64, cited
Keeley v Horton [2016] QCA 253, cited
Koch Marine Inc v D'Amica Societa di Navigazione ARL (The Elena d'Amico) [1980] 1 Lloyd's Rep. 75, cited
Payton v Brooks [1974] RTR 169, cited
Ruthol Pty Ltd v Tricon (Australia) Pty Ltd [2005] NSWCA 443, cited
Spencer v The Commonwealth (1907) 5 CLR 418, cited
Westpac Banking Corporation v Jamieson [2016] 1 Qd R 495; [2015] QCA 50, cited

COUNSEL: C C Heyworth-Smith QC and S M McNeil for the plaintiff
J B Sweeney and K J Horsley for the defendant

SOLICITORS: Hall & Wilcox for the plaintiff
Carter Newell Lawyers for the defendant

[1] The essential issue in contest is the salvage value of suits and other items that were affected by smoke and soot from a fire which started in a basement tenancy, close to the plaintiff's menswear store. The smoke and soot that entered the plaintiff's tenancy damaged most of the store's stock as well as fittings, furniture and equipment.

[2] The fire in the basement tenancy was caused by a vacuum cleaner supplied by the defendant to that tenant. The defendant admits liability in tort for property damage or economic loss caused to the plaintiff as a result of the fire.

[3] The plaintiff's tenancy had to be decontaminated and cleaned by a specialist cleaning contractor. Before the fire the plaintiff's stock was in a new, pristine condition and included luxury suits. Specialist chemicals and processes were required to remove soot from the suits and other stock. However, vacuuming and chemical dry sponging of the stock could not remove all the soot and the odour which impregnated the fabric. Dry cleaning would affect the fabric. The high quality and high retail value of the stock made it practically impossible to bring the items back to their pre-fire condition.

[4] There is no suggestion that the plaintiff's duty to mitigate its loss required it to sell the salvaged stock in its store.

[5] The plaintiff's insurer agreed to meet its claim for property damage, based on a careful assessment of the condition and value of the damaged stock. The insurer obtained a valuation

of the salvaged stock, which an experienced auctioneer and valuer proposed to sell on the insurer's behalf at an auction. Fearing the consequences of what an auctioneer's "fire sale" over which it had no control would do to its trade and goodwill, and to the reputation of the brands it stocked, the plaintiff agreed to pay $225,000 for the damaged, but salvaged, stock.

[6] The plaintiff claims the cost of decontamination and cleaning, and also the costs of engaging a forensic examiner/expert to investigate the cause of the fire. More significantly, it claims for damage to its property, measured by the difference between the wholesale value of the stock in an undamaged state and the salvage value of the stock.

[7] It claims $1,240,367 in respect of stock which was damaged by the smoke and soot. This sum represents the wholesale cost of the stock in the store at the time of a stocktake soon after the fire, less new purchases, undamaged stock and the salvage value of the damaged stock:

Total stock count	$1,683,974
Less new purchases	$34,231
Less undamaged stock	$184,376
Wholesale value	**$1,465,367**
Less salvage value of damaged stock	$225,000
TOTAL	**$1,240,367**

[8] The defendant denies the plaintiff's allegation that, after the stock was cleaned and treated by ozone rehabilitation and chemical sponging, its salvage value was no more than $225,000. The defendant does not admit that the undamaged stock had a value of $184,376. However, the evidence to be discussed establishes this fact.

The issues

[9] The substantial issues are:

1. Is the plaintiff's proposed measure of the property damage it suffered, namely the diminution in the value of the stock that came to be damaged, appropriate? As noted, the plaintiff seeks the difference between the wholesale value of the stock just before the fire and its salvage value shortly after the fire. Should the plaintiff's loss be assessed according to some other measure or at some other point in time?

2. What was the salvage value of the damaged stock after it was cleaned and treated?

3. Was the value of the undamaged stock $184,376?

[10] The defendant's submissions raised for the first time an issue in relation to the period for which statutory interest should be granted due to alleged delay in the commencement and conduct of the proceeding. These issues were not raised in response to the plaintiff's pleaded claim for interest. However, I will address them in due course.

The non-issue of avoided loss

[11] The defendant's pleading contended that if the plaintiff suffered the diminution in the value of its property alleged by it, then this loss was eliminated and avoided because it offered the

salvaged stock for sale at a "fire sale". It sought to invoke the "rule as to avoided loss",[1] under which it bore the onus. However, the defendant did not press this defence.

[12] Because the defence is not pressed, little might need be said about it. However, the evidence and issues which arose in relation to the rule as to avoided loss are reflected, to some extent, in the defendant's arguments about the plaintiff's loss and how and when it should be measured. Defence counsels' decision to not press the defence based on the rule as to avoided loss was appropriate. The evidence did not establish that the plaintiff made a net gain by conducting a "fire sale" of salvaged suits and other items.

[13] In addition, reliance upon the rule was misplaced because the decision to acquire the salvaged stock from its insurer, or retain title to it, was taken as a preventative measure to avoid that stock being sold to a third party and retailed in a manner which would do great damage to the plaintiff's trade, goodwill and reputation. Moreover, as Viscount Haldane LC observed in the leading case of *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No 2)*:[2] "The subsequent transaction, if it be taken into account, must be one arising out of the consequence of the breach and in the ordinary course of business."[3] As the plaintiff pleaded in reply, it was not part of the plaintiff's business, nor in the continuation of that business, that it should sell damaged stock or any stock that was not in a new, pristine condition.

[14] Avoided loss, if it is to be taken into account in mitigation of damage, must arise out of the act of mitigation itself.[4] The plaintiff's act in acquiring title to the salvaged stock, or retaining title to that stock pursuant to an agreement with its insurer, did not arise out of an act of mitigation in respect of the loss it suffered when its stock was damaged and could not be sold in the ordinary course in its store. The plaintiff mitigated the loss of its new stock by ordering and deploying more stock. It did not sell the salvaged stock in a "fire sale" in order to continue trading. Instead, it did so in order to avoid the additional damage which would be done by the salvaged stock passing out of its control and damaging its business.

[15] Although the defendant no longer relies on the rule as to avoided loss, the ghost of that defence haunts the case. The evidence the defendant assembled in an unsuccessful attempt to support a now abandoned defence is deployed to try to displace the normal measure of damages. The forensic accounting opinion evidence relied upon by the defendant suggests that, doing the best one can to work out what the salvaged stock sold for and what gross profit margins the plaintiff's store achieved over a lengthy period after the fire, the salvage value of the stock must have been more than $225,000. However, for reasons to be discussed, the evidence does not establish this.

Is the plaintiff's proposed measure of damages appropriate?

[16] The plaintiff's claim is for damage to property. It advances minor claims for consequential loss, such as the cost of decontaminating and cleaning its tenancy, including stock and other items.

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1 James Edelman, *McGregor on Damages* (Thomson Reuters, 20th ed, 2018) [278] 9-108 – [306] 9-165.

2 [1912] AC 673.

3 At 690.

4 *McGregor on Damages*, 20th ed, [283] 9-119; *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd* [2005] NSWCA 443 at [47].

The plaintiff does not claim for loss of trade, "business interruption" or other financial consequences of the fire.

[17] Where a defendant's tort has caused damage to a claimant's existing property, the general compensatory principle dictates that the claimant should be put into as good a position as if its property had not been damaged. As Professor Burrows states, there is a basic choice between:

(a) awarding the diminution in value of the property; and

(b) the cost of cure, comprising the cost of replacing or, if possible, repairing the goods.[5]

[18] Authorities can be found to the effect that the starting point in the case of damage falling short of destruction is that the normal measure is "the amount by which the value of the goods has been diminished".[6] However, as appears from the ship collision cases, this has been taken to be *prima facie* the reasonable cost of repair. As *McGregor on Damages* states, in the case of goods other than ships, the cost of repair has now become established as, *prima facie*, the correct measure of the claimant's loss.[7]

[19] If, despite the repairs, the market value of the goods is less than before, the claimant should be entitled to such diminution in value in addition to the cost of repair.[8]

[20] This principle applies in the present case since the decontamination and cleaning of the stock did not, and could not, return it to the condition it was in before the fire or to a condition in which suits were sold in the plaintiff's store. As a result, the stock's value was diminished despite all reasonable steps being taken to remedy the damage.

[21] When property is damaged, the owner suffers an immediate loss. The owner may suffer subsequent, consequential loss. Its loss may be mitigated so as to limit its recoverable loss. In any event, the conventional approach is to assess damages at the date when the cause of action arose. This rule is not universal. It may be departed from whenever it is necessary to do so in the interests of justice.[9] However, the general rule concerning the date of assessment exists for good reason, including the cost and complexity of investigating subsequent events and deciding normative questions about supervening causes, collateral benefits, the extent to which the claimant's financial position has been improved or impaired by its subsequent conduct and upon whom the risk of rises and falls in value should fall.

[22] In summary, the plaintiff adopts a conventional measure for damage to property. Because the decontamination and cleaning did not restore the suits to their original quality, the plaintiff

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5 Andrew Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd ed, 2004) 232, 236.

6 *Davidson v J S Gilbert Fabrications Pty Ltd* [1986] 1 Qd R 1 at 3 ("*Davidson*"), citing Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 14th ed, 1980) 706 [1030].

7 *McGregor on Damages*, 20th ed, [1124] 37-003.

8 Ibid citing *Payton v Brooks* [1974] RTR 169 at 176; *Davidson* at 5-6.

9 *Johnson v Perez* (1988) 166 CLR 351 at 355-356; [1988] HCA 64 at [6]; *Westpac Banking Corporation v Jamieson* [2016] 1 Qd R 495 at 537 [119]; [2015] QCA 50 at [119].

argues that it is entitled to the diminution in their value, in addition to the cost of cleaning. It seeks to measure this loss at about the time the loss was sustained. Strictly speaking, the diminution in value relates to the difference between the value the suits and other items would have had if they had remained undamaged and their value after they were cleaned. There is no suggestion that there was any market movement or other factor to make the difference between the date of loss on 29 September 2010 and the date when the items had been cleaned a few days later of any significance.

[23] The defendant recognises that in a case of property damage, falling short of destruction, the normal measure of compensation is the amount by which the value of the chattel is reduced because of the damage. It submits, however, that the Court is not compelled to adopt a normal measure and that the "normal measure" is only to be applied if it produces a fair result.

[24] The defendant points to parts of Mr Ogilvie's evidence about the consequences of the fire on his trade and his business. These include the fact that "a large and valuable inventory of new and pristine stock which had already been purchased was damaged such that it was no longer of the quality required by the business. The business stock inventory value immediately plummeted and the opportunity to sell such stock for its full expected retail value was lost." It also points to Mr Ogilvie's evidence that "the usual expected customer demand for the business' high quality product was temporarily redirected, and unusually accelerated to the large amount of greatly discounted product available in the fire damage sale". Thereafter there were "lower than expected sales levels". Mr Ogilvie also noted that there was "less tangible and subtle damage" caused to the business "by being associated with the heavily discounted fire damage sale of stock".

[25] A few matters may be noted about this evidence. First, apart from the "value immediately plummeted" (referable to the claimed diminution in value of stock), the plaintiff does not claim for these financial consequences. The plaintiff no longer makes a claim for trading losses or "business interruption". For example, it does not make a claim for loss of profit associated with lost sales on the basis that it would have been able to sell the damaged goods for their full retail value in an undamaged state.

[26] Second, the quoted evidence of Mr Ogilvie was relevant to the now abandoned defence of avoided loss, so as to point out that the sale of fire stock was not in the ordinary course of the plaintiff's business and, in any event, caused damage to the business and its trade. Also, the evidence was given in an affidavit in July 2017 at a time when the plaintiff was still pursuing a claim for interruption to its trade.

[27] The defendant concedes that if there was "a deal" between the plaintiff and its insurer (also described as a "buyback") by which the plaintiff agreed to take back the salvaged goods, then the Court could only rationally apply "the normal measure", assessed at the date of that transaction. According to the defendant, it would follow that the expert evidence would be irrelevant, unless that evidence tended to show that the exchange value of $225,000 was less than the market value.

[28] The defendant goes on to submit that if there was no "buyback" then the Court should consider whether or not to apply "the normal measure". Its principal argument is that the Court should look at an alternative measure because the plaintiff through Mr Ogilvie (as quoted above) "essentially makes complaint about the downstream *economic consequences* of the physical damage to his business over 2010 and into 2011". It argues that, if the fire had not occurred, the items in the plaintiff's inventory would have been converted into money by

retail sale between the date of loss and the date of judgment. This is said to suggest that the date at which the injury should be assessed should reflect the times of the intended sale, namely the period of October 2010 until November 2011. The defendant notes that plainly there were "serious potential economic consequences to the plaintiff from the fire". The plaintiff made the sensible decision to pursue the course that it did after the fire over 2010 and into 2011. These actions are submitted by the defendant to have made the consequences less serious than they would otherwise have been.

[29] These arguments are unpersuasive as to why the normal measure of damages should be displaced. In my view, it is not appropriate to assess the plaintiff's claim for property damage as if the plaintiff was claiming for a variety of "downstream economic consequences" including loss of trade, loss of profit, loss of goodwill and loss of business reputation.

[30] Moreover, the sale of fire damaged stock was not something that the plaintiff was required by its insurer to undertake or which the defendant submits the plaintiff was required to undertake in order to mitigate property damage to its stock.

[31] The plaintiff did not acquire the salvaged stock or retain it so as to replace its normal stock. It kept possession of the salvaged stock in order to avoid further harm. It thought that less harm would be done to its business by its control of a "fire sale" than the damage that would be done to its business and the brands it stocked by the salvaged stock being sold by others in competition with the plaintiff. This was not business as usual. As noted, any benefit to a claimant, if it is to be taken into account in mitigation of damage, must arise out of the act of mitigation itself.[10] The plaintiff's act in acquiring/retaining the salvaged stock and selling it did not arise out of an act in mitigation of the loss which is being claimed by it.

[32] It is unnecessary to address the authorities in connection with the rule as to avoided loss. It is sufficient to observe that the plaintiff advanced, in response to the defendant's now abandoned reliance upon the rule, a persuasive case that the sale of the salvaged stock did not attract the rule. Any compensating advantage might be described as "indirect or collateral" or not arising "out of the act of mitigation itself".[11] To adapt the words of Robert Goff J in *Koch Marine Inc v D'Amica Societa di Navigazione ARL (The Elena d'Amico)*[12], the plaintiff's decision to sell the salvaged stock was "an independent decision, independent of the breach, made by the [party] on his assessment of the market". It was a decision made by Mr Ogilvie on an assessment of the market for the salvaged stock if he did not negotiate with his insurer to retain it, the financial consequences to his business if others sold that stock and the financial advantages, disadvantages and risks of selling stock which he would not ordinarily sell in his business.

[33] Leaving aside "the rule as to avoided loss", the same normative question arises as to whether, if it is appropriate to depart from the normal measure of damage and the date for assessment, a supposed compensating advantage is "indirect", "collateral" or "independent" so that it should not be brought into account in assessing the claimed loss. The independent decision of the plaintiff, which it was not compelled to take to mitigate the claimed loss, carried both risks and rewards for it. The decision can be characterised as generating collateral or independent

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[10] *McGregor on Damages,* 20th ed, [283] 9-119.

[11] *Ruthol Pty Ltd v Tricon Australia Pty Ltd* [2005] NSWCA 443 at [51].

[12] [1980] 1 Lloyd's Rep. 75 at 89 col 1 cited in *McGregor on Damages*, 20th ed, [291] 9-135.

advantages and disadvantages which should not be brought into account in assessing a claim for property damage.

[34] If, despite these features, it was thought appropriate to attempt to assess the gains made by the plaintiff through the "fire sale" of damaged stock, it would be necessary to set off against those gains the various losses to which Mr Ogilvie alluded in his evidence (and which are quoted above) but which he does not claim. These include the loss of the opportunity to sell undamaged stock for its full retail value, the diversion of customers who might ordinarily have been expected to purchase an undamaged suit for its full price into acquiring a salvaged suit at the fire sale, resultant diminution in expected sales and other damage to the business' goodwill associated with selling heavily discounted fire damaged stock.

[35] In summary, Mr Ogilvie's evidence may have included evidence about what the defendant describes as the "downstream economic consequences" of the physical damage to his business during 2010 and 2011. However, the plaintiff does not claim those economic consequences, either as a category of direct loss or as consequential losses. In the circumstances, it is inappropriate to assess a claim for property damage by reference to a variety of financial advantages and disadvantages experienced by the business over a lengthy period.

[36] The cost and complexity of such a task is another reason to not depart from the normal measure. The plaintiff was not required to sell the damaged stock in order to mitigate its claimed loss. The sales in question were not in the ordinary course of its business. Any inquiry into the losses and gains made by the plaintiff as a result of the sale of the damaged stock would involve a number of factual investigations and normative judgments about whether those gains and losses were indirect or collateral. It would require investigation into gains and losses of a variety of kinds. It would include assessing the extent to which the defendant should be entitled to bring into account an advantage or benefit which the plaintiff gained as a result of taking the risk to sell salvaged stock which it was not obliged to sell by way of mitigation for the claimed loss. The costs and complexities of the defendant's attempted, but abandoned, invocation of the rule as to avoided loss are instructive. The investigation and analysis of financial consequences over the relevant period, including gains and losses incurred as a result of selling stock it would not ordinarily sell, would involve extensive forensic accounting analysis.

[37] In circumstances in which the defendant does not contest Mr Ogilvie's general evidence about the various adverse financial consequences of selling the salvaged stock, and did not attempt to quantify many of them, it is not apparent that a fair assessment (even if one was possible) of various losses and benefits from the sale of salvaged stock would reveal a net gain to the plaintiff.

[38] In my view, it is neither necessary nor appropriate to depart from the normal measure of damages for a claim for damage to property or to adopt a different date of assessment. It is not necessary to do so in the interests of justice.[13] In fact, to do so would be complex, costly and probably inconclusive.

[39] I reach this conclusion, irrespective of whether or not "the deal" done between the plaintiff and its insurer should be characterised as a "buyback". Even if there was no "buyback", the defendant's argument that damages should be assessed on the basis of the economic

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[13] *Johnson v Perez* (1988) 166 CLR 351 at 355-356; [1988] HCA 64 at [6].

consequences to the plaintiff over a period in 2010 and into 2011 mischaracterises the nature of the plaintiff's claim as one for "downstream economic consequences". In fact, the plaintiff's claim is a simple one for damage to its goods. The acquisition or retention of the damaged goods was a decision made by the plaintiff in order to avoid *future* losses to its trade, its goodwill and its business reputation if another party had acquired them and marketed them in a manner which damaged the plaintiff's business. It was an independent decision of the plaintiff which carried risks and rewards. The actual outcome of that decision over a lengthy period was affected by a number of supervening causes. The corresponding advantages and disadvantages to the plaintiff from the decision to trade in salvaged goods are collateral in terms of causation. In any event, the evidence has not attempted to capture and assess all of them. The plaintiff does not claim to recover for the disadvantages it encountered in selling salvaged stock. The defendant's expert was not asked to assess the various advantages and disadvantages the plaintiff encountered in selling salvaged stock. It would have been a complex, costly and probably inconclusive exercise, whether or not there was a "buyback".

[40] The defendant has not persuaded me that the measure of damages proposed by the plaintiff, which is acknowledged to be the normal measure, should be departed from. I conclude that the measure of damages proposed by the plaintiff is an appropriate one in the circumstances.

The facts in more detail

The business and the fire

[41] The plaintiff's business, Mitchell Ogilvie Menswear, was established by Mr Ogilvie in 1981. It stocks luxury Italian suits and business shirts, made-to-measure luxury suits, everyday business attire as well as casual wear and high-end accessories. In 2010, the retail store was located at 190 Edward Street.

[42] The fire which originated on 29 September 2010 in a vacuum cleaner in the basement tenancy of a jewellery business caused soot and smoke to enter into the plaintiff's store. It had wood grain wall panelling, parquetry flooring, wool carpets and decorative lighting throughout. Most of the stock was hanging on display. There was some stock folded on tables and shelves throughout the store, with a small amount of stock behind glass cabinets or in cupboards or drawers.

[43] The fire caused a fine layer of soot to cover most, if not all, of the clothing stock in the store, the store fit out, floor coverings, horizontal surfaces (shop counters, cabinetry and display tables), and even in drawers. The store and its contents had a strong smoke odour. The soot fell predominantly on horizontal surfaces, as it fell from the ceiling once it cooled. The soot had a greasy residue, which is caused by synthetics burning. It appeared on clothing to be a grey film, but when touched, the soot left a black mark on a person's skin.

[44] There was a pungent smoke odour throughout the premises after the fire. The clothing stock had a smoke odour, caused by soot particles impregnating the stock. This occurs when the room pressurises and fills with smoke, which envelopes the items and enters the weaving of the fabric.

Cleaning of stock and store

[45] At the time of the fire, the plaintiff had a Commercial Special Risks policy of insurance with Allianz Australia Insurance Ltd. The policy insured the stock in the store. The plaintiff made a claim on that policy and Allianz engaged Cunningham Lindsey loss adjusters to assess the

property damage at the store. Mr Hanlon of Cunningham Lindsey then engaged CIRiS Commercial Industrial Restoration Insurance Services ("Ciris"), a business which supplied commercial decontamination and restoration services.

[46] On and from 30 September 2010, Mr Haynes of Ciris began to project manage the restoration works (being the cleaning and decontamination) of the store and stock.
Mr Ogilvie wanted to get his business operational as quickly as possible, and Mr Hanlon gave Mr Haynes authority to commence work as quickly as possible.

[47] They discussed the potential restoration of the stock against the replacement of the stock and the possibility of dry-cleaning the garments. Mr Haynes expressed the view that:

(a) the soot as well as odour which impregnates into the fabric of the material would need to be dealt with;

(b) the only way to remove the odour was dry-cleaning (to remove all carbon residue from within the clothing materials).

[48] Mr Ogilvie and Mr Haynes agreed that the clothing could not be dry cleaned as the high quality of the clothing would be compromised. Once a high-end fabric has been dry-cleaned, it is noticeably altered or changed. Mr Haynes, Mr Hanlon and Mr Ogilvie agreed that it would be practically impossible to bring the items back to a re-sellable
pre-incident condition due to the high retail value, high quality of the stock and the soot contamination.

[49] Mr Haynes ultimately recommended the cleaning and decontamination work including:

(a) pre-vacuuming all stock, contents, fixtures and fittings, throughout the property;

(b) chemical dry sponging fabric-based items;

(c) removing contaminants from fixtures and fittings by way of wet wipe alkaline treatment and then neutralise;

(d) arranging for a commercial carpet cleaner to attend and clean all carpets and affected upholstery, clean/scrub and reseal the parquet floors; and

(e) after-hours ozone treatment of the premises as an odour control measure.

[50] Between 30 September and 6 October 2010, chemical cleaning (by chemical dry sponging and cleaning) of the stock was carried out, the purpose of which was to try and increase potential return on salvage value. Between 12 October 2010 and 9 November 2010 further works were carried out including onsite ozone treatment, stripping and re-sealing the parquetry floors and undertaking a detailed final clean.

[51] The results were variable. Some of the suits and other clothing looked worse than they had before cleaning as the sponging had smeared soot. For some stock, chemical cleaning improved its condition close to its original appearance, but did not restore its pre-incident condition.

[52] After the restoration works had been carried out, Mr Haynes sent a letter to Mr Hanlon in which he stated, among other things:

> "Upon initial inspection we noted a fine layer of soot contamination and fallout had settled on the entire clothing stock, store fit out and floor coverings …
>
> We have worked through the store and decontaminated the fit out and content items. Stock clothing items (suits, pants, belts, ties etc) have all individually been chemical sponged to remove as much residue from the surfaces as possible. It is our opinion that to remove all carbon residue from within the clothing materials, these items would require specialist dry cleaning, and an ozone treatment to remove any residual smoke odour. Treating these items for odour without the prior dry cleaning will be unsuccessful as there will still be a source within the material. This being said, the insured has outlined that dry cleaning is not an option, as their internal policy is that the dry cleaning would damage their top quality products."

Mr Haynes noted that after carrying out of the process of the pre-vacuum and chemical sponge "there was still a pungent odour right though all the garments."

The salvaged stock

[53] The wholesale value of the stock within the plaintiff's tenancy at around the time of the fire was $1,683,974. On the basis that there was a quantity of stock that was not damaged which totalled $184,376 (a fact not admitted by the defendant), and that, at the time that the relevant stock list was produced, a quantity of new stock had arrived in store which had a value of $34,231, the wholesale value of the damaged stock immediately before the fire was $1,465,367.

[54] Mr Hanlon decided that due to the extensive soot contamination nothing could be done to return the clothing products to their as new condition. He recommended to Allianz that there was a total loss of trading floor stock and made recommendations as to the salvage.

[55] Mr Ogilvie was advised by Mr Hanlon that pursuant to the terms of the insurance policy, Allianz was entitled to retain the damaged stock when it made a payout under the policy and to recoup the salvage value of that damaged stock. The policy provided:

> "9 INSURER(S) RIGHTS
>
> On the happening of any loss, destruction or damage in respect of which a claim is or may be made under this Policy the Insurer(s), and every person authorised by the Insurer(s) may, without thereby incurring any liability, and without diminishing the right of the Insurer(s) to rely upon any Conditions of this Policy, enter, take or keep possession of any building or premises where the loss, destruction or damage has happened and may take possession of or require to be delivered to the Insurer(s) any of the property hereby insured and make keep possession of and deal with such property for all reasonable purposes and in any reasonable manner."

[56] Allianz proposed two options as to how to deal with the salvage of the damaged stock:

(a) an assessment of the damaged stock with a payment to the plaintiff equivalent to its wholesale cost, or value net of GST, where the property would become the property of Allianz and later sold on behalf of Allianz for salvage value; or

(b) for the plaintiff to offer to retain the damaged stock at its agreed salvage value, following which the plaintiff would then be responsible for dealing with the damaged stock, for example by holding a fire damage sale and bearing the risks of the outcome of that process.

[57] The business' stock had been accumulated by Mr Ogilvie over a number of years, through trips to Europe, selection of appropriate styles and pre-ordering stock from suppliers. Replacement stock for that damaged in the fire could not be delivered immediately. The business could not properly service its regular customers until replacement stock arrived, and Mr Ogilvie was concerned that the business would have to work hard to rebuild the loyalty and custom from long standing customers. Additionally, the high-end labels that were stocked had exclusive supply arrangements and relatively small production output. The clothing labels that the business stocked were highly protective of their reputation and brand. Mr Ogilvie's supplier relationships, some of which have existed over many decades, require continual time and attention to maintain.

[58] Mr Ogilvie was concerned that:

(a) the sale of premium label stock by a party unknown to the suppliers in a damaged state and at discount prices would be of great concern to his suppliers;

(b) stock might be purchased in large quantities by clothing retailers operating in a different segment of the market and put forward as new stock at greatly reduced prices. There would be no ability for him to control whether or not the stock was sold in a poor condition when ultimately retailed to the public; and

(c) a public auction would have resulted in the damaged stock being sold in an unknown condition outside of the business' control, which would potentially cause damage not only to the business' reputation but the reputation of his suppliers.

As a result, Mr Ogilvie wanted to be able to control how and when the damaged stock was placed on the market. He advised Mr Hanlon, via his broker, that the plaintiff was prepared to pay $150,000 to $200,000 in exchange for the damaged stock (10 to 15 per cent of the wholesale value).

The decision to obtain a salvage valuation from Mr Webber of Lloyds

[59] Mr Ogilvie was advised that Mr Hanlon did not consider his offer to represent the true salvage value for the damaged stock, and that a high-end clothing auctioneer would need to be appointed to advise Allianz of what constituted an acceptable value.

[60] Mr Hanlon engaged Mr Webber, a valuer with over 20 years' experience and the Managing Director of Lloyds Auctioneers & Valuers, to prepare a salvage valuation and a proposal for the sale of the damaged stock by public auction. Mr Hanlon considered Lloyds to be a valuer and auctioneer with the experience required for high-end clothing such as the damaged stock in the store. Mr Webber had experience in providing valuations of damaged stock, specifically high-end clothing which had been damaged by fire, smoke or water.

[61] Lloyds was also asked to provide a net guarantee for the sale of the salvage. Mr Webber attended the store and inspected the damaged stock in early October 2010. He formed the view that the stock could not be sold at its original retail value because it had been damaged by smoke and soot, retained the smell of smoke, and exhibited changes in aesthetics from the soot.

[62] In carrying out his inspection he assessed the quality of the stock, the extent of damage and how the stock would appeal to potential customers. He walked through the entire store to assess the stock and individually inspected a sample of the stock (probably between 50 to 100 items of stock including suits). He followed his usual process in respect of inspecting damaged stock:

(a) he was provided with a stock list or something similar as a starting figure for the retail value of the stock, pre-damage;

(b) he inspected a sufficient sample of the stock to satisfy himself that the retail value he had been provided with was accurate.

(c) he then assessed the damage to the sample of the stock and assessed, on a per piece basis, the likely cents in the dollar figure that individual pieces of stock would achieve at an auction; and

(d) once that process had been carried out for an appropriate sample, he extrapolated those figures to the entirety of the stock.

[63] Having carried out this process, he was satisfied that the pre-damage retail value of the stock was approximately $4.5 million, as outlined in the plaintiff's stock list.

[64] On 7 October 2010 Mr Webber produced a report in which he:

(a) advised that the estimate of realisation of the damaged stock was between $220,000 and $450,000 with net guaranteed proceeds of sale of $195,000 (gross guaranteed proceeds of $220,000) if such auction was conducted by Lloyds, with Lloyds' commission to be increased from 12.5 per cent to 22 per cent if the gross exceeded $210,000; and

(b) recommended a well-advertised public auction at Lloyds' premises on 22 and 23 November 2010, with advertising expenses up to $7,000 and colour brochures at a cost of $1,500.

[65] The figures outlined in his report were based on his inspection and the pre-damaged retail value of the stock being $4.5 million dollars. He says that, based on his experience and his inspection of the sample stock, he considered that an appropriate estimate of the realisation of the pre-damaged *retail value* for the damaged stock was between 5 cents to the dollar at the low range and 10 cents to the dollar at the high range, which yielded a monetary range of between $220,000 and $450,000. He considered that $195,000, being the net guaranteed proceeds of sale, was a reasonably safe figure, being below 5 cents to the dollar, as he was reasonably confident he could meet or exceed that figure at a public auction.

[66] Mr Webber's opinion about what a buyer would be willing to pay for the damaged stock at auction was based on his experience with damaged stock and public auction sales.

Further negotiation with Mr Ogilvie

[67] In light of Mr Webber's valuation, Mr Ogilvie increased his offer to Allianz to $225,000 for the damaged stock. On the basis that the offer exceeded Lloyds' net guarantee of $195,000, the offer was accepted.

The fire sale

[68] A decision was made by the plaintiff to hold a one-off "fire sale". Nothing like it had been held at the business before. The two annual end of season sales held each year were quite unlike the fire sale. The "fire sale" was held over a two week period between 29 October and 10 November 2010.

[69] Undamaged stock was available for sale during the period of the fire sale, comprising the undamaged stock with a wholesale value of $184,376, and the new stock which arrived in store before the stock was counted, with a wholesale value of $34,231.

[70] During the first few days of the fire sale, there was an "all hands on deck" approach needed by the staff. There was a line of people down the middle of the shop waiting to have their sale processed. Significant discounts were offered on damaged stock. For example, the store was selling 10 items for $199, which included shirts that were usually sold for $250 each and other casual clearance items usually sold for up to $595.

[71] The business used the "Swingtag" program, a point of sale program that assisted the business to keep track of stock available at any time. The system uses an SKU number, being the identification number allocated within Swingtag when the stock was first entered on it after arrival at the store.

[72] Due to the significant discounts and multiple items being purchased at the fire sale, it was easier for staff to enter an "open code" SKU in the point of sale system for a miscellaneous payment of $199 instead of scanning 10 items and reducing them all manually by 90 per cent. This was not the usual practice for end of season sales, but was necessary during the fire sale in order to process the large number of sales that were being made quickly. As a result, individual items were not recorded through the system as having been sold but were grouped into one transaction.

[73] Not all of the damaged stock was sold during the fire sale. The leftover stock was put away in the storeroom to be brought out during the next sale in January/February 2011. When the stock was brought out at the end of season sale period it remained at fire sale prices. Customers were told it was fire damaged stock.

Operation of the business after the fire sale

[74] Sales after the fire sale were not as strong as usual, as some customers' suiting needs had already been met. This was particularly the case with the January/February 2011 end of season sale.

[75] After the fire the business had a reduced amount of stock. However, new stock which had been ordered before the fire began to arrive from 1 October 2010. Over time, stock levels built up again. Between the date of the fire and 21 December 2010, the plaintiff received deliveries of new stock (which had already been ordered) in store which had a wholesale value of $511,256.90. There was also stock undamaged by soot and smoke available for sale at this

time, with a wholesale value of $184,376. Consequently, by around January 2011, the wholesale value of brand new stock available for sale in the store was approximately $695,632.

[76] The business continued to trade throughout 2011. By the end of that year, arrangements were in place for the store to move premises. In October 2011 a moving sale was held. A significant amount, if not all, of the fire damaged stock had been sold or disposed of before the move.

Business records and the inability to accurately assess the sale price of salvaged stock

[77] The plaintiff's employees included an operations manager, a stock manager (Ms Braadvedt) and a bookkeeper. In 2010, another employee, Ms Guyatt, created monthly MYOB reports and spreadsheets based on data that had been entered by the stock manager and reconciled the business accounts. The MYOB reports then were used to create the business' annual financial returns.

[78] The data entered by the bookkeeper, which Ms Guyatt accessed, was entered into a system called "ICAD". "Swingtag" is effectively the next model of ICAD. This program has been used by the plaintiff since 2008.

[79] In 2010, when stock arrived at the business, it was Ms Braatvedt's responsibility to enter information about the new stock into Swingtag. The process she followed was as follows:

- With the invoice received with the stock, determine the cost price which may include calculating an exchange rate from Euro or USD to Australian dollars;
- Factor in if the plaintiff received a discount;
- Add Duty, GST and freight charges;
- Then calculate the retail price of the stock and enter all information into the Swingtag system.

[80] In addition to determining the above costs and retail price of an item of stock, Ms Braatvedt was responsible for entering further information about a stock item into Swingtag, as well as the database holding additional information about the items, which included:

- An SKU identification number;
- A description of the item, including design, colour and size;
- How many of the item there were;
- The date the item arrived into the shop, and if the item was sold, the date it sold; and
- Information about who it was sold to, and any discounts given.

[81] There is a feature of the program which overwrites the existence of particular items (SKU codes) within the system after a time. Ms Braatvedt discovered this feature when comparing sales as recorded in the Swingtag records against MYOB records. Based upon her review of the program data and the various reports, she concluded that if a SKU code lies dormant for roughly two years, the program will effectively pick that SKU up again and assign it against a new item of stock.

[82] For this and a variety of other reasons which were explored in the evidence, the business' records in relation to the sale of salvaged stock could not accurately isolate and arrive at the sale price of the salvaged goods, as distinct from new goods that were sold at or about the same time as the "fire sale" and the other sales at which the salvaged goods were sold.

What was the salvage value of the damaged stock after it was cleaned and treated?

[83] Adopting the conventional measure of damages, the significant issue in contention, as identified in the pleadings, is whether, after the stock was cleaned and treated by ozone rehabilitation and chemical sponging, it had a "salvage value of not more than $225,000". To be clear, the issue is the salvage value of the partly cleaned and partly rehabilitated damaged stock as a whole as at early October 2010. Expressed differently, it is the wholesale value of the damaged stock at that date. Whether characterised as a "market value" or an "exchange value",[14] one is concerned with the price, in cash or kind, which would be obtained for the property in question in an arm's-length dealing between a willing but not anxious seller and a willing but not anxious buyer.[15]

[84] The salvage value of the property in question in this case, assessed by reference to the price that would be paid in such a transaction in early October 2010, should not be confused with a different price from a different kind of transaction. It should not be confused with, for example:

(a) the prices which an auctioneer *might* obtain from members of the public at an auction at some later date (less sales costs) together with the value of the residue of stock that could not be sold at auction; or

(b) the prices a hypothetical retailer, having purchased all of the salvaged stock, *might* achieve in selling at an established retail store, or at a "pop up store" for fire damaged stock, over some period of time (less sale costs), together with the value of the residue of unsold stock; or

(c) the prices that the plaintiff in fact achieved in selling the fire damaged stock at a "fire sale" in October/November 2010 and in subsequent sales in 2011.

The evidence relied upon by the plaintiff

[85] The plaintiff places particular reliance in its case about the value of the salvaged stock as at October 2010 upon the expert evidence of Mr Webber and the view formed by three commercial entities at the time (an experienced auctioneer and valuer, a commercial insurer and the plaintiff) about what the stock was worth. Particular reliance is placed upon:

(a) the plaintiff's original offer to purchase the salvaged stock for $150,000 to $200,000;

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[14] *Boland v Yates Property Corporation Pty Ltd* (1999) 167 ALR 575 at 595 [79]; [1999] HCA 64 at [79] per Gleeson CJ ("*Boland*") citing *Spencer v The Commonwealth* (1907) 5 CLR 418 at 431.

[15] *Franke v CIC General Insurance Ltd* (1994) 33 NSWLR 373 at 376.

(b) Mr Webber's assessment of its value and the range from $220,000 (gross) to $450,000 (gross) which he thought the stock might achieve at an auction conducted by his organisation;

(c) the minimum auction guarantee of $195,000 offered to the insurer;

(d) the plaintiff's offer of $225,000; and

(e) the insurer's acceptance of this offer.

[86] The relevant market for the sale of fire damaged suits and other stock is entirely different to the market for sale of new suits to retailers or consumers. There is not the same "established market" or "readily identifiable market".[16] However, there is a market for the sale of damaged stock of high quality clothing brands, and Mr Webber of Lloyds Auctioneers and Valuers has considerable experience in the valuation and sale of damaged stock. This includes the salvage sale of suits. When consulted in October 2010 by the loss adjuster, Mr Hanlon, Mr Webber recommended conducting a well-advertised public auction where all of the stock would be auctioned at Lloyds' premises at Carrara. He outlined a marketing program and its cost, together with a commission structure whereby Lloyds would receive 12.5 per cent up to $210,000, and 22 per cent thereafter. This commission structure was one that placed the risk that the stock would sell for less than $220,000 upon Lloyds, given its minimum net return guarantee of $195,000.

[87] Mr Webber's proposal of 7 October 2010 gave an estimate of realisation at the proposed auction of between $220,000 and $450,000. His expert report and affidavit explained that, based on his experience and his inspection of the stock, an appropriate estimate of the realisation of the pre-damaged retail value for the damaged stock was between five and ten cents to the dollar. He explained in his evidence, persuasively, that his figures took into account that the customer base that would be interested in a smoke or soot damaged suit were not the plaintiff's usual customers. The market to buy the damaged suits would be people who were expecting to pay very low prices for the damaged high-end stock. Mr Webber gave oral evidence, which I accept, about his inspection of the relevant stock.

[88] The defendant submits that the "range of values for the stock" given by Mr Webber of between $220,000 and $450,000 justifies the finding that $325,000 was the post-fire value of the stock. However, the range of $220,000 to $450,000 was the range of expected total sale prices at an auction in November 2010, before a deduction of the costs of sale and commission. Mr Webber did not say that his company would buy the salvaged stock from the insurer or from the plaintiff for any price. His company, Lloyds, was in the business of selling salvaged stock at auction, not buying it.

[89] Any willing, but not anxious, buyer of the salvaged stock, either from the insurer (if the insurer paid the plaintiff the sum assessed for its loss of stock and thereby acquired title to the salvaged stock) or from the plaintiff (if it chose to retain title to the salvaged stock and accept a reduced payment from its insurer) would take on the risk that the stock, so acquired, would sell for less than $220,000 (gross) as well as the opportunity to on-sell the stock for more than $220,000 (gross).

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[16] *Boland* at 595 [79].

[90] The opportunity to share in the potential benefit of the stock selling at Lloyds' auction in November 2010 for more than $220,000 was the proposal which Mr Webber put to the insurer. This proposal also included that the insurer would receive $195,000 (which took account of commission and sales costs) if the stock sold at auction for less than $220,000. Faced with this proposal, the insurer preferred the plaintiff's offer of $225,000. In other words, it accepted a proposal which offered it $30,000 more than the guaranteed return of $195,000 proposed by Mr Webber.

[91] This guaranteed return of $195,000 was a net figure. To obtain more than this net figure, would require gross sales of more than $220,000, from which sales costs and commission would be deducted. In order to achieve a net figure of $225,000 from Lloyds' proposed auction, the minimum gross sales would have to have been about $275,000:

GROSS SALES	$275,000
Less COSTS/COMMISSION	
(a) Promotion/advertising	$8,500
(b) Commission	
○ 12.5% on $210,000	$26,250
○ 22% on $65,000	$14,300
	$49,050
GROSS SALES LESS COSTS/COMMISSION	$225,950

[92] As noted, the plaintiff relies upon the actual transaction in October 2010 between it and the insurer, informed as it was by Mr Webber's experience and professional advice and the risks and rewards to the insurer of accepting Lloyds' auction proposal, as the best evidence of the value of the salvaged stock in October 2010.

[93] The defendant acknowledges that if there was an "exchange transaction" in which the exchange value of the transaction was $225,000, then the Court could only rationally apply "the normal measure" assessed at the date of that transaction. It also acknowledges that if that transaction can be regarded as capturing the "market price", then the transaction would be compelling evidence of market value after the fire being $225,000.

[94] The defendant, however, goes on to submit that the transaction of $225,000 should not be seen as capturing the "exchange value" or "market value" because both the insurer and the plaintiff were "overanxious" to do a deal. I will return to that contention shortly.

[95] Before doing so, I would add that, in my view, a transaction of $225,000 being compelling evidence of market value (assuming a willing but not anxious vendor and a willing but not anxious purchaser) does not depend upon an exchange transaction in which there was a "buyback". The defendant uses that term to describe a transfer of title to the salvaged property from the plaintiff to its insurer and an agreement to buy the property back for $225,000. In my view, an estimate of the "salvage value" of the relevant property should have regard to the substance of the transaction between the plaintiff and its insurer. If, in fact, there was no transfer of title to the insurer and no "buyback", there nevertheless was a

transaction between the plaintiff and its insurer about what the plaintiff was prepared to accept as a reduction in its insurance payout in order to retain title. Such an agreement or transaction, as with a "buyback" transaction, provides important evidence of market value in circumstances in which the plaintiff was not legally obliged to retain the salvaged stock and to undertake its sale as part of a duty to mitigate.

[96] In short, for present purposes, consideration of the "exchange transaction" between the plaintiff and the insurer does not depend upon characterisation of the transaction as a notional "buyback" or an actual "buyback" with a transfer and immediate re-transfer of legal title for the salvaged stock. Either way, one is concerned with what price the plaintiff was prepared to place on the salvaged stock in an arm's-length agreement with its insurer, and what price the insurer was prepared to accept. That price reflects the substance of the transaction.

[97] In deciding the "exchange value" or "market value" of the subject matter in question, an actual transaction at the relevant time of the same subject matter is important, indeed compelling, evidence of market value.

[98] I return to the issue of whether the weight of that evidence is diminished because, according to the defendant, the insurer and the plaintiff were "overanxious to do a deal". I am not persuaded of this. The insurer was not anxious. It had an interest in obtaining the best price it could in the circumstances from the sale of the salvaged stock. It was not obliged to offer the stock to the plaintiff. It might, if it assessed it to be in its best interests, accept Mr Webber's proposal in the hope of netting more than $225,000. The course of selling the stock to the plaintiff for $225,000 was strongly recommended to the insurer by a loss adjuster, Mr Hanlon, who has extensive experience in claims, including high end clothing. Mr Hanlon considered that the public auction outcome predictions provided by Mr Webber were not necessarily achievable and that the outcome of a public auction sale process is "highly fickle and can be affected by unpredictable factors beyond the seller's control". Acting on the advice of Mr Hanlon, and considering where its best interests lay, the insurer accepted the plaintiff's offer of $225,000, and this sum was ultimately deducted from the insurer's payout to the plaintiff.

[99] As to whether the plaintiff was anxious or not, it was not anxious to acquire or retain the salvaged stock so that it could be sold in the ordinary course of its business. On the contrary, it was interested in buying back or retaining the stock so that an uncontrolled sale did not do damage to its business. If anything, the plaintiff was probably prepared to pay more than another potential buyer would have paid for the salvaged stock in order to avoid this loss.

[100] Having received the plaintiff's offer of $225,000, the insurer did not seek any further offer from any other auctioneers. The defendant points to this fact and notes that the price an item sells for "after taking adequate steps to obtain offers represents the best evidence of its post-damage market value".[17] However, the insurer was not obliged to seek offers from any other auctioneers. There is no evidence that any auctioneer would have offered the insurer a better proposal than the one advanced by Mr Webber. There is no evidence that Mr Webber would have improved his guaranteed minimum return if he had been asked to do so after the insurer received the plaintiff's $225,000 offer. It was not suggested to Mr Webber in his evidence that he would have done so if the insurer had asked him.

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[17] *Davidson* at 7.

[101] The defendant did not call evidence from any auctioneer or valuer to contradict the evidence of Mr Webber. It did not call evidence from a suit seller, an entrepreneur or anyone else about what he or she would have paid the insurer to buy the smoky suits and other stock.

[102] In the circumstances, the evidence pointed to by the plaintiff, including Mr Webber's proposal, the plaintiff's various offers and the insurer's acceptance of an amount of $225,000 in respect of the salvaged stock, is cogent evidence of the price that would have been achieved between a willing but not anxious vendor and a willing but not anxious purchaser of the same subject matter at the same time.

Expert accounting evidence

[103] The defendant's submissions rely upon the expert accounting evidence in connection with its contention that there was no "buyback" and that therefore an alternative measure of loss should be adopted. I have earlier concluded that an alternative measure of loss should not be adopted, even if one was to conclude the transaction was one in which there was no "buyback" in the sense of a transfer and re-transfer of title. The defendant also points to some of the accounting evidence as evidence upon which reliance can be placed in arriving at a salvage value in October 2010. The essence of the defendant's argument is that one does not see a large reduction in the plaintiff's gross profit margins, even during the "fire sale months", and this suggests that the loss of value was not as great as the plaintiff contends.

[104] Mr Haley produced four expert reports for the defendant. The first two were largely superseded by his third report. Simply stated, Mr Haley attempted to trace the sale of stock that was in the store on 29 September 2010 and of new stock that entered the store after the fire. The attempt to arrive at the value of the stock that was sold over a substantial period of time and to arrive at a value for the so-called "fire stock"[18] at the date of the fire proved fruitless for a number of reasons. One reason is that it was premised on a "first in/first out" theory. The defendant's submissions accept that the application of this theory makes Mr Haley's attempt "largely fruitless". There were many other problems associated with the exercise undertaken by Mr Haley. These need not be detailed at this point. They appear in the plaintiff's submissions and in the evidence of Mr Box.
Mr Haley's analysis was based on an incomplete data source. Importantly, it made assumptions about the period over which the salvaged stock was sold, which was inconsistent with the unchallenged evidence of Ms Braatvedt and Mr Rondo that, after the fire sale, the damaged stock was put in a storeroom, and only brought out again and offered for sale at the next end of season sale. Further, any attempt to rely upon sales figures and gross profit margins for particular months and to translate them to the sale of damaged stock is difficult because the relevant sales were for a more limited period, not the whole month. Also, undamaged stock was sold at the same time as damaged stock. The post-fire store trading performance could not be isolated to damaged stock because the sales data was a combination of sales of damaged and undamaged stock (including stock that was not damaged in the fire, stock from another store and new stock purchased after the fire).

[105] There are numerous reasons as to why the data relied upon by Mr Haley and his analysis of it do not permit a conclusion to be reached about the outcome of the plaintiff's sale of the salvaged stock. However, even if it had been possible to identify the sales that were achieved

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[18] This term when used by Mr Haley was not limited to the damaged stock, but extended to stock at the time of the fire which was undamaged.

in respect of the salvaged stock, and to attribute to them appropriate costs for achieving those sales, and to thereby arrive at an estimate of the profit or loss achieved in selling those items, that would not permit one to arrive at an appropriate figure for the value of the salvaged stock in October 2010. The sales figures, which did not accurately or comprehensively distinguish between the sale of salvaged stock and new stock, were achieved over a substantial period. The sale of salvaged stock must have had an effect on what would have been the ordinary course of business. The gross profit margin achieved on selling all stock sold over a certain period might be calculated. However, that relates to an actual outcome. That known outcome does not indicate what the financial performance of the business would have been if the salvaged stock had not been included. More importantly for present purposes, that actual outcome does not determine what someone in the plaintiff's position (or, indeed the plaintiff itself) would have been willing to pay in early October 2010 in order to achieve the financial results that were in fact achieved. In early October 2010 those outcomes were unknown and unpredictable.

[106] The exercise undertaken by Mr Haley does not take into account the risk which the plaintiff undertook in purchasing damaged stock and selling it, compared to the ordinary risk/reward involved in acquiring its normal stock. One is not concerned with what the plaintiff would have been prepared to pay for new, pristine replacement stock in October 2010, knowing, with the benefit of past sales experience what the stock, so acquired, might be expected to sell for and so as to achieve, with all other things being equal, a usual gross profit margin.

[107] I agree with Mr Box's critique that Mr Haley's analysis failed to recognise the risks assumed by the plaintiff in retaining or repurchasing the stock when the plaintiff had never before undertaken a sale of fire damaged goods, and where there was no certainty as to the demand for the damaged stock items or the prices that they might realise.

[108] The outcome that was in fact achieved was not an outcome that would have been known at the time the decision was made to retain or purchase the salvaged stock as part of the settlement of the plaintiff's insurance claim.

[109] In my view, it is artificial to work back from the actual sales that were achieved in relation to a sales period during which salvaged stock was sold, consider a gross profit margin which the business customarily achieved and, by applying a certain gross profit margin arrive at a value for the relevant stock in September 2010. Apart from anything else, the actual sales performance of the business over a substantial period might have been affected by a variety of extraneous factors including management, competition, general economic conditions, the state of the retail industry, exchange rate fluctuations and many other matters that would bear upon sales and profit.

[110] Even if it was possible to arrive at a reasonably accurate figure for the total sales of the salvaged stock (and there are many reasons why this simply is not possible) it would be impermissible to apply a gross profit margin associated with the usual conduct of the business in selling new stock, so as to arrive at a notional price that the plaintiff would have been prepared to pay to acquire or retain the salvaged stock in order to achieve that gross profit margin. One reason is that the plaintiff was taking on an unknown risk, with a variety of adverse consequences for its business, and might be expected to heavily discount the price it was prepared to negotiate with the insurer to take that risk.

[111] As the forensic accounting expert called by the plaintiff, Mr Box, pointed out, and as the defendant acknowledged in its submissions, the plaintiff's business records do not allow one to identify what the stock on hand at the time of the fire sold for, and whether it sold for a lower

gross profit margin than would ordinarily be expected. The plaintiff's sales records do not record whether a sale was an item of stock on hand at the time of the fire or an item that was purchased after the fire. They also do not record whether the stock on hand at the time of the fire was damaged or undamaged.

[112] Without descending into unnecessary detail in relation to a forensic accounting analysis that has been overtaken by events and appropriate concessions in the defendant's submissions, Mr Haley's analysis was largely based on an analysis of the gross profit margins achieved on sales in the 12 to 15 months after the fire. Some of his analysis attempted to trace the sale of items of stock that were in the store on 29 September 2010 and of new stock that came into the store after the fire, based upon the plaintiff's sales system. In undertaking this exercise, he divided the stock into two categories which he described as "fire stock" and "non-fire stock". However, these definitions are problematic because he defined "fire stock" in terms of the stock on hand at the date of the fire according to a certain stock sheet. Therefore, what he described as "fire stock" included both damaged and undamaged stock. Even then, the analysis confronted a number of problems. These included its reliance on an incomplete data source. Mr Haley was unable to identify the relevant transactions for more than $1 million wholesale value worth of stock, or 60 per cent of the admitted wholesale value stock of $1,683,964. As previously noted, the analysis was based on a "first in/first out" theory. The plaintiff explains in its submissions, and Mr Box also explains, why this assumption should not have been adopted. Since the defendant accepts that the application of "first in/first out" makes Mr Haley's analysis largely fruitless, it is unnecessary to outline those reasons.

[113] Mr Haley's analysis assumed that the damaged stock was sold for a period of 12 months, or alternatively 15 months, after the fire. At one stage, he expressed the view that the proportion of fire stock to total sales in the post-fire period was 85 per cent to 15 per cent. However, this cannot be right when regard is had to the acquisition of stock into the store and the uncontested evidence that the damaged stock was only sold for very limited periods during the two week "fire sale" and during some subsequent sale periods.

[114] The defendant submits that an alternative 55 per cent/45 per cent division suggested in Mr Haley's fourth report might be adopted. However, in my view, that still involves unproven assumptions. As noted, between the date of the fire and 21 December 2010 the plaintiff received deliveries of new stock (which had previously been ordered) into the store, which had a wholesale value of $511,256.90. This was in addition to the existing stock of undamaged items which the plaintiff quantified at $184,376 (to be discussed below). The evidence is that while stock levels were down after the fire sale in the last few months of 2010, the store was reconfigured and stock was spaced out to make the store look fuller so that it could return to a normal business operation, and appear that way to customers. The evidence also is that a large amount of new stock was received in around January 2011.

[115] Leaving aside the problem of incomplete data, and the recognition in Mr Haley's analysis of "missing sales" and an inability to verify sales of $681,378, there is no allowance for unsaleable stock. The business does not hold any documents relating to stock items that were damaged so severely that they could not be sold during the fire sale. Mr Ogilvie's affidavit suggests that a small amount of stock was unsaleable and was disposed of in an "all items for $10" bin. In a different context, the defendant's submissions seek to contrast the number of suits that were advertised for sale in a "fire sale brochure" and the claimed number of damaged suits. The reason for any difference was not explored in cross-examination of the plaintiff's witnesses. The possibility exists that the advertised quantity of suits available at the "fire sale" did not state the number of damaged suits that were held and which were available for sale. Another

possibility is that Mr Ogilvie's recollection of the number of suits that were disposed of is inaccurate. The experts agree that after the fire the plaintiff disposed of fire damaged stock considered unsaleable, but the value of the stock disposed of is unknown. It is sufficient to observe that the number of damaged suits and other items that were unsaleable and disposed of is another "known unknown".

[116] Because one does not know the sales mix between undamaged stock and damaged but salvaged stock, no reliable conclusion can be drawn about the gross profit margin achieved in the sale of the salvaged stock.

[117] In short, it simply is not possible on the available evidence, or appropriate, to rely upon the actual financial performance of the business over the substantial period considered by Mr Haley (either a 12 or 15 month period) or even the so-called fire sale months (when the mix of salvaged and new stock sales cannot be accurately isolated) in order to arrive at a figure for the "salvage value" of the stock in early October 2010.

[118] In addition to matters relating to the assumptions and data upon which Mr Haley's analysis and opinion is based, there is a significant issue concerning the methodology by which he ventures opinions about the wholesale value of the damaged stock. In essence, his approach, on the basis of incomplete data, is to attempt to determine a loss of gross profit margin, either by reference to a period of 12 or 15 months or by reference to some shorter period. This is done by attempting to determine what the stock sold for, arriving at a figure for the loss of gross profit and then applying that per centage loss to the wholesale value. This proceeds on the basis that the ultimate sale price is relevant to determining the loss of wholesale value. Mr Box correctly questions the correctness of an assumption that the per centage loss of wholesale value of stock would be the same as the per centage loss of receipt upon sale. Most importantly, as previously discussed, such an approach does not take into account the risks as to the price the damaged stock could be realised for in the immediate aftermath of the fire. It does not take into account the then unknown, adverse consequences of selling fire damaged stock on the plaintiff's normal trade, goodwill and reputation. In early October 2010 a person in the plaintiff's position would expect a large discount on the normal wholesale value of the relevant stock in order to take these unknown and unpredictable risks.

Conclusion on salvage value

[119] The arm's-length transaction between the plaintiff and its insurer in relation to the actual subject matter to be valued, being a transaction which occurred at the time which is relevant for the assessment of loss, is the best evidence available of the value of the salvaged stock. This conclusion does not depend upon whether the transaction is characterised as one in which title to the salvaged goods passed to the insurer and was immediately transferred back to the plaintiff for $225,000, or one in which the plaintiff's insurance claim was settled on the basis that the plaintiff could retain the salvaged stock with an adjustment of $225,000 to the insurance payout on account of its value.

[120] The defendant's submission that a figure of $325,000 as the post-fire value of the stock would be appropriate is not supported by the evidence. The fact that that figure falls within the range given by Mr Webber is an insufficient justification. That range relates to the sale price which might be expected at a Lloyds' auction before deduction of sale costs and commission. To achieve a net return of $325,000 would require total auction sales to gross at the top of that range. Moreover, the submission begs the question as to why the insurer, with the advice available to it from experienced adjusters, auctioneers and valuers, was prepared to accept a figure of $225,000, rather than take its chances that Lloyds' auction might achieve gross sales

of more than $275,000. The answer would appear to be that the insurer was not willing to take that risk. The negotiated price of $225,000 was $30,000 more than the price guaranteed by Mr Webber.

[121] The defendant has not called valuation or any other evidence from an auctioneer, valuer or even an entrepreneur with an interest or experience in buying and selling salvaged suits. In the absence of such valuation evidence, the best evidence of value is the price negotiated for the relevant subject matter at the relevant time in an arm's-length transaction between two commercial entities. In the circumstances, an appropriate assessment of the salvage value of the stock after it was cleaned and treated is $225,000.

Was the value of the undamaged stock $184,376?

[122] The figure of $184,376 for undamaged stock is derived from a document which was prepared for the specific purpose of assessing the stock that was damaged and the stock that was not damaged. This task was undertaken by employees of the plaintiff and representatives of the insurer, including Mr Hanlon and those who assisted him. At some stage, Mr Ogilvie and Mr Hanlon undertook a comprehensive manual count of all stock. The relevant document is a 48 page spreadsheet which lists stock. One column is devoted to undamaged stock and those figures total $184,376.

[123] Mr Hanlon's evidence about the comprehensive manual count of all stock was convincing. The first aspect of the exercise was to ensure that the stock report itself was accurate. He explained that in any areas that soot or odour did not migrate to, the parties agreed that the items were not damaged and there was a physical count of them. The items were scanned and recorded as undamaged. It seems that all or most of the relevant items were in a storeroom, some four levels up, and well away from the source of the fire. All or most of the stock that was on the ground floor was affected by odour or soot and was treated as damaged.

[124] The defendant does not admit the figure of $184,376. It submits that the figure is "demonstrably too low" and places particular reliance upon the fact that it does not include any suits as being undamaged. The defendant submits that "it is clear" from the evidence that some suits were in the stockroom and therefore were undamaged. The plaintiff contests that the evidence establishes this, based upon the reliability of the process and the list that was produced. It also relies upon the fact that Mr Hanlon was not cross-examined and tested with the proposition that there were undamaged suits in the stockroom.

[125] The defendant places reliance upon some of the oral evidence of Ms Braatvedt, who was involved in the process. However, Mr Braatvedt's affidavit did not say anything about suits being amongst the undamaged stock. Instead, it recounted the process by which Mr Ogilvie, Ms Blanch (who worked with Mr Hanlon at Cunningham Lindsey) and she inspected the undamaged stock and, having regard to the stocklist, which also was found to be accurate, agreed that goods with a wholesale value of $184,376 had not been damaged by the fire. In her oral evidence Ms Braatvedt's recollection (almost nine years after the event) was that the unaffected items were mainly shirts and ties that would have been in plastic and "lots of cuff links". When asked under cross-examination about suits in the stockroom, Ms Braatvedt said she "could guess" and that underneath the rails there "may have been suits, may have been some trousers, but … I don't know." Earlier, when asked about suits in the stockroom, her recollection was that the "top layer of suits got soot on them" but that others were unaffected by soot. Her later evidence showed no clear recollection of how many suits were normally in the stockroom. She said most suits were "on the floor" and it was only "double ups" that were upstairs. She could not recall if there were suits and trousers in the "small stockroom" that

were underneath any suits on the top rails. Her initial recollection of suits *in the stockroom* being damaged by soot may be imperfect. However, if it is accurate, it says nothing about whether there were undamaged suits beneath them which were unaffected by soot or smoke. She really could not recall any. Her evidence falls short of proving that there were undamaged suits in the stockroom.

[126] Mr Hanlon was cross-examined about the process of identifying and recording undamaged stock. His evidence supports the conclusion that the stock list of damaged and undamaged items that was prepared through the process in which he and the plaintiff's employees were engaged is reliable. He confirmed that the stock in the storeroom was deemed to be not damaged. He could not recall the exact stock. His evidence was that as he and others inspected the undamaged stock, and confirmed the wholesale and retail value of that stock, they counted everything. It was not by testing a number of random samples.

[127] Mr Hanlon did not give specific evidence about suits in the stockroom or their state. If the defendant wished to challenge the accuracy of the record that was created in relation to undamaged stock, then its case might have been advanced by putting to Mr Hanlon that the list of undamaged stock was inaccurate, particularly in relation to the non-inclusion of suits and shoes.

[128] Mr Ogilvie's evidence did not indicate that there were undamaged suits in the stockroom. Under cross-examination he gave some brief evidence as to how undamaged stock was determined and mentioned that some of the undamaged stock was in drawers and some of it was in the stockroom. His recollection when giving evidence was that very little on the ground floor was not affected.

[129] Mr Ogilvie's evidence, like the other oral evidence at the trial, does not call into question the accuracy of the document which produced an agreed list of undamaged stock and that its wholesale value totalled $184,376. The evidence has not established that there were some suits in the stockroom that were undamaged and which were omitted from the list of undamaged items. Instead, the evidence tends to prove that the undamaged items were almost entirely in the stockroom and were correctly recorded. Therefore, it is inappropriate to engage in the kind of exercise invited by defence counsel of discounting or adjusting calculations on the basis of assumptions, that, for example, 10 per cent of the suits were undamaged.

[130] The relevant stock spreadsheet was prepared through a careful, consultative process involving an experienced loss adjuster who undertook a physical count. No good reason is advanced as to why the loss adjuster would permit undamaged suits to be recorded as damaged.

[131] The evidence, including the document upon which the plaintiff places reliance, being a contemporaneous document prepared precisely for the purpose of identifying damaged and undamaged stock, sufficiently proves the plaintiff's case that the undamaged stock had a value of $184,376.

The plaintiff's claim for property damage

[132] The plaintiff's approach to the assessment of its property damage claim is appropriate. The elements of its calculation have been outlined above. The defendant admitted the following matters:

(a) The wholesale value of the stock as contained in the plaintiff's tenancy at the time of the fire was $1,683,974;

(b) The plaintiff had purchased new stock, which was received into store after the fire, but prior to the counting of the stock, which was not damaged and had a value of $34,231;

(c) The cost of decontamination and cleaning of the tenancy (including stock, floors, walls, ceilings, furniture and equipment) in the sum of $22,085.28;

(d) The engagement of a forensic examiner/expert in respect of investigating the cause of the fire in the sum of $10,061.24.

[133] The plaintiff has established the components of its calculation of loss. Some of these components were admitted. The value of undamaged stock of $184,376 has been adequately proven. The disputed value of the salvaged, damaged stock has been established to be $225,000. Accordingly, the plaintiff has established that the property damage loss which it suffered at the date of the fire should be assessed at $1,240,367.

The balance of the plaintiff's claim

[134] The costs incurred in carrying out the decontamination and cleaning of the tenancy and stock is a category of loss which is recoverable. No argument is advanced by the defendant to the contrary. The plaintiff also contends that its engagement of a forensic examiner was recoverable. The defendant's pleading denied an entitlement to recover the costs of those investigations. However, the table at [133] of the defendant's submissions accepts that the costs of cleaning, forensic examination and loss assessment in the agreed quantum are recoverable. For completeness, I add there is a reasonable argument that the cause of the fire needed to be investigated at or about the time the storeroom and stock were being cleaned and decontaminated lest there be any argument concerning the cause of the fire and its consequences for the plaintiff. Arguably, such a cost might also have been claimed as part of the plaintiff's costs of the proceeding. However, in circumstances in which the defendant does not advance an argument as to why these costs were not consequential and linked to its negligence, I am inclined to allow their recovery. The same applies to the costs of Mr Hanlon in assessing the extent of loss and damage. The costs incurred for work carried out by Mr Hanlon ($6,195) should be recovered in the absence of any argument as to why those losses were not consequential losses that are recoverable.

Interest

[135] The plaintiff claims interest on the sum of $1,278,708 from the date of the fire until judgment.

[136] The plaintiff pleaded a claim for interest from the date of the fire, pursuant to s 58 of the *Civil Proceedings Act* 2011 (Qld). The defendant did not plead any matters that were said to suggest that the plaintiff should not be awarded statutory interest, or only awarded interest over a shorter period. Incidentally, when the parties were required to identify issues to be determined at the trial the defendant did not nominate the awarding of interest or the period over which it should be awarded. Against that background, it is unsurprising that the plaintiff did not call evidence concerning matters which might affect the discretion to award interest.

[137] The defendant raised the issue in its written submissions and contended that:

(a) instead of obtaining interest from the date of the fire to trial, the plaintiff should be limited to statutory interest from the date of commencement of the proceedings; and

(b) there were delays in the conduct of the proceeding.

The plaintiff objected to these matters being raised for the first time in final written submissions. However, I am prepared to address the matter in the interest of resolving the proceeding without further costs and delay.

[138] I was not favoured with any authorities by the defendant in support of its submission that the plaintiff's statutory interest should be limited due to delay. Because the matter was not raised sooner, the plaintiff was not in a position to cite authorities in its written or oral submissions.

Relevant principles

[139] Section 58 confers a broad discretion to award interest, including the period over which it is awarded. The purpose of the provision is to compensate a successful plaintiff from being kept out of the judgment sum.[19] The proper approach to the exercise of such a discretion is that interest ought to be granted, unless there are proper reasons for withholding it.[20]

[140] As to the relevance of delay, the leading statement of principle remains that of McPherson JA in *Interchase Corporation Ltd v Grosvenor Hill (Qld) Pty Ltd (No 3)*.[21] Those principles were discussed and applied in *Cerutti v Crestside Pty Ltd*[22]:

> "[89] … Interest may be awarded from the date the cause of action arose, the date of demand for compensation or for some other period. Often the relevant period is between the cause of action accruing and the date of judgment.[23] As McPherson JA observed in *Interchase Corporation Limited v Grosvenor Hill (Queensland) Pty Ltd (No 3)*:
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> > 'In a perfect world, a defendant who injured a plaintiff would immediately recognise the wrong done and pay the amount of compensation required to make good the loss. For reasons that are self-evident, that never happens in practice, and the justification for awarding interest is, as s 47 recognises, to compensate for the delay in payment between the time when the cause of action arises and the date of judgment.'[24]
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> [90] His Honour (with whom McMurdo P and Thomas JA agreed) also stated that it not immediately apparent why, as a matter of justice, that delay in

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[19] *Keeley v Horton* [2016] QCA 253 at [7].

[20] *Hadzigeorgiou v O'Sullivan* [1983] 1 Qd R 55 at 57.

[21] [2003] 1 Qd R 26; [2001] QCA 191 (*"Interchase"*).

[22] [2016] 1 Qd R 89; [2014] QCA 33.

[23] *MBP (SA) v Gogic* (1991) 171 CLR 657 at 663; *Haines v Bendall* (1991) 172 CLR 60 at 66-67.

[24] *Interchase* at 52 [59].

> instituting or prosecuting proceedings should operate to defeat or reduce a plaintiff's right to receive interest as compensation for the whole of the period during which the amount was not paid. Quite apart from the loss to the plaintiff, the defendant has had the benefit of the money, and may be assumed to have put it to good use.[25] Still, the authorities recognize that it would sometimes be unfair to order a defendant to pay interest for the whole period between accrual of the cause of action and the date of judgment. One example is where the plaintiff has been guilty of unreasonable delay in prosecuting the claim.[26]
>
> …
>
> [96] The applicants also complain that there was no evidence before the primary judge to suggest that the 'very great and unexplained delay in bringing the matter to trial' was their fault. It is said that there was evidence on the file which explained the delay and the role of the respondents in respect of it. There is no rule that delay in itself restricts the period over which interest may be awarded.[27] Unreasonable delay may be taken into account, but even in such a case, the plaintiff has been kept out of its money for the entire period."

[141] After referring to the fact that a defendant may take steps to bring a matter on for trial,[28] the Court observed:

> "Reducing the period over which interest is awarded is not the most appropriate device to ensure that a plaintiff conducts proceedings with expedition, and **the governing principle remains that interest is awarded to compensate the plaintiff for having been kept out of money from the date the cause of action accrues**. …"[29] (emphasis added)

Application of these principles

[142] The proceeding was commenced three and a half years after the fire. The investigation and formulation of such a claim is necessarily complex. The plaintiff had six years within which to commence such a proceeding. The defendant has not established that the plaintiff acted unreasonably in delaying commencement of the proceeding. The defendant does not advance a good reason as to why interest should not be awarded from the date the cause of action arose.

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[25] Ibid at 53 [61].

[26] Ibid at 53 [61]-[62].

[27] Ibid at 54 [63].

[28] *Cerutti v Crestside Pty Ltd* [2016] 1 Qd R 89 at 123 [101]; [2014] QCA 33 at [101].

[29] Ibid at 123 [102].

[143] I turn to the period between the commencement of the proceeding and judgment. The defendant's submissions note that parts of the plaintiff's pleading in reply were struck out and that evidence came in "in dribs and drabs". This necessitated the preparation of additional expert reports in the light of the further evidence. The late provision of an expert report in February 2019 led to the trial being adjourned, with an award of indemnity costs against the defendant. It appears then that the late provision of documents and costs thrown away by the adjournment were addressed appropriately by a costs order.

[144] In any event, in recent years the expensive exercise of obtaining further forensic accounting reports, and obligating the plaintiff to provide additional documents upon which the defendant's expert could base calculations, may be attributed, at least in part, to the defendant's:

(a) unsuccessful attempt to rely upon an unconventional approach to the measurement of damage; and

(b) pleading of a defence which relied upon the rule of avoided loss, being a defence which lacked merit and which was eventually abandoned.

While some of the costs and delay associated with the case may be attributed to the plaintiff seeking at one stage damages for business interruption, a significant amount of delay and cost appears to have been contributed to by the defendant's ambitious attempts to prove that the property loss claimed by the plaintiff should not be measured according to the normal measure or was avoided or eliminated by mitigating action. These attempts were unsuccessful and must have contributed to delay in the matter being ready for trial and a delay in the matter eventually coming on for trial.

[145] I am not in a position to be satisfied that any particular period of pre-trial delay was solely attributable to the plaintiff. In any event, pre-trial delay by a plaintiff is only one factor which must be taken into consideration.

[146] As stated in *Cerutti*[30], reducing the period over which interest is awarded is not the most appropriate device to ensure that a plaintiff conducts proceedings with expedition, and the governing principle remains that interest is awarded to compensate the plaintiff for having been kept out of money from the date the cause of action accrues.

[147] The defendant has not advanced a sufficient reason for me to exercise my discretion in relation to interest by limiting the period to only "part of the period between the date when the cause of action arose and the date of judgment".[31] In the circumstances, I exercise my discretion to award interest from the date the cause of action arose, 29 September 2010, to the date of judgment. Calculating interest according to the Court interest calculator, interest is assessed at $795,799.

Conclusion

[148] There will be judgment for the plaintiff for:

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[30] Ibid.

[31] *Civil Proceedings Act* 2011 (Qld) s 58(3).

(a) damages in the sum of $1,278,708;

(b) interest thereon from 29 September 2010 to 31 May 2019 in the sum of $795,799

being $2,074,507.

[149] If necessary, I will hear the parties in relation to costs. Otherwise, the order for costs will be that the defendant pay the plaintiff's costs and incidental to the proceeding to be assessed on the standard basis.

[150] The plaintiff's claim is one for damage to property. Its evidence is that the fire caused it a variety of losses including loss of stock, loss of trade and loss of profits. But it does not claim all those losses. Because it does not claim both for loss of stock and loss of profits, no occasion arises to consider the problem of overlap or double compensation for the loss of stock, being stock which would have been disposed of by sale in deriving a profit, the loss of which is also claimed.

[151] What seemingly prompted the plaintiff to confine its claim to property damage and not press an additional claim for "business interruption to its trade", is the problem of properly proving the loss of profit it suffered as a result of the fire, including from the loss of business it suffered because of a temporary reduction in stock levels.

[152] The problem of proof arises because after the sale it was not "business as usual", selling the same stock to the same clientele, but with a temporary reduction in stock levels. Instead, the plaintiff continued to sell high quality undamaged stock, but also conducted the unusual business of a "fire sale" of damaged goods to both its existing customers and others who were attracted to a fire sale. However, its sale records do not indicate whether a sale was for stock on hand at the time of the fire or whether the sale was of damaged or undamaged stock. The problem of proving what sales the plaintiff would have achieved if there had not been a fire, and how many of those sales were lost altogether and how many were diverted into buying heavily discounted, salvage stock is obvious. The evidentiary problems of properly proving a loss of profits claim does not mean that profits were not lost, and other economic loss suffered, as a result of the fire. Instead, it explains why the plaintiff simplified its claim to one capable of relatively easy proof: damage to its property.

[153] The problem of proof, in circumstances in which a fire sale was conducted and business records mixed sales of both damaged and undamaged stock, explains why the plaintiff's loss of stock (or economic loss in general) cannot be fairly assessed by reference to sales over a lengthy period after the fire, such as a 12 month period or until the store closed.

[154] The plaintiff does not claim for all the economic consequences of the fire. It is not required to do so when, on any view, problems of proof and the cost and complexity of proving them all are so great.

[155] The defendant does not suggest that the evidence is such as to allow all of the economic consequences to the plaintiff, referred to by Mr Ogilvie, to be captured and quantified. All of the financial advantages and disadvantages to the plaintiff of trading in the unusual circumstances in which it found itself in late 2010 and into 2011 cannot be properly measured. The plaintiff does not seek to claim and measure all its losses over that period. The defendant does not say the evidence permits this to be done.

[156] The plaintiff, faced with problems of proving all of the losses it suffered as a result of the fire, is entitled to frame its claim as one for property damage which was suffered at the time of the fire. The conventional approach to measuring such a loss is an appropriate one in the circumstances of this case. The plaintiff has proven the components of its claim according to that measure.