SUPREME COURT OF QUEENSLAND

CITATION:	*Kotku Bread Pty Ltd v Vero Insurance Ltd & Anor* [2012] QSC 109
PARTIES:	**KOTKU BREAD PTY LTD (ACN 089 980 772)** (plaintiff) **v** **VERO INSURANCE LIMITED (ACN 005 297 807)** (first defendant) and **786 INTERNATIONAL (AUST) PTY LTD (ACN 010 805 222)** (second defendant)
FILE NO:	BS 2284 of 2011
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	26 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	13-17, 20, 23 and 24 February 2012 and 21 March 2012
JUDGE:	Applegarth J
ORDERS:	**1. The plaintiff's claim against the first defendant is dismissed.** **2. Judgment be entered for the plaintiff against the second defendant for damages in the amount of $2,706,300 together with interest to be assessed.**
CATCHWORDS:	INSURANCE – GENERAL – MISREPRESENTATION AND NON-DISCLOSURE – Statutory remedies – where contents of building destroyed by fire – where plaintiff's fixtures, fittings, equipment and stock insured by first defendant – where the internal construction of the building comprised a high proportion of highly flammable Expanded Polystyrene ("EPS") – whether in response to a question about EPS in an online insurance proposal form the plaintiff, through its broker, the second defendant, had not disclosed or misrepresented the amount of EPS in the building's internal construction – whether the first defendant, by means other than the answer, knew that the internal walls had a substantial amount of EPS – whether the plaintiff made a misrepresentation or breached its duty of disclosure – whether the first defendant is entitled to reduce its liability to

nil pursuant to s 28(3) *Insurance Contracts Act* 1984 (Cth)

INSURANCE – INSURANCE AGENTS AND BROKERS – GENERAL DUTY OF CARE – where the plaintiff engaged the second defendant as its insurance broker over several years – where an employee of the second defendant completed an online proposal for insurance with the first defendant – where in response to a question about EPS in the online proposal the second defendant gave an incorrect answer – where, had the correct answer been given, the proposal would have been declined by the first defendant – whether the second defendant failed to warn the plaintiff of the significance of EPS and failed to make proper inquiries as to its presence – whether the second defendant breached its duty of care to the plaintiff and contractual retainer

Insurance Contracts Act 1984 (Cth), ss 21, 28

Esanda Finance Corporation Ltd v Colonial Mutual General Insurance Co Ltd (1993) 217 ALR 180, cited
Evans v Sirius Insurance Co Ltd (1986) 4 ANZ Ins Cas 60-755, cited
Gaiform v Suncorp (1992) 7 ANZ Ins Cas 61-143, cited
Geoffrey W Hill & Associates (Insurance Brokers) Pty Ltd v Squash Centre (Allawah North) Pty Ltd (1996) ANZ Ins Cas 61-012, cited
HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640, cited
Jones v Dunkel (1959) 101 CLR 298, cited
Macfie v State Government Insurance Office (Qld) (1985) 3 ANZ Ins Cas 60-606, applied
Marvin Manufacturers (Aust) Pty Ltd v Chamber of Manufacturers Insurance Ltd (1992) 7 ANZ Ins Cas 61-122, cited
Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd (1991) 25 NSWLR 541, cited
Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd (1977) 16 ALR 23, cited

COUNSEL: P J Dunning SC and C A Johnstone for the plaintiff
A P J Collins for the first defendant
P H Morrison QC and N H Ferrett for the second defendant

SOLICITORS: Bennett & Philp for the plaintiff
Carter Newell for the first defendant
Sparke Helmore for the second defendant

[1] The plaintiff ("Kotku") operated a bakery business from premises at Capalaba. On 19 August 2010 the premises which it occupied were destroyed by a fire. It lodged a claim under a policy of insurance that it had with the first defendant ("Vero") and claimed indemnity for destruction of and damage to its fixtures, fittings, equipment and stock. Vero's assessors assessed the loss at $2,716,300.

[2] The second defendant ("OIB"), an insurance broker, had placed the insurance with Vero. Previously it had placed Kotku's insurance with Suncorp-Metway Insurance Limited ("Suncorp"). Suncorp had insured Kotku's business for several years, long before it relocated its bakery to the Capalaba premises in 2006, and continued to insure the business at its new location.

[3] Suncorp acquired Vero in 2007. It decided that Vero should take over its Small to Medium Enterprise ("SME") policies. Suncorp/Vero established systems for insurance brokers, such as the broker in this case, to simply and efficiently take out a new policy with Vero. Certain information that Suncorp had was "pre-populated" onto Vero's computer system to enable brokers to complete the necessary forms online to transact the policy. OIB effected such a policy for Kotku when a member of its staff, Ms Moore, used Vero's Enterprise system on 22 February 2010. The policy covered the period of 12 months starting 8 March 2010.

[4] Vero declined Kotku's claim under the policy. In December 2010 it asserted that the way in which OIB had completed the application form online conveyed a misrepresentation about the amount of Expanded Polystyrene ("EPS") in the internal walls of the premises. It also asserted non-disclosure in respect of the answer given to a question about EPS.

[5] OIB's employee, Ms Moore, denied having completed the form in the manner alleged by Vero. A substantial part of the trial was occupied with evidence from information technology experts and other witnesses about whether Vero's computer system asked a Trade Specific Question ("TSQ") about EPS. Vero's case is that on 22 February 2010 its Enterprise ("e2") computer system asked OIB ("the TSQ"):

> "What percentage of the internal construction comprise EPS (Sandwich Panelling) eg in walls, lining, ceilings, cold rooms and general fit out?",

and required OIB to select one of the following three responses from a drop down box that appeared on the broker's computer screen:

> "Zero Percent
> 1 to 33 Percent
> Over 33 Percent".

Its case is that Ms Moore selected the answer "Zero Percent".

[6] There is no dispute that the internal construction of the premises comprised a substantial amount of EPS. On one approach to calculation it is as high as 67 per cent. On any view of the evidence an answer "Zero Percent" misrepresented the true amount.

[7] Kotku seeks:

(a) indemnity from Vero pursuant to the policy in the amount of $2,716,300 together with interest and costs; or

(b) alternatively, as against OIB, loss and damage for negligence and/or breach of contract in the same amount.

[8] Vero's defence is that the answer given by the broker to the TSQ was untrue, a misrepresentation within the meaning of s 28 of the *Insurance Contracts Act* 1984 (Cth) ("the Act") and was given in breach of Kotku's duty of disclosure under s 21 of the Act. It says that if the true level of EPS at the premises had been disclosed to it by Kotku or by OIB on Kotku's behalf, then Vero would not have issued the policy or insured Kotku's contents, equipment and stock. It says that if the response "Over 33 Percent" had been selected to the TSQ, then its computer system would have informed OIB that the requested policy was declined. It says that in the circumstances it is entitled pursuant to s 28 of the Act to reduce its liability in respect of the claim to nil on account of a failure to comply with Kotku's duty of disclosure or the misrepresentation conveyed by the alleged "Zero Percent" response.

[9] Kotku denies that its broker was asked and answered the TSQ. Although Kotku knew of the "Sandwich Panelling" in the walls of its premises (which its director Mr Cavus described in his evidence as "coldroom panel"), it says that it did not know of it as EPS and was unaware that it was a matter that was relevant to Vero's decision to insure its business' contents, equipment and stock. It says that it relied on the expertise of its broker, OIB, to exercise care in placing the requested cover.

[10] Kotku's primary position is that Vero is not entitled to deny indemnity under the policy because the TSQ was neither asked of OIB on 22 February 2010, nor answered as alleged by Vero. If, however, Vero establishes a misrepresentation/ non-disclosure in respect of the answer, and is entitled to reduce its liability under the policy to nil, then Kotku claims against OIB in contract and in negligence on the basis that OIB breached its duty of care and its retainer in answering the question as it did, and, more generally in failing to inquire about the presence of EPS (Sandwich Panelling) and in failing to inspect the premises.

The issues

[11] The issues in the proceedings may be summarised as follows.

Is Kotku entitled to be indemnified by Vero under the policy?

1. Is Vero entitled, pursuant to s 28(3) of the Act, to reduce its liability under the policy to nil because of the alleged misrepresentation/non-disclosure entailed in answering the TSQ "Zero Percent". The main factual issues in that regard are:

   (a) Was the TSQ pleaded by Vero asked at the time OIB completed the online application on 22 February 2010?

   (b) If so, did OIB, through Ms Moore, select the answer "Zero Percent"?

(c) If so, was the answer a misrepresentation because the percentage of EPS was substantial, and more than 33%?

2. Vero's case is that the correct answer was "Over 33 Percent" and that this answer would have been met with a "hard decline". There is evidence, including evidence from OIB, that cover was readily available from other insurers.

3. OIB contends that the correct response to the TSQ was "1 to 33 Percent" and that if this answer had been given, then Vero's system would have accepted the risk without further steps, such as a survey, being required.

4. If, however, the correct answer was "Over 33 Percent" and Vero would have declined the risk if the TSQ had been correctly answered, then Vero was entitled, pursuant to s 28(3) of the Act, to reduce its liability under the policy to nil.

If Vero is entitled to reduce its liability under the policy to nil, was OIB negligent or in breach of contract in failing to obtain the requested cover?

5. There is no substantial dispute about the nature of the duty owed by OIB to Kotku under OIB's retainer and under the general law. However, Kotku and OIB have some differences concerning the scope of the duty.

6. There is no dispute that if the TSQ was asked:

(a) OIB in the discharge of its retainer was obliged to ascertain Kotku's answer to the TSQ before submitting the same to Vero; and

(b) OIB did not conduct its own inquiries or ask Kotku if EPS/Sandwich Panelling was present.

7. There is no dispute that if OIB on behalf of Kotku was asked the TSQ and the answer given was "Zero Percent", whereas the correct response was "Over 33 Percent", then:

(a) the answer was wrong and a misrepresentation by Kotku for the purposes of s 28 of the Act; and

(b) in giving that answer OIB would have failed to discharge its duty to Kotku.

In addition, OIB accepts that if certain matters alleged by it are not established, there would also have been a non-disclosure of a fact which would have affected Vero's decision to grant cover. The matters that OIB raises are whether Vero as at February 2010 had knowledge:

(a) of the presence of EPS at the premises; and

(b) that the percentage of EPS comprised approximately 35% of the internal construction of the premises.

OIB relies on the fact that in 2006 another broker, Comsure Insurance Brokers Pty Ltd ("Comsure"), which was seeking to be engaged by Kotku, informed Suncorp in writing of the existence of "internal insulated panelling" at the premises. Comsure's document was treated by Suncorp as an approach by Comsure to place new business. The Comsure inquiry did not lead to the placing of insurance with Suncorp. OIB remained as Kotku's broker, and continued to renew the policy on Kotku's behalf.

8. OIB nevertheless argues that the information given to Suncorp by Comsure in 2006 was information known to Vero in 2010, and relies on the fact that in February 2010 Vero represented to Kotku and OIB that it would rely on the information given to Suncorp when Kotku first took out insurance "as well as any other information provided to Suncorp". It alleges that, as a consequence, Vero knew (or should be taken to have known) that there was a substantial amount of EPS in the building. As a result, this fact did not have to be disclosed.

9. Vero responds that, according to well-settled principles governing the state of an insurer's knowledge, the information which did not go beyond Suncorp's new business section in 2006 was not known by Vero.

10. OIB also relies on the unpleaded fact that Comsure provided certain information to Vero by telephone in 2006. Vero responds that there is no documentary evidence to support the conclusion that Vero ever had the requisite knowledge.

11. OIB contends that, on the basis of the information provided by Comsure in 2006, the existence of a substantial amount of EPS was already known so that no duty of disclosure arose in respect of that matter. Alternatively, it submits that if that fact was not known to Vero, in the particular circumstances the scope of the duty owed by it did not extend to seeking to discover the extent of EPS as a prelude to disclosure of those facts.

12. OIB submits that if the misrepresentation occurred, and there was a breach of duty, no loss flowed from its breach because:

    (a) the correct answer to the TSQ was "1 to 33 Percent" so that, even if the correct answer had been given, Vero would have accepted the risk without further steps;

    (b) Kotku, through Comsure, had already disclosed the existence of a substantial amount of EPS so that the duty of disclosure had previously been fulfilled;

    (c) Kotku was aware, from its discussions with Comsure, that the extent of EPS in the building was a fact that might affect an insurer's decision to accept the risk; and

    (d) at best, the scope of OIB's duty was to advise Kotku that the extent of EPS was a fact which might affect Vero's decision to accept the risk, and that was a fact of which Kotku was already aware, but said nothing.

13. Kotku's response to these arguments is that:

    (a) the duty of OIB as a competent broker was to warn Kotku, which OIB knew relied on it, of the fact that coldroom panelling which OIB was told was present, could be EPS and that EPS was a matter of material interest to an insurer;

    (b) the fact that EPS was a matter of interest to an insurer was generally known in the broking industry, and OIB was aware that the presence of EPS was a material concern to Vero. OIB's failure to raise this matter with Kotku at all was negligent and a breach of its retainer;

    (c) in any event, OIB should have inspected the premises itself so that it was capable of answering the questions asked of it by Vero, given that at no time did OIB seek to clarify any of the information provided to Vero prior to submission;

    (d) Kotku was aware of the presence of "insulated panelling" and told Mr Hamill of Comsure about this in 2006, but was not aware of the significance of insulated panelling, that the insulated panelling was EPS and that the presence of EPS was a matter of concern to insurers; and

    (e) OIB failed in not inquiring about, or ascertaining through inspection, the extent of EPS in the internal construction of the premises, and in not disclosing this information to Vero.

14. In summary, there is no dispute that if OIB was asked the question alleged by Vero and answered it "Zero Percent" then that was a misrepresentation made by OIB in breach of its duty. In that event, OIB raises questions of the loss that flows from that breach of duty as to:

    (a) What the correct answer to the TSQ was, and, if the correct answer had been "1 to 33 Percent" then OIB says that Vero would have accepted the risk without further steps; and

    (b) What Vero knew about the existence and extent of EPS by virtue of the information provided by Comsure in 2006.

Kotku's loss

15. The final principal issue is the extent of Kotku's loss in the event it succeeds against Vero or OIB. If it succeeds against Vero then the quantum is not in issue. The obligation is to indemnify in the amount of $2,716,300.

16. As to Kotku's alternative claim against OIB in the event that Vero is not liable to indemnify, Kotku relies upon evidence that alternative insurance cover was available, including the evidence of OIB's witness, Ms Moore, that if Vero had declined cover she would have been capable of placing alternative cover within 24 hours through an insurer that was prepared to provide cover to a business that had EPS in its premises. Kotku submits that the value of the loss suffered by it as a consequence of OIB's negligence and breach of retainer is

the amount for which it would have been indemnified under such alternative cover, being the same amount of indemnity that it sought and obtained from Vero. It points out that OIB did not give evidence that the alternative cover that it would have been able to obtain would have involved a higher premium.

17. OIB, however, submits that if Kotku had been told that the amount of EPS was an obstacle to obtaining insurance then, on the basis of the evidence given by Mr Cavus on behalf of Kotku, he would have taken steps to remove the EPS and replace it. It submits that the amount of damages for which it is liable should take account of the cost of replacing the EPS with some other material. This submission is without merit, and ignores:

    (a) The fact that Mr Cavus said he would remove the EPS and replace it with other material if he had been told that the amount of EPS was an obstacle to obtaining insurance; and

    (b) OIB's own evidence that the presence of EPS was not an obstacle to obtaining insurance.

18. Accordingly, the amount of Kotku's indemnity if it succeeds against Vero, and the quantum of Kotku's damages if it succeeds against OIB are not significant issues.

The centrality of the issue of whether the TSQ was asked

[12] As noted, the critical factual issues in dispute between Vero and the other parties are whether the TSQ pleaded by it was asked when OIB, by Ms Moore, completed the online application on 22 February 2010 and, if so, whether she selected the answer "Zero Percent". Proof of the asking and answering of the TSQ is critical to Vero's defence to the claim for indemnity. It is the basis of the alleged misrepresentation. It is also the pleaded basis upon which Vero relies to allege that Kotku/OIB knew that the existence and extent of EPS was relevant to its decision to insure the risk. Vero does not plead a duty to disclose the existence and extent of EPS on any other basis.

[13] There is no dispute between the parties that for the purposes of providing information to Vero (whether by answering questions online or otherwise), the matters which OIB knew or ought to have known in the course of its discharging its retainer as Kotku's insurance broker are the matters which Kotku knew or ought to have known. For this reason, if OIB was asked the TSQ on 22 February 2010 and thereby would have known that the existence and extent of EPS in the internal construction were relevant to Vero's decision whether to accept the risk, then Kotku will be taken to have known of these matters.

[14] The TSQ is central to the case. The critical issue is whether the TSQ was asked in the online application on 22 February 2010, and whether a "Zero Percent" answer was selected by Ms Moore:

    (a) either deliberately or inadvertently from the three options that Vero says would have presented themselves and required an answer to complete the application (the TSQ being a mandatory field to be completed in the application process); or

(b) by not altering a "Zero Percent" answer that was a "pre-populated" answer to the TSQ.

Vero's case is that the system operated according to its design and that the answer to the TSQ would have appeared blank, and required the selection of one of the three possible answers. However, the possibility that the system did not operate as intended, and that Ms Moore did not alter a Zero Percent answer that was already there (and thereby adopted that answer) is left open by certain evidence in the form of a report prepared by a Suncorp/Vero employee, Ms Kerr, dated 31 October 2010.

[15] Although the asking of the TSQ and the answer selected by OIB if it was asked are central to the case, many other issues arise, and I next address the factual background to those issues.

Factual background

[16] Kotku obtained insurance with Suncorp several years ago. Its insurance cover included the replacement of plant, equipment and stock in certain events, including fire. Originally Kotku conducted its bakery business from premises at Redland Bay Road, Capalaba. In 2002 it moved its business to other premises at Capalaba. The insurance was renewed each year and there were regular endorsements to cover additional equipment that it acquired. It remained insured with Suncorp until 8 March 2010, when the relevant Suncorp policy was replaced by the Vero policy that is the subject of these proceedings.

[17] Throughout this period Kotku used OIB as its broker. Mr Mahmood Osman is the principal of OIB. He dealt with directors and staff of Kotku from time to time.

[18] In early 2006 new premises that Kotku was expected to occupy were under construction. The premises are located at 49-51 Steel Street, Capalaba. The land and building are owned by persons associated with Kotku, and OIB was the broker that placed insurance in respect of the building. The insurance of the building was placed with a different insurer. Kotku's plant, equipment and other contents owned by it were separately insured with Suncorp.

[19] Remarkably, OIB and Mr Osman in particular did little, if anything, to ascertain the internal construction of the new premises. Mr Osman visited the new building in early-to-mid 2006 after being told that the business was going to move there, but at the time of his visit it consisted of the external walls and a slab.

[20] In around May 2006 Mr Osman spoke with Ms Vada Erol, who was the wife of one of Kotku's directors, about the new building, including whether it had fire extinguishers or hose reels. In response to a question about whether there was going to be a coldroom, Mr Osman was told that there was going to be one in the premises. He asked this because there was a coldroom in the existing premises. Having been told that there would be a coldroom in the new building, Mr Osman says that he estimated that the amount of EPS involved was approximately 10 per cent of the construction. There is no evidence that a note was placed on Kotku's file about the existence of EPS and that Mr Osman estimated the amount of EPS was 10 per cent.

[21] On another occasion, and after the building had been completed and fitted out, Mr Osman visited it. His recollection is that he went there in respect of a renewal of a motor vehicle policy and met with one of the directors of Kotku named Talha. Neither on this occasion, nor on any other occasion, did Mr Osman or any other representative of OIB inspect the interior of the building or take any other steps to ascertain the extent to which its interior construction consisted of EPS. Mr Osman only found out about the amount of EPS after the fire. The only thing that he knew about insulated panelling was what he inferred after Ms Erol told him that a coldroom was to be constructed at the new premises. He did not ask anyone associated with Kotku whether there was going to be insulated panelling in the internal construction of the building or its extent. He did not ask for a plan of the new building and its internal construction.

[22] In 2006 Mr Eyyup Yilmaz was the office manager for Kotku. Mr Osman dealt with him from time to time, and met him when the new building was being purchased. However, after that, Mr Osman obtained information from the "administration side", particularly from Ms Vada Erol about the equipment that was purchased and the existence of a coldroom.

[23] At about the time Kotku moved into the new premises in 2006 an endorsement was made on the Suncorp policy to record a "change of situation". It recorded the new address from which the business was to operate and included the following endorsement: "Built 2006 – Construction Walls/Concrete-Floor/Concrete Roof/Concrete." In due course, what OIB had told Suncorp about the external construction of the building found its way into the policy that was issued by Vero. The schedule to the Vero policy relevantly stated:

> "You have advised us that the construction of your building is Brick/Concrete/Non-Combustible walls WITHOUT sprinklers."

This reference was understood by OIB and by Suncorp/Vero to relate to the external construction of the building. Although this entry was pleaded by Vero and OIB in their respective defences, reliance was not placed upon it in submissions because of the evidence that it referred to the external construction of the building.

[24] Kotku's policy of insurance with Suncorp was renewed each year through the agency of OIB. The existence of EPS in the internal construction of the premises was not disclosed to Suncorp as part of that renewal process. Mr Osman was told in 2006 by a Suncorp employee that Suncorp might want to carry out a survey of the premises, but there is no evidence that such a survey ever took place. There was nothing in the documentation provided to Suncorp by OIB after 2006 that prompted Suncorp to undertake a survey of the premises.

[25] After Kotku occupied the premises and during the years that the Suncorp policy was renewed OIB did not inquire about the internal construction of the building, and insulated panelling in particular, or inspect the interior construction of the building, despite an opportunity to do so. During these years it did not request a plan of the internal construction of the building. If it had done so then Kotku would have been in a position to provide it with a plan of the building, as constructed, including documents provided to Kotku by the contractor which constructed the building's interior. These plans referred to the existence of insulated panelling. Other

documents, including payment claims under the contract, would have revealed the existence of insulated panelling.

[26] In 2006 and at a time when Kotku was still in occupation of its previous premises, another broker, Comsure, attempted to obtain Kotku's business. Mr Hamill, who was then an account executive with Comsure identified Kotku as a new business lead and made a "cold call" about visiting its premises. Mr Hamill was told that new premises were being built. Mr Hamill spoke with Kotku's employee, Mr Eyyup Yilmaz by telephone and also vested Kotku's place of business. Mr Yilmaz was referred to in the evidence as Kotku's office manager or general manager, and the business card he gave Mr Hamill described his position as Sales Manager.

[27] During Mr Hamill's visit discussion turned to the processes of the business and reference was made to the new building. On the basis of what he was told, Mr Hamill sketched a rough plan of what the new building would be like when it was finished. After the meeting he drove past the new building and took some photographs of its exterior. Construction was nearing completion. Mr Hamill's "mud map" of the new building is on a page that has the initials "IPS", which was an abbreviation used by him to refer to insulated panelling systems.

[28] The meeting between Mr Hamill and Mr Yilmaz occurred on 10 April 2006, and Mr Hamill was concerned that the interests of the owners of the new building were not protected against public liability. He obtained an interim cover note for that risk. Mr Hamill also set about to obtain quotations from various insurers. At that time some insurers were transacting online, whilst others provided quotes on the basis of slips prepared by brokers. Mr Hamill prepared such a slip for Industrial Special Risks in respect of the new business premises and the business to be conducted at it. The slip described the construction of the building as follows:

> "External: Tilt Slab/Metal Roof/Concrete Floor
> Internal: Insulated Panelling approx 35% of walls, also has mezzanine and first floor office areas and storage area."

Given Mr Hamill's knowledge of the insurance industry, he thought that he should disclose the fact that insulated panelling was to be part of the building's interior. The percentage figure of 35 per cent did not come in any precise form from Mr Yilmaz. Nor was it based upon Mr Hamill sighting any building plans. It was Mr Hamill's estimate based upon the information that was contained on the mud map. Still, it was a product of his discussions with Mr Yilmaz.

[29] There is no evidence that Mr Hamill or Mr Yilmaz referred to the insulated panelling in their discussions in April 2006 as "EPS". Mr Yilmaz was not called as a witness. The evidence given by Mr Hamill establishes that Mr Yilmaz would have understood that Mr Hamill was interested in ascertaining information about both the external and internal construction of the new building. There is no evidence that Mr Hamill told Mr Yilmaz, or that Mr Yilmaz knew, that the insulated panelling was of particular concern to insurers. Mr Yilmaz might have inferred this from his dealings with Mr Hamill, but he might also have inferred that Mr Hamill was interested in the construction of the building and its contents because he wanted to know about the business and its premises and some of this information was relevant to the sums to be insured and the cost of replacing the building or its

contents if they were damaged or destroyed by fire. No explanation was given as to why Mr Yilmaz was not called as a witness. He was apparently available to give evidence if subpoenaed. OIB seeks a finding that Kotku, via Mr Yilmaz, knew that the premises contained substantial amounts of EPS and that fact was a matter of significance to insurers. It submits that it should be inferred that his evidence would not have assisted Kotku in this regard and cites *Jones v Dunkel*.[1] I am prepared to infer that Mr Yilmaz's evidence would not have assisted Kotku. However, this inference may not fill gaps in the evidence.

[30] The evidence establishes that Mr Yilmaz knew in 2006 that insulated panelling was to form part of the interior construction of the building and that Mr Hamill, as an insurance broker, was interested in ascertaining the nature of the external and internal construction of the new building. The evidence also supports the inference that Kotku, by Mr Yilmaz, in 2006 knew that an insurer of the building and its fittings also would be interested in ascertaining the nature of the building's construction, both external and internal. This falls short of proving that Mr Yilmaz knew that insulated panelling was known as EPS or that, however described, the extent of EPS was a matter of significance to insurers.

[31] The evidence does not persuade me to conclude that Mr Yilmaz (or Kotku) knew in 2006:

(a) that the insulated panelling was known as EPS; and

(b) that EPS was a matter of significance to insurers in assessing risk and in deciding whether to insure the building and its contents.

OIB has not proven that Mr Yilmaz knew that the insulated panelling was known as EPS and that insurers regarded a building that contained EPS as a high risk to insure. Mr Hamill, who was an impressive witness, did not indicate that he told Mr Yilmaz these things. There is no evidence that Mr Yilmaz or anyone else at Kotku knew these things from any other source.

[32] The fact that Mr Osman did not ask Mr Yilmaz about EPS or tell him in 2006 (or subsequently) that EPS/Sandwich Panelling was a concern to insurers does not assist OIB in proving that Mr Yilmaz must have known these things.

[33] OIB also seeks a finding that as at February 2010 Kotku, via Mr Yilmaz, knew that OIB had not inspected the premises nor been given any details of the EPS levels. I decline to make that finding. Mr Osman visited the premises. For reasons best known to him and never adequately explained in his evidence, he did not inspect the interior of the premises. He only visited the administration area. He dealt with a director named Talha on that occasion, and, as previously noted, on an earlier occasion sought and obtained information from the wife of one of the directors. Mr Yilmaz was not Mr Osman's sole point of contact at Kotku. Mr Yilmaz might have reasonably concluded that Mr Osman or some other person from OIB would inspect the new premises at some stage, and seek and obtain any details about its construction that were not evident from such an inspection. Such an expectation would have been reasonable. Mr Osman did in fact inspect the premises after it was operational and he did in fact speak to someone in Kotku's administration about the

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1 (1959) 101 CLR 298 at 304 and 305.

building. Mr Yilmaz was not to know that upon such an inspection Mr Osman would not inspect the main part of the interior of the building, or that, upon making inquiries of Kotku staff would not ask the type of questions that Mr Hamill had asked Mr Yilmaz.

[34] Kotku was entitled to rely upon OIB, in discharging its professional duty, to inform itself about both the external and internal construction of the building and other matters of relevance to current or potential insurers. Kotku might reasonably have expected OIB to have done this by inquiry and inspection in the course of renewing insurance, insuring the new building, notifying of the change of Kotku's premises and providing information to a new insurer, such as Vero. Kotku knew that Mr Osman had inspected the premises after its fitout and had the opportunity to ascertain the nature of its internal construction.

[35] As for Comsure, in April 2006 it sent the quotation slip that Mr Hamill prepared to some insurers, and communicated with other insurers by other means. It approached Suncorp to obtain a quotation by faxing to Suncorp a referral form that was prepared on a form used by Suncorp. The referral form sent by Comsure to Suncorp indicated that Suncorp should treat the request as new business. Mr Hamill did not know that the risks in respect of which he was seeking a quotation were already insured by Suncorp, and had he known this he would not have submitted the referral form to Suncorp. In any event, the approach for new business was not sent to the employees of Suncorp who administered the existing policy. Comsure's document was treated as an approach to quote on new business and referred to Ms Natalie Johnson, an underwriter employed by Suncorp. The document described the external construction of the building and included Mr Hamill's handwritten note "Has internal insulated panelling". Unlike the Comsure quotation slip there was no estimate of the extent of internal panelling. Ms Johnson sent an email back to the broker referral section in the following terms:

> "Broker has advised that there is insulated panelling in this building, please advise what % of the building has this panelling? If more than 33% please decline as building would need to be sprinklered. If under 33% let me know. (We may not have time to survey as it would be hard pressed to get a surveyor there next week.)"

Ms Johnson's response was based upon the fact that Suncorp only wrote up to 33 per cent at that time if the building did not have sprinklers. Even for new business, the premises had to be sprinklered if the amount was over 33 per cent. As matters transpired, Suncorp quoted a premium which was provisional, and subject to a survey.

[36] Nothing came of this or of any other quotation that Comsure obtained. Mr Hamill tried to contact Mr Yilmaz about the results of Comsure's work in obtaining quotations for the new building. On 2 May 2006 Mr Hamill wrote to Mr Yilmaz and provided a brief summary of the quotations. However, Kotku did not respond to Mr Hamill and there was no further contact from Mr Yilmaz or anyone else on his behalf. Mr Hamill made a handwritten notation that Kotku's business had been placed elsewhere without an opportunity for Comsure to present terms.

[37] The fact that nothing came of the Comsure inquiry of Suncorp in April 2006 is relevant to an issue to be later discussed as to whether Vero as at February 2010 had

knowledge of the presence of EPS at the premises by virtue of Comsure's inquiry of Suncorp in April 2006. For present purposes, it is sufficient to conclude that the information submitted by Comsure to Suncorp in April 2006, including the fact that the premises had internal insulated panelling, went no further than the broker referral section and Ms Johnson in 2006. It went no further because the inquiry was not pursued by Comsure. The employees of Suncorp who dealt with the new business inquiry and Ms Johnson did not know that Kotku was an existing Suncorp client. As a result, the information submitted by Comsure did not find its way into that part of Suncorp's administration that was concerned with existing business and the renewal of Kotku's policy with Suncorp.

[38] Whereas OIB in its further amended defence pleaded the Comsure advice to Suncorp in April 2006 as a basis for the contention that Vero knew in February 2010 that the building had internal insulated panelling, OIB did not plead any communication by Comsure with Vero in 2006. However, in its submissions OIB contended that Vero was informed in 2006 that the building had insulated panelling estimated at 35 per cent of walls. Vero contests that it knew this information in 2006.

[39] Mr Hamill's evidence does not indicate that he sent the slip to Vero in 2006, and there is no documentary evidence that he did. His evidence was that Vero at the time had an electronic transaction system that a broker could utilise. He thinks that he would have used that transaction system to see if their system could quote on it. His evidence is that he spoke to Vero by telephone. Mr Hamill's acceptance under cross-examination that he ended up communicating with all insurers, and wrote up a slip that recorded an estimate of 35 per cent of insulated panelling, does not constitute acceptable evidence that either the quotation slip or the 35 per cent estimate was communicated to Vero. The evidence indicates that Vero would not have quoted on such a risk. The quotation which it provided on 13 April 2006 to Comsure makes no reference to what it was told about the interior construction of the building. A handwritten notation by Mr Hamill records that Vero indicated that it would require a survey. Vero may have required a survey as a matter of sound underwriting practice, not because it was told anything in particular about internal insulating panelling. It is possible that Mr Hamill mentioned something about the internal construction of the building when he spoke to Vero by telephone. He thinks that he would have mentioned insulated panelling to Vero. However, there is no documentary evidence to support this. Despite complaints about the late disclosure by Vero of certain other documents, there was no issue raised before me during the trial that Vero had failed to locate and disclose any record of Mr Hamill's telephone conversation. I am not satisfied, in the circumstances, that Vero was told by Mr Hamill that the internal walls of the building consisted of EPS that he estimated to be in the order of 35 per cent. The fact that Vero said that it would require a survey during the period of insurance is not sufficient to support the conclusion that Vero knew in 2006 that the building consisted of EPS estimated to constitute 35 per cent of the walls and was prepared to quote on that basis.

[40] If, however, Vero was provided with this information for the purpose of quoting in April 2006 then this information apparently remained in that part of its administration that was concerned with an inquiry about new business in April 2006, and nothing came of the inquiry. As with Suncorp and the other insurers who were approached to quote on the new business, nothing came of it.

This is because, as Mr Hamill explained, he had no further contact with Mr Yilmaz or Kotku and, to use sales terminology, "it went cold."

[41] In the absence of any evidence that Vero recorded information to the effect that the building had insulated panelling estimated to constitute 35 per cent of walls, and in the context of an inquiry about a quotation for new business in April 2006 that went nowhere, I am not satisfied that Vero knew in 2006 of the matters alleged by OIB in its submissions about the existence and extent of EPS, or that any information that it possessed in 2006 in relation to these matters means that it knew or ought to have known these matters in February 2010. This makes it unnecessary to address whether it would have been appropriate to make a finding of knowledge against Vero on a basis that was never pleaded.

Vero and its systems

[42] Suncorp acquired Vero in 2007. It decided that Vero should take over its SME business. This involved a process by which Suncorp/Vero would invite Suncorp policyholders to take out new policies with Vero upon the expiry of their Suncorp policies. The process of transitioning Suncorp's SME business to its wholly owned subsidiary, Vero, was substantial and took some time.

[43] On 1 February 2010 Vero sent a letter to OIB in the following terms:

> "**Re: Insured KOTKU BREAD PTY LTD Suncorp policy number BCM99966P**
> Due to changes in brand and distribution strategies by the Suncorp Group, Vero Insurance Limited ("Vero") is authorised by Suncorp-Metway Insurance Limited ("Suncorp") to inform you that:
>
> - your customers policy with Suncorp BCM99966P expires at 16:00 on 08/03/2010; and
>
> - as Suncorp is no longer issuing this class of insurance through brokers, Suncorp is not prepared to offer renewal terms.
>
> Please note that Suncorp's declinature of renewal is not based on factors relating to the assessment of your customer's particular insurance risk, and therefore does not need to be disclosed by you or your customer in any future applications for insurance.
>
> Please rest assured that Suncorp will meet claims for policies it has already issued.
>
> Vero (also part of the Suncorp Group) is prepared to offer a replacement new business policy (number SMX093219280) on the Enterprise Business Insurance Policy policy wording (reference V4537 V10).
>
> We would remind your customer of their duty of disclosure, which is included in the attached documentation. In offering this insurance, Vero will not require a new business application form, and will rely

> on the information given to Suncorp when the insurance was first taken out, as well as any other information provided to Suncorp. We will assume that the information is still accurate and complete unless you tell us otherwise."

A letter in practically identical terms was sent by Vero to Kotku care of OIB the same day. Vero's letter to OIB advised that the offer to take out a new policy with Vero could be accepted and transacted online using Vero's e2 system. The following description of the e2 or Enterprise system is drawn principally from Vero's written submissions and is not contentious insofar as it describes the Vero computer system and how it was intended to operate. The critical issue for determination is whether the system operated as intended on 22 February 2010 when Ms Moore used it.

[44] Brokers like OIB are able to access a number of insurers online through the Sunrise/Ebix system which operates as a portal for brokers to the systems of individual insurers. The systems of individual insurers such as Suncorp and Vero have what is described as a "front end system" that the broker accesses and a "back-end system" that is used by the insurer, to which brokers do not have access. Suncorp's front-end system was called Positive and its back-end system called Insure. Vero's front-end system was called Enterprise or e2 and its back end system called Protect.

The e2 system

[45] The e2 system is the front-end system used by brokers to place business with Vero over the internet. It can be used by brokers to obtain a quotation, place new business, alter an existing policy by endorsement and effect renewals with Vero. It is used for all transactions. Only certain staff members at Suncorp/Vero have administrator access to e2 which allows them a "read-only" view and to print screens from that system to see the information a broker has entered. The e2 system communicates with Protect. The underwriting rules in e2 are derived from Protect.

The Protect system

[46] Protect is used to store business rules, rates and underwriting criteria which are applied by Vero (including TSQs for different occupations) and to store the information provided by brokers in relation to each individual risk. Protect provides underwriting, claims and accounting functions for a number of Suncorp brands.

[47] Within Protect, 42 occupations generate a TSQ in relation to EPS. The TSQ in relation to Bakeries (being TSQ 0428) has been asked since 15 November 2009.

[48] A very limited number of Vero personnel have the ability to alter information contained in Protect. If information in Protect is altered, there would be a record of that alteration stored in Protect including the identity of the person who made the change, the date of the change and details of the change.

The conversion process

[49] When Suncorp purchased Vero in March 2007, a business decision was made to transfer the SME broker business from Suncorp to Vero. That transfer commenced on 26 January 2009.

[50] When the SME policies in Suncorp were almost due to expire, they were transferred from Suncorp to Vero by the following process:

(a) A pre-renewal was run in Suncorp's back-end system, Insure, to generate a price for each existing policy. That information in relation to the existing Suncorp SME policy was then transferred from Insure into Vero's back-end system, Protect where the client name was uploaded. Information was pre-populated into Protect from the information stored in Insure. Mr Harvey was the SME Portfolio Manager with Suncorp, and a specialist in underwriting matters for commercial insurance for small to medium sized businesses. He was involved in the transfer of Suncorp's SME broker business from Suncorp to Vero. He provided technical expertise to a working party that made all decisions in relation to the transfer, including decisions about the transfer of Suncorp data into the Vero system. According to Mr Harvey, fields that could not be pre-populated (because Insure did not have that information) were left blank for the brokers to complete. For this policy, the transfer of information occurred on 28 January 2010.

(b) The premium was then capped so that there was not a major jump in premium when the policy was brought over from Suncorp to Vero.

(c) The policy was then validated against current Vero business rules so that anything that did not pass Vero's underwriting rules would be rejected by Protect.

(d) Policy details would then be sent to the Sunrise system so that brokers could input the policy details and process the policy as new business. For this policy, that occurred on 29 January 2010.

[51] Each of these transactions is recorded in the history of the policy in Protect. Likewise, each transaction effected by a broker in e2 in relation to the policy that is not declined by the business rules, rates and underwriting criteria stored in Protect, is recorded in Protect.

Using the e2 system

[52] The e2 system permits the broker to enter relevant information about the proposed risk, obtain a quote and, if the risk is acceptable to Vero, effect a policy of insurance.

[53] In the case of policies that were transferred from Suncorp to Vero during the conversion process, certain information was pre-populated into e2 based on the information that had previously been provided by brokers to Suncorp and transferred to Protect in the conversion process. Brokers were required, as a result of the insured's disclosure obligations, to check that the pre-populated information was correct.

[54] One of the fields that was pre-populated was the occupation field. Based on the information provided to Suncorp in this case, that field was pre-populated with the occupation "bakery". The occupation "bakery" triggered a question in e2 specific to that occupation.

The Trade Specific Question: the TSQ

[55] The Protect and e2 systems were designed so that, when a broker entered "bakery" into e2 as the occupation of the proposed risk, Protect generated TSQ 0428 which, at the time OIB placed this risk, read as follows:

> "What persentage (sic) of the internal construction comprise EPS (Sandwich Panelling) eg in walls, lining, ceilings, cold rooms and general fit out?"

[56] The answer field to the TSQ is designed to be blank. A broker is required to choose one of the following answers from a drop-down menu:

(a) "Zero Percent";

(b) "1 - 33 Percent"; or

(c) "Over 33 Percent".

[57] Vero's records indicate that the TSQ has been a mandatory question since 15 November 2009, having been implemented into the e2 system on 30 September 2009. According to Vero's evidence, particularly the evidence of its computer specialist Mr Helmore, the TSQ was not altered in the process of transferring policies from Suncorp to Vero. His and other evidence indicates that Suncorp did not have a TSQ on its computer system in relation to EPS. Vero did, however, have a TSQ in relation to EPS. This aspect assumes importance because of a reference in an email from a Suncorp investigator on 29 September 2010 which suggests that certain matters were "suppressed" during the transfer from the Insure system to the Protect system. The document to which the investigator referred summarised differences between the Insure and the Protect systems and stated:

> "Not all TSQs will be converted as part of the Insure to Protect conversion. Those TSQs that are not specifically converted will be set to 'suppressed' so that they are not asked when the policy is taken up by the broker through E2 or endorsed in Protect.
>
> Where a TSQ is to be converted, the answer for the TSQ will be sourced from Insure endorsement codes."

This entry does not support the conclusion that Vero's TSQ was suppressed in the conversion process. A Suncorp TSQ about EPS might have been. However, there was no Suncorp TSQ about EPS on the Insure system.

[58] According to the evidence called by Vero, particularly the evidence of Ms Reamsbottom who is familiar with the e2 system and Mr Helmore, Vero's TSQ in relation to EPS applied to both new and existing policies. If the system operated as intended, then the TSQ would have been asked on 22 February 2010 whether the policy was treated as a renewal or new business. According to the evidence given by Vero's technical experts (particularly Mr Helmore and Mr Padilla) and other persons who were familiar with the e2 system (such as Mr Harvey and Ms Reamsbottom) if the Vero system was working as it was intended to, there was

no circumstance whereby the TSQ would not be asked. This conclusion was supported by an independent expert, Dr King.

[59] Vero's records, particularly Exhibit 30, record that the TSQ was generated by the e2 system in respect of Kotku when Ms Moore accessed the system on 22 February 2010.

[60] According to Mr Helmore, and this is confirmed by Vero's records, the TSQ has undergone only one change since it went "live" on 15 November 2009. That is that the spelling was changed from "persentage" to "percentage" on 31 August 2010. If anything else had changed in relation to the TSQ, there would be a record of it.

[61] The system is designed so that a proposal cannot be completed online if the TSQ is not answered. If the broker does not answer the TSQ an error message will appear in the "Policy at a Glance" information panel stating, "Underwriter question must be answered". If a broker answers "Over 33 Percent" in answer to the TSQ, it will be unable to obtain a premium summary or complete the proposal. The policy will be described as "Declined" in the red banner at the top of the screen.

[62] The system is designed so that if a broker chooses "Zero Percent" or "1-33 Percent" the system will allow the broker to complete the online proposal, obtain a quote and bind cover. However, if the broker chooses "Over 33 Percent" and attempts to complete the proposal, the proposal will be declined and the broker does not have any opportunity to refer the matter to an underwriter online for further consideration. If a broker chooses "Over 33 Percent" in the e2 system, it will be taken directly to the "time error and decline" screen as a consequence of that answer and the broker is immediately alerted that the policy is declined. The broker would have to contact Vero's Enterprise Underwriting staff to discuss whether the policy might be placed notwithstanding the presence of EPS.

[63] The computer system is designed for applications to be accepted or declined without the involvement of Vero staff. An "Over 33 Percent" response to the TSQ about EPS produces a hard decline. If a quote for a policy was declined, there would be no record of that kept in Protect.

[64] If the system is working as it is intended to, the proposal cannot be submitted without answering the TSQ.

Effecting a policy using the e2 system

[65] To effect a policy of insurance using the e2 system the broker is required to import the specific policy either as new business or as a renewal, depending on its status.

[66] Before the proposal can be submitted to Vero, the broker must complete any mandatory fields and make any necessary amendments to the pre-populated fields (such as the sum insured and interested parties) before submitting the proposal online. The broker can alter any of the pre-populated information by simply overwriting that information or choosing another option from a drop down menu.

[67] The broker is required to navigate through the e2 proposal form by either using the "Policy at a Glance" information panel on the right-hand side of the screen or by using the navigation panel on the left-hand side of the screen to move through each page systematically.

[68] The "Policy at a Glance" information bar provides the broker with an overview of the sections of the policy that must be reviewed, what information has been completed, what information must be completed and identifies information that will cause the proposal to be declined before the proposal can be submitted by displaying an asterisk. It also displays a tick (indicating the requested information has been provided and is acceptable), an "E" symbol (indicating an error) or a cross (indicating declinature) next to each section of the online proposal.

[69] Once all of the required information has been provided and the broker is satisfied that the pre-populated information is correct, it goes to the premium and summary screen to obtain the premium for the policy. If the premium is acceptable to the broker, it can accept and complete the policy. At that stage, cover is bound. When operating properly, the e2 system would only accept the quotation in relation to bakeries if the TSQ 0428 had been answered. If the quotation was accepted by the broker, the policy of insurance was effected.

[70] If the TSQ is answered with "Over 33 Percent", a cross will appear in the "Policy at a Glance" information panel next to "Fire". It will not result in a tick appearing next to "Fire".

[71] If the TSQ is unanswered in the proposal, the e2 system prompts the broker (via a message in the "Policy at a Glance" information panel) to answer that question. In this case, if the TSQ is not answered, when the broker attempts to either validate the page it is on or obtain a premium summary to complete the proposal, the following message appears in the "Policy at a Glance" information bar:

> "Situation 1
> Fire underwriter question must be answered."

Did the Vero system operate as intended on 22 February 2010?

[72] Vero's witnesses, and the documents tendered by it, such as documents recording transactions that occurred on its system on 22 February 2010, tend to prove that the system operated as it was designed to operate, and that on 22 February 2010 the TSQ was asked and the answer "Zero Percent" was selected. Vero relies on the evidence of Suncorp/Vero employees such as Ms Reamsbottom, Mr Harvey and Mr Padilla about how the Vero computer system operates, and upon the evidence of an independent expert, Dr King. It also relies upon information drawn from its e2 and Protect systems including "screen dumps" of information taken from computer records. It also relies on the results of a test facility that was established to recreate the system as it operated in February 2010.

[73] In response to Vero's case that the TSQ was asked and answered as alleged, Kotku and OIB rely particularly on the evidence of:

(a) Ms Moore;

(b) Ms Bristow, a solicitor who acted for OIB in October 2010 and who observed Ms Moore operate the system on 21 October 2010;

(c) a computer expert engaged for the purposes of these proceedings, Dr Schatz, who concluded that without further testing it was not possible to draw any conclusion as to whether the Vero system operated correctly;

(d) the contents of a report prepared by a Suncorp investigator, Mr Zegarac, on 29 September 2010; and

(e) a report prepared by another Suncorp employee, Ms Kerr, dated 31 October 2010 which reviewed the evidence in relation to the claim and recommended that it be declined on the ground of non-disclosure.

It is convenient to deal with each of these areas of evidence separately, recalling that the onus is on Vero to prove its case that the TSQ was asked and answered as alleged, and thereby constituted a misrepresentation and a breach of Kotku's duty of disclosure.

Ms Moore

[74] Ms Moore has about 25 years experience in the insurance industry, both in broking and underwriting. She has been employed by OIB in her current role as a broker's assistant for about seven and a half years.

[75] The transaction by which Ms Moore obtained the Vero policy for Kotku occurred on 22 February 2010. She used the Winbeat program, which was installed on her computer. Winbeat is software commonly used by insurance brokers to access insurers' computer systems. Ms Moore accessed Vero's e2 system.

[76] Ms Moore used the import renewal process. Exhibit 65 shows the screens encountered at the commencement of that process. That was the only process by which a policy being transferred from Suncorp to Vero could be addressed.

[77] The interface offered by e2 did not offer up a single form to be completed. Rather it consisted of various pages, each of which was accessed by a series of buttons on the left-hand side of the window. The "Policy at a Glance" panel directed Ms Moore to the pages that needed attention.

[78] Ms Moore used that system to direct herself to the pages that she understood required attention. She did not use it to check the correctness of data already held on the system. She did that by studying the paper documents sent by Vero, and made use of her hard copy file, which she had with her.

[79] As to her operation of the system on 22 February 2010, Ms Moore gave the following evidence-in-chief:

> "Do you have any specific recollection of doing this Kotku renewal?-- No, not – no, I don't have any recollection of doing it.
>
> Do you – in terms of how you would have approached it and your usual practice are you able to tell us something about that?-- It looks like a straightforward transfer renewal and I just hit the buttons and entered it.

> You just called it a 'transfer renewal' is that-----?-- Well, transferring from Suncorp to Vero.
>
> And in terms of the usual practice you followed when you were importing these transferring policies are you able to tell his Honour about whether or not you might have followed that usual practice or departed from it?-- Yeah, I checked the premium from the previous year, it hadn't gone up by more than 10 per cent so there was no need to shop around and so I went in and renewed the policy.
>
> Do you have any specific memory of what screens you might have gone to for this particular renewal?-- I went into the insured and corrected the postal address and made sure the names were right and then I would have gone to the premium screen, I would have tried to end it and if everything was right then I would have ended it.
>
> Okay. Can you recall going into the property risk screen?-- No, I did not go into the property risk screen.
>
> Can you recall seeing a question about EPS?-- I didn't see any EPS question."

[80] Later in her evidence, Ms Moore said that if she had seen the question and had to answer it, then she would have found out the information. Ms Moore acknowledged that she had no recollection of processing the application for the policy that day. However, her evidence was that if she had seen the question she would have answered it, but not have simply made up an answer about how much EPS was in the bakery.

[81] OIB submits that great store should be placed on the fact that Ms Moore had no reason to give a false answer, and would have understood the serious consequences for her employer and herself of giving a deliberately false answer. It submits that she did not know if there was EPS in the premises, and could not have said what percentage there was. In those circumstances, she would have sought an answer, via Mr Mahmood.

[82] In response, Vero submits that OIB's reliance on Ms Moore's evidence is misconceived in circumstances where she acknowledges having no recollection of the events that occurred. It submits that her evidence is nothing more than a combination of speculation and evidence of habit.

[83] The fact that Ms Moore has no recollection of the events in relation to the renewal of the Kotku policy does not deprive her evidence of value. Her evidence, like other evidence, bears upon the probability or improbability that the TSQ was asked and answered. In that regard there are four distinct possibilities. The first is that the TSQ was not asked because the Vero system did not function as intended, at least in respect of policies that were transferred or the Kotku policy in particular. The second possibility is that the TSQ was asked and answered "Zero Percent" by the deliberate selection of that response by Ms Moore on 20 February 2009. The third possibility is that the TSQ was asked and answered inadvertently by, as it were, the accidental slip of Ms Moore's computer mouse. The fourth possibility is that, contrary to Vero's evidence that the answer to the TSQ was left blank, the answer

was "pre-populated" with the "Zero Percent" answer in respect of policies such as Kotku's that were transferred from Suncorp. If this is the case, and the "Zero Percent" response was, in effect, the default answer, then it would have been selected by Ms Moore when she did not alter this entry. This possibility derives some support from the wording of Ms Kerr's report dated 31 October 2010.

[84] Ms Moore frankly acknowledged that she could not recall the events in question. Accordingly, her denials of having seen the question and answering it were based upon a reconstruction of events. Ultimately, limited reliance can be placed upon her reconstruction of what occurred. Instead, an assessment must be undertaken of the probability or improbability that she would have answered "Zero Percent" in circumstances in which she did not personally know the correct answer and had no good reason to provide an answer that she knew to be false. The assessment of that probability depends upon Ms Moore's evidence and the evidence of other witnesses. Insofar as Ms Moore's evidence is concerned, regard must be had to the context in which she processed the online application on 22 February 2010.

[85] On that day Ms Moore was carrying out her daily routine of processing renewals. She had the letter from Vero dated 1 February 2010 and would have been able to access relevant information on the screen. In her evidence she said that the matter would have looked like "a straightforward transfer renewal and I just hit the buttons and entered it". Her practice would have been to check the premium from the previous year, and if it had not increased by more than 10 per cent there would have been no need to "shop around", and she would have "renewed the policy". On this occasion she corrected a postal address and the names of certain interested parties. Her belief is that she would have processed the application by accessing the "Policy at a Glance" facility, corrected certain details and proceeded to renew the policy without going into the property risk screen which Vero alleges contained the TSQ.

[86] The evidence, including the evidence of Ms Moore, establishes that various parts of the online proposal were pre-populated. These included yes or no answers to certain general underwriting questions. Ms Moore's evidence is that these were pre-populated.

[87] Vero relies upon its technical evidence to contend that, at some stage, the TSQ presented itself to Ms Moore and that she could not have avoided it by using the "Policy at a Glance" function. The system, if it operated as intended, would have required her to go to the page that contained the TSQ and answer it. If this is so, then it is necessary to assess Ms Moore's likely response to the TSQ. Ms Moore had some understanding in February 2010 about what EPS was. She understood that it was the Sandwich Panelling used in coldrooms or linings for abattoirs or cold stores to keep food cool. She knew that by 2010 it was a matter about which insurers often asked questions.

[88] Vero submits that considerable support for its case that the TSQ was asked and answered can be derived from answers that Ms Moore gave in an interview with an investigator on 12 October 2010. It relies on the following passages of the recorded interview:

> "Q121. Umm, look I'm not sure, I'm not in a position to be able to disclose that to you. But its certainly higher then (sic) the zero percentage that is actually marked on the policy. See

I'm trying to clarify with you, and I appreciate you've already answered these questions, but I do need to make sure of these, of your answers that, one you're saying that you don't recall being asked that question, is that correct?

A121. That's correct. **If it was a butchery, I'd probably look into it**, you know like it probably would have picked my eye up or something like that, you know, if it was a butchery or something like, that would have that sort of thing in there, or an Abattoir or something like that.

Q122. Yeah.

A122. **Or a meat manufacturer or something like that.**

Q123. **Well why not with a bakery?**

A123. **I'm thinking more about the deterioration of stock and the stock in the freezers and things like that. Not so much a bakery.**" (emphasis added)

[89] At the trial Ms Moore was asked whether she would have been surprised if the question was there, to which she responded, "It might have surprised me, being a bakery". She went on to acknowledge that there might be coldrooms in a bakery. This evidence is broadly consistent with the contents of her interview, namely that she would not expect EPS to be in a bakery, and that she associated it with businesses like butchers and abattoirs that had freezers to cope with the deterioration of stock.

[90] The fact that Ms Moore treated the processing of the application on 22 February 2010 as, in effect, a routine renewal is important. Her approach to processing the application would have been different to that adopted in applying for a new policy with a new insurer. Although she actually was applying for a new policy with a new insurer, she treated the matter as a renewal. It was a routine process so far as she was concerned. If, as Vero contends, she was required to answer the TSQ then she had no information in her possession that indicated that this bakery contained EPS, and her belief was that bakeries generally did not contain EPS. Her limited knowledge of EPS did not extend beyond a belief that it was used in freezers and similar installations. It would be understandable for her to assume that if Kotku's premises contained EPS, then this information would have been obtained by Mr Osman at some stage in the previous four years. Ms Moore had never been to the premises.

[91] Having not been told by Mr Osman or anyone else of EPS at Kotku's premises, there being no record in the documents that Ms Moore looked at of the premises having EPS, and believing that bakeries did not tend to contain EPS, it is not improbable that Ms Moore selected the Zero Percent response, believing it to be the correct answer on the basis of the information that was known to her. If the Vero system was operating properly then she would have been required to answer the TSQ. The fact that she has no recollection of going to the Property Risks screen and answering the TSQ is unremarkable. She could not be expected to have a

recollection of processing the application on the day in question. If she had answered the TSQ then one would not expect her to have a recollection of having done so.

[92] It is possible that the TSQ was answered inadvertently. However, it is more likely that Ms Moore responded to the TSQ in the course of undertaking what she thought to be a routine renewal and, on the basis of information available to her and in the absence of any information that Kotku's bakery contained EPS, selected the Zero Percent answer.

[93] The possibility that the answer to the TSQ was pre-populated was not put to Ms Moore by Vero's counsel or any other counsel. She was asked some questions about the pre-population of certain answers but this did not extend to the possibility that the answer to the TSQ was pre-populated. If the answer to the TSQ was pre-populated, then this would serve to explain why Ms Moore had no recollection of being asked the TSQ. If the TSQ was in fact pre-populated then this would explain why Ms Moore would be unlikely to pay much attention to the answer, which she might have readily assumed was accurate.

[94] In summary, Ms Moore has no recollection of processing what was described as the Kotku "renewal" on 22 February 2010. Her evidence amounts to an understandable reconstruction of what she thinks she probably did. She had no reason to give an answer to the TSQ which she knew to be false. This makes it improbable that she simply would have supplied a "Zero Percent" answer knowing it to be false. However, in the process of transacting a renewal she might have been prepared to answer the TSQ, if it was asked, on the basis of her belief that bakeries did not contain EPS and the fact that nothing in the documents she looked at recorded that Kotku's premises had EPS in its internal construction. There is no evidence that the information that Mr Osman said he obtained in 2006 to the effect that the new premises would have a coldroom came to Ms Moore's attention on or before 22 February 2010. The fact that it had a coldroom, and (if this be the case) Mr Osman had estimated in 2006 that EPS constituted 10 per cent of the internal construction, was never disclosed by OIB to Suncorp and was not recorded on policy documents. Instead, the policy documents that were in Ms Moore's possession referred to its external construction, including its "Non-Combustible Walls". I conclude that it is likely that Ms Moore believed, on the basis of the information in her possession on 22 February 2010, that the Kotku bakery did not contain EPS and answered the TSQ accordingly.

Ms Bristow

[95] Ms Bristow is a solicitor who was admitted in 1993. Her practice has been principally in the area of insurance law. The firm for which she worked in October 2010 acted for OIB at that time. On 21 October 2010 Ms Bristow spoke to Ms Moore at Kotku's premises. After their meeting Ms Moore showed Ms Bristow OIB's computer system and accessed the Kotku file through Sunrise. Ms Bristow was standing behind her and watching the screen. Ms Moore went to a certain page and Ms Bristow recalls that there was a question in relation to EPS. She recalled at the trial that the question was along the lines of, "What percentage of the walls comprise EPS?". She has no recollection of the word "internal" being in the question. She was sure at the trial of the accuracy of her recollection in this regard because at the time she read the question she thought it was "very badly worded and

that anyone reading that question would not know whether or not to include 'external walls' as part of any calculation." She thought that the question was ambiguous in that regard.

[96] Ms Bristow could not recall the words "lining", "ceilings", "cold rooms" or "general fitout" appearing in the question. She acknowledged that the words "sandwich panelling" may have been in the question. She did not believe that the word "construction" was in the question, but believed the word "walls" was.

[97] After her meeting at OIB's offices Ms Bristow returned to the city and, possibly after having dealt with some emails, dictated a file note which reads:

> "Meeting attended by Gillian Bristow, Mahmood Osman and Mary Moore.
>
> 1. Since then, Mary has gone back into the online "Sunrise" system that is run by Suncorp Insurance and there is a question in relation to EPS. It asks the insured to notify whether the percentage of EPS is 0%, 1 to 33% or over 33%. She did not complete the question and there was nothing to tell her that she was required to do so – it was not a mandatory field and the system let her complete the 'renewal' without answering the question.
>
> 2. After our meeting, Mary demonstrated the Sunrise system to me. She logged in this particular policy and went as if to change the details for the insurance and to answer the question in relation to EPS. By answering the question that the amount of EPS was between 1 and 33%, the premium did not change. The change also did not require referral – the computer would simply let this change process without the need for it to go to a staff member at Vero."

Ms Bristow explained that the opening words, "Since then", refer to the period after Ms Moore spoke to a Vero investigator. Ms Bristow gave oral evidence about her discussions with Ms Moore on 21 October 2010. Ms Moore had explained to her that the first time that Ms Moore became aware of a question relating to EPS was when she logged on to the system after having a meeting with the Vero investigator. In Ms Moore's discussions with Ms Bristow, Ms Moore did not positively assert that the question was not there on 22 February 2010. She simply said that she did not see a question. In the demonstration, Ms Moore accessed the TSQ and three options for answering it appeared. Ms Moore did not say that she must have left the answer blank when she processed the application on 22 February 2010.

[98] The demonstration and discussion led Ms Bristow to understand that Ms Moore had used the system and completed the details without the system indicating that a mandatory field had been left unanswered so that the application could not be processed because certain answers had not been supplied.

[99] During Ms Bristow's cross-examination, counsel for Vero suggested to her that on the day of the demonstration the answer to the TSQ was blank. Ms Bristow could not recall this being the case. OIB attempted to make much of the form of counsel's

question as indicating that Vero considered that the answer to the TSQ was blank on 22 February 2010. I did not interpret the question that way. Counsel for Vero was simply cross-examining Ms Moore about what appeared on the screen during the demonstration and the form of question does not indicate that Vero's case was different to the case that it conducted. I reject OIB's attempt to read too much into this passing question.

[100] The evidence of Ms Bristow raises the possibility that any TSQ asked of Ms Moore on 22 February 2010 was in a different form to that pleaded by Vero and possibly in the simpler form that Ms Bristow can recall seeing on 21 October 2010. It raises other possibilities including instability in the Vero system such that it might have asked different questions on different days.

[101] Ms Bristow gave her evidence confidently and clearly. She impressed me as a witness who was doing her best to recall what she saw on the screen on 21 October 2010. Unfortunately, her recollection of the demonstration and the TSQ that was asked that day is not assisted by a printout of what she saw on the screen or a file note that recorded her recollection of the contents of that question.

[102] I accept that Ms Bristow thought at the time she saw the question on 21 October 2010 that it was very badly worded and that anyone reading the question would not know whether or not to include the interior side of external walls as part of the calculation. However, that can be said about the TSQ for which Vero contends, and is in fact argued by OIB in support of its contention in relation to the correct answer to the question.

[103] Ms Bristow was giving her recollection at a trial in February 2012 of what she saw on a computer screen in October 2010. In the absence of a printout of the question that appeared on the screen or a file note of the form of the question I am reluctant to accept Ms Bristow's recollection, given the passage of time. Ms Bristow's evidence was given carefully, as would be expected of an officer of the Court, and there is no suggestion that her evidence was affected by any wish to serve OIB's interests. Her evidence raises an important issue as to the form of the question that appeared during the demonstration on 21 October 2010, and therefore the form of any question that appeared on 22 February 2010.

[104] Ms Moore did not give evidence about the terms of the TSQ that was seen on 21 October 2010 in the presence of Ms Bristow and that it was different to the form of the TSQ contended for by Vero. However, she gave evidence that the first time she saw the question was a day or two after she was interviewed by Vero's investigator and, as a result of being interviewed, she went into the Sunrise system. She did not print a copy of the question that appeared, and at the trial could not remember exactly what it said. However, she thought that it was not as long as the TSQ for which Vero contends. I found Ms Moore's evidence in this regard unconvincing. I was not persuaded that she had a reliable recollection of the question she saw that day.

[105] Other evidence tends to indicate that the TSQ observed by Ms Bristow on 21 October 2010 is the TSQ contended for by Vero. This is evidence of investigations undertaken by Mr Zegarac in late September 2010 to which I refer below. Of present relevance is the fact that on or about 27 September 2010 Mr Zegarac accessed the e2 system and produced a "screen dump" of the

underwriting question on the Kotku file. It was in the form of the TSQ contended for by Vero. He also accessed the e2 system and inserted the same details as appeared on the Kotku file (save for the name of the client for which he used a fictitious name). The e2 system generated the TSQ.

[106] It is improbable that the TSQ appeared on Kotku's file, when accessed by Mr Zegarac on 27 September 2010, but appeared in a different form when it was accessed by Ms Moore in October 2010. It is improbable that the TSQ would have changed during that period. If someone made a change to the form of question then it probably would be recorded. Mr Helmore gave evidence about the process by which a TSQ might be changed and how this would be recorded if the change was made within his area of operation. Relevantly, the system recorded the correction of the spelling of percentage in the TSQ, being a correction that was made on 31 August 2010. As previously noted, there is no record of any other change in relation to the TSQ. The evidence left open the possibility that someone on the production side with appropriate authority might have changed the TSQ without reference to Mr Helmore's section. However, this is an unlikely possibility.

[107] I am not persuaded that the TSQ seen by Ms Moore and Ms Bristow on 21 October 2010 was in a different form to the TSQ that operated on the Vero system on 22 February 2010 (save that the spelling of percentage was corrected) or that it was any different to the TSQ that Mr Zegarac saw when he used the e2 system on or about 27 September 2010.

The expert evidence

[108] It is convenient to address the expert evidence of Dr Schatz upon which OIB relies along with other expert evidence, including that of Dr King, who was engaged on behalf of Vero.

[109] The course of discovery in the proceedings, and the need for an early trial so as to serve the interests of justice, meant that orders were made in December 2011 for Dr Schatz to undertake certain tests. Arrangements were made for a test facility to be created and for Dr Schatz to obtain certain information and documents. Both Dr Schatz and Dr King attended at the test facility in Sydney on 13 January 2012. Each provided reports and they gave their evidence concurrently. They are highly qualified experts and their evidence was of assistance to the parties and to the Court.

[110] OIB's submissions rely on:

(a) Dr Schatz's point that a bug in an IT system is an ascertainable fact, as Dr King accepted;

(b) Dr Schatz's conclusion that further testing was required before concluding that there was no bug;

(c) Dr King's concession that, given more time, he would have undertaken other investigations; and

(d) the fact that the provenance of the system was not fully proven.

OIB also submits that Dr Schatz was refused access to the test facility after 13 January 2012 otherwise than on unreasonable conditions. He is said to have been effectively denied the opportunity to undertake further testing. That point is strongly contested by Vero, and I have had regard to correspondence between the parties concerning the matter. The fact of a dispute about further access by Dr Schatz between the testing on 13 January 2012 and the trial was unfortunate. The dispute should have been resolved by agreement or absent agreement by seeking a direction from the Court. Dr Schatz did, however, have access to a similar test facility that was established for the purpose of the trial, and had the opportunity to access that facility outside court hours.

[111] I accept that further testing of the test facility *may* have provided further assistance to Dr Schatz in exploring possibilities. However, I do not consider that the problem that arose concerning his further access to the system significantly alters the nature of the expert evidence or the issues that arise in respect of it.

[112] Dr Schatz's report and his oral evidence raised a number of possibilities. He was instructed by OIB's solicitors to prepare a report that answered the following question:

> "As at 22 February 2010, was the first defendant's computer system ('the System') configured so as to preclude the possibility that Mary Moore could have completed the application process administered through the System for policy number SMXO93219820 ('the Policy') without:
>
> (i) seeing; and/or
> (ii) responding
>
> to the question set out in paragraph 12(b)(ii) of the first defendant's defence (the TSQ)."

In response, his report concluded that he was:

> "... unable to form a concluded opinion as to the question posed in my instructions, as I have been unable to undertake the testing necessary. Further testing is required to address the following areas of uncertainty:
>
> a) The range of potential actions undertaken by Ms Moore on 22 February 2010; and
> b) The extent to which the test facility behaves in a materially equivalent manner to the system as it existed on 22 February 2010."

[113] As to the first matter, Ms Moore's actions were the subject of an affidavit sworn by her and were capable of being addressed by further inquiry by Dr Schatz or OIB's solicitors if the need arose. As to the second matter, although it is possible that the test facility behaved in a materially different manner to the system as it existed at 22 February 2010, the opportunity existed for Dr Schatz to explore this issue in his discussions with Vero's experts and staff, and for the matter to be examined in evidence at the trial. I do not have a basis to conclude that there are any substantial issues in relation to the provenance of the test facility. It was established to create

the Vero system as it existed on 22 February 2010. It is possible that it did not achieve this goal, but I am not persuaded to conclude that it did not.

[114] Dr King's report addressed a number of possibilities and scenarios that were suggested as explaining why the system may not have operated as intended. For reasons that were given by him in his report and in his oral evidence, each of these possibilities was found to be highly unlikely.

[115] As to the suggestion that there may have been a bug in Vero's system, Dr King deemed this to be unlikely and the source code referred to by Mr Helmore at the trial indicates that there were no bugs in the systems as at 22 February 2010. Dr Schatz agreed that there was no evidence that a bug had been present in the Vero system as at 22 February 2010.

[116] Dr King expressed the view in his report that the most likely rationale for the "Policy at a Glance" panel to show all ticks was if the TSQ had been answered. Dr King also confirmed that the "Policy at a Glance" panel did not drive the system but was merely a view of some information that might guide the user using the system.

[117] Dr King confirmed in his testimony, based on the further evidence adduced during the proceedings and based on his own investigations, his view that it was:

(a) extremely unlikely that the TSQ did not appear when Ms Moore effected the policy; and

(b) unlikely that Ms Moore left the TSQ unanswered but that it showed up with an answer of "Zero percent" in the system.

He concluded that it was highly unlikely that the TSQ would have the pre-populated answer "Zero percent" or that this answer would be recorded if no answer was chosen by the broker. Dr King gave compelling reasons for these conclusions and I accept them.

[118] Both Dr King and Dr Schatz agreed that if there were problems with the TSQ code then this would manifest itself across many other TSQs within the system. That had not happened.

[119] Both experts agreed that there were two levels of validation that Ms Moore had to pass through to effect the policy and that, if the system worked correctly, she would have been advised at each validation that she had to answer the TSQ before the system would let her effect the policy.

[120] Dr Schatz acknowledged that, for the system to have failed in the way suggested by OIB, it must have failed in three ways:

(a) at the "save" validation level;

(b) at the premium amount summary validation level; and

(c) by self-populating "Zero Percent".

[121] The expert evidence leads me to conclude that it is probable that the TSQ was asked and answered as alleged by Vero.

[122] Kotku submits that reliance should not be placed upon Vero's expert evidence and other evidence given by Vero about the operation of its system because in reaching their conclusions the experts did not have reference to Mr Zegarac's email of 29 September 2010 (Exhibit 17) or Ms Kerr's report of 31 October 2010 (Exhibit 61). Some relevant witnesses were taken to Mr Zegarac's email and asked questions about it and whether it altered their conclusions. Submissions were made by counsel for Kotku and Vero about the form of questions asked of these witnesses and what should be made of their responses. I do not propose to detail their evidence. For the reasons given in relation to my consideration of Mr Zegarac's email of 29 September 2010 (Exhibit 17) and more importantly, his emails of 27 and 28 September 2010 (Exhibits 49 and 50), Mr Zegarac did not conclude in September 2010 that the TSQ had not been asked. Dr King's evidence was that if he had seen Exhibit 17 earlier he would not have done his investigation any differently. It is understandable that Exhibit 17 was not provided earlier to Mr Helmore, Dr King or other technical experts to assist in their consideration of whether the TSQ was asked. It added very little to the topic. But it, along with Exhibits 49 and 50, indicated that the TSQ was asked and that Vero's records showed that it was answered "Zero Percent".

[123] As to Ms Kerr's report, it was not disclosed until the sixth day of the trial and relevant technical witnesses were not asked to consider its contents. No request was made for them to be recalled for them to do so. For the reasons to be discussed below, Ms Kerr's report is worded in a manner that suggests that the answer to the TSQ was pre-populated. However, for reasons to be given, I conclude that Ms Kerr had no reasonable basis to reach that conclusion on the information that was available to her as at 31 October 2010. Had Dr King and others been shown Ms Kerr's report then they may have had some doubt as to whether the answers were not pre-populated. However, they probably would have inquired about the basis that Ms Kerr had to apparently conclude that the answer was pre-populated and, in the absence of any reliable basis for such a conclusion, probably adhered to their evidence that the answer was not pre-populated.

[124] I do not consider that the contents of the Zegarac email or the Kerr report require a different conclusion to be reached about the expert evidence.

[125] I should add that Mr Helmore was an impressive witness. I take account of the fact that he is an employee of Suncorp/Vero. However, this is not a sufficient reason to discount the reliability of his evidence or his credibility. As a technical expert he seemed motivated to fairly answer the technical questions that were asked of him, and there is no suggestion that he was motivated to provide evidence that simply suited the interests of Vero. Like Dr Schatz, Dr King and Mr Padilla, Mr Helmore gave honest and reliable evidence.

[126] Overall, the expert evidence supports the conclusion that the TSQ was asked and answered. The possibilities raised by Dr Schatz do not persuade me otherwise.

The report of Mr Zegarac

[127] In September 2010 Mr Zegarac worked in Suncorp's Adelaide office. His position was described as "Northern SME Audit and Training Specialist" in the area of Commercial Insurance. In late September 2010 Ms Debra Kerr, who was based in Suncorp's Brisbane office and had a senior role in the investigations of claims, involved Mr Zegarac in relation to the investigation of the Kotku claim. She advised Mr Zegarac that she was going to appoint an external investigator to interview the broker in relation to what she did with regard to accepting the policy. Ms Kerr asked Mr Zegarac to provide her with the underwriting questions relating to the whole policy that the broker would have had to answer when completing the quote and policy. Ms Kerr's intention was to send them to the investigator so that Ms Moore could be interviewed in relation to them.

[128] Mr Zegarac sent emails to Ms Kerr at 4.40 pm on 27 September 2010 (Exhibit 49) and at 10.06 am on 28 September 2010 (Exhibit 50).

[129] In his first email report (Exhibit 49) Mr Zegarac reported details in relation to the Kotku policy and the online transactions that were completed by Ms Moore on 22 February 2010. This email report included a "screen dump" of what would be seen by the broker on her Sunrise system and advised on the basis of the evidence outlined by Mr Zegarac that:

> "it is clear that the broker would have had opportunity to check the details, terms and cover of the policy on E2 prior to Closing and Accepting the New Vero Policy: **this would include the Underwriting Question regarding the EPS percentage**." (emphasis added)

The report went on to show a screen dump of the relevant entry from the Protect system which also recorded the answer to the question regarding EPS as having been answered Zero Percent.

[130] The second email report set out certain General Underwriting Questions and also the question in relation to EPS. Mr Zegarac produced this question in the email in the form of a screen shot that contained the relevant page from the e2 system. The details of the premises and that it was a bakery coincided with the details in relation to Kotku, but Mr Zegarac used a different name for the client in this exercise. The screen showed the TSQ. The space to answer it was blank with the three options below it.

[131] These reports make clear that Mr Zegarac's investigations led him to conclude that the underwriting question which has been referred to in these proceedings as the TSQ in relation to EPS would have been asked of Ms Moore.

[132] On 29 September 2010 Mr Zegarac sent an email to Mr Sweetman, a senior underwriter within Suncorp based in Sydney, about Kotku. The email followed a discussion between Mr Zegarac and Mr Sweetman. Mr Zegarac advised that he had "further investigated what the Broker's responsibilities were regarding Duty of Disclosure once the Old Suncorp Policy was cancelled and a new Vero policy offered". This email report which became Exhibit 17 was forwarded by Mr Sweetman to, amongst others, Ms Kerr later on 29 September 2010.

[133] Exhibit 17 became the focus of much consideration at trial with Kotku contending that it reported that the result of Mr Zegarac's investigations was that the EPS question was not asked in respect of policies that were transferred from Suncorp to Vero. I do not consider that the email has that meaning and such a meaning would be inconsistent with what Mr Zegarac had reported in his earlier emails about the questions that were asked of Ms Moore.

[134] Particular reliance is placed upon the following passages of Mr Zegarac's email of 29 September 2010:

> "As I have shown previously Vero offered the Broker/Client a NEW Business Policy (and although information would have been taken from the Old Suncorp Policy) this should be treated as a New Business Policy and not a Renewal – with all Terms, Conditions, Clauses etc checked and confirmed, and any changes required and made prior to Accepting the offer and Binding Cover.
>
> In regards to New TSQ's (Underwriting Questions on E2) I have found the following:
>
> > Page 25:
> >
> > 15. Summary of differences INSURE → Protect
> >
> > **Trade Specific Questions**
> > Trade Specific Questions are used in Protect to determine if the standard cover provided should be modified based on the answers a series of questions that are generated. The type of questions that are generated on Protect/E2 is dependent on the risk type and the occupation code.
> >
> > Not all TSQs will be converted as part of the Insure to Protect conversion. Those TSQs that are not specifically converted will be set to suppressed so that they are not asked when the policy is taken up by the broker through E2 or endorsed in Protect.
> >
> > Where a TSQ is to be converted, the answer for the TSQ will be sourced from Insure endorsement codes.
>
> Ross this is the Reason that the TSQ regarding Sandwich Panelling didn't refer to Enterprise for Consideration prior to offering cover.
>
> My reasoning is that as there were no TSQ's relating to EPS on the Insure System the I2P process automatically suppressed this due to the above reason. It is also my assumption that the Mandatory Survey was suppressed for the same reason.
>
> My subsequent tests on E2 to add the same risk (identical sums insured and with Zero EPS Percent selected) did generate the following Referral:

> **Fire**
> - Mandatory survey required (Open)
> - Combined Fire and BI Sum Insured (Open)
>
> This does therefore indicate that Vero does consider this Occupation as a High Exposure Risk and the above 12P loophole has been closed when it comes to offering New Business.
>
> My conclusion, as I expressed to you yesterday, is that as this is not a Suncorp Renewal – rather a New Business Offer from Vero it is the Brokers Responsibility to Check that all the Details are correct (and make any amendments as required), confirm Duty of Disclosure and review all the Underwriting Question Answers and Check all policy Clauses."

[135] The subject matter of the relevant passages relates to the transition from Suncorp's Insure system to Vero's Protect. Mr Zegarac explains that there were no TSQs relating to EPS on the Suncorp Insure System that would have been transferred to the Vero Protect System. The Vero TSQ in relation to EPS would generate either an acceptance or a decline. It would be accepted if the TSQ was answered "Zero Percent" or "1 to 33 Percent". It would be declined if it was answered "Over 33 Percent". There was no requirement for a mandatory survey (at least at the date of the Kotku transaction) if the policy was accepted. The sentence, "Ross this is the Reason that the TSQ regarding Sandwich Panelling didn't refer to Enterprise for Consideration prior to offering cover", apparently refers to the fact that Vero permitted automatic acceptance of an application where there were certain levels of EPS/Sandwich Panelling without the matter being referred to an underwriter for consideration.

[136] Mr Zegarac also refers to the fact that his subsequent tests on e2, however, did generate a referral that required a mandatory survey. In his report to Ms Kerr dated 27 September 2010 (Exhibit 49) Mr Zegarac stated that providing the answer "Over 33 Percent" to the EPS underwriting question will generate a referral for acceptance by the Enterprise Underwriting Team, who would then contact the broker and advise that the EPS percentage was unacceptable and that Vero declined to quote due to the high fire exposure. The screen dump that appears on page 6 of that document does not record the message "Refer to Enterprise Underwriting Team". It records the status as being "Declined". Mr Zegarac's reference in this regard seems to be to the fact that upon the application being declined by the e2 computer system the application, in effect, would be referred by other means to the underwriters in the face of the decline. If, however, I am wrong in this regard and the screen dump referred to by Mr Zegarac in Exhibit 49 does show that a referral was generated by computer then the same essential point is being made. Mr Zegarac's references to referrals to the Enterprise Underwriting Team in a case where an answer "Over 33 Percent" was given and the generation of referrals for, amongst other things, mandatory surveys, does not address the issue of whether the TSQ was asked. Importantly, the email report which became Exhibit 17 does not report that he accessed the system and the TSQ was not asked. On the contrary, it is consistent with his earlier reports which were to the effect that the TSQ was asked, including when he undertook tests on e2 to have the same risks insured.

[137] Exhibit 17 needs to be read in the context of the reports that Mr Zegarac prepared on 27 and 28 September 2010.

[138] I do not accept Kotku's submission that Exhibit 17 discloses that by 29 September 2010 Mr Zegarac's investigations had revealed that the TSQ about EPS was not asked in respect of the policies that were transitioned from Suncorp to Vero. At the trial a number of Vero witnesses were asked about Exhibit 17 and I have had regard to submissions about what should be made of their answers. Relevantly, these witnesses were not shown Exhibits 49 and 50 in the course of their cross- examination.

[139] The subject matter of Exhibit 17 was not whether the TSQ was asked in February 2010 or was still being asked in September 2010. Those matters were addressed in Mr Zegarac's earlier reports, Exhibits 49 and 50. Mr Zegarac's report which became Exhibit 17 related to a different subject matter, namely OIB's responsibilities in relation to disclosure once the Suncorp policy was cancelled and a new Vero policy offered. After reaching the conclusion that I have earlier quoted, Mr Zegarac's report addressed other matters in relation to the duty of disclosure before expressing the opinion that because the matter was:

> "… a New Business Offer from Vero, rather than a Suncorp Renewal, it was the broker's responsibility to:
>
> Check all aspects of the policy on offer from Vero, present this to their client to confirm that all cover was up to date and if there are (sic) anything that Vero should know that would be relevant to Vero accepting the offer in this instance the use of EPS in the Client's business".

[140] The essence of the three reports from Mr Zegarac was that the TSQ in relation to EPS was asked of Ms Moore in February 2010, was not correctly answered by OIB by ascertaining these details from their client and, accordingly, there was a breach of the duty of disclosure.

[141] If Mr Zegarac had concluded that the TSQ was not asked of Ms Moore, then one would have expected him to say so, initially in Exhibits 49 and 50, and subsequently in Exhibit 17.

[142] Exhibit 18, being a "Large Loss Underwriting Analysis" prepared by Mr Zegarac, and updated by him on 18 January 2011, served to confirm in respect of the Kotku claim that the TSQ was asked and answered "Zero Percent". Mr Zegarac also reported in that document the concern that, in spite of the large sum insured, the system did not require a survey when the policy was transferred from Insure to Protect.

[143] Mr Zegarac was not called as a witness at the trial. By the time of the trial he was no longer an employee of Suncorp, having been retrenched. As OIB submitted, because Mr Zegarac was not called as a witness "what he did is to be derived from the document he generated." More precisely, what he did is to be derived from the documents he generated. The documents he generated show that he was asked by Ms Kerr to investigate the underwriting questions that were asked of Ms Moore at the time the policy was taken out on 22 February 2010. The documents that he

generated, particularly Exhibits 49 and 50, indicate that the underwriting questions that Ms Moore was asked included the TSQ in relation to EPS. I do not accept Kotku and OIB's submissions to the effect that Mr Zegarac reported that his investigations showed that the TSQ was not asked. If he had concluded this then one would have expected him to say so.

[144] Exhibit 17 was addressed to Mr Sweetman, an underwriter, and addressed underwriting processes, including brokers' duty of disclosure when Suncorp policies were cancelled and new Vero policies were offered. It provided support for Vero to refuse the Kotku claim on the basis of non-disclosure. It also identified a perceived problem that had once existed in respect of policies that were transferred from Suncorp to Vero, namely that a baker was not treated as a fire risk that generated a mandatory survey, but that this "loophole" had been closed in respect of new businesses.

[145] Exhibit 17 was forwarded to Ms Kerr by Mr Sweetman on 1 October 2011 for her consideration since Mr Zegarac's views about the duty of disclosure were relevant to her investigation. However, Mr Zegarac had already reported to Ms Kerr in the form of Exhibits 49 and 50 about the underwriting questions that Ms Moore would have had to answer when completing the quote and the policy. His reports indicate that she would have been asked the TSQ for which Vero contends.

Ms Kerr

[146] Ms Kerr was in charge of the investigation into Vero's claim in late 2010. She read Mr Zegarac's emails which contained screen dumps showing the TSQ. After Mr Zegarac sent his email of 29 September 2010 (Exhibit 17) he had no further role in the investigation. Ms Kerr appointed an investigator who conducted interviews. Ms Kerr's consideration of the Kotku claim also included the perusal of documents, internal reviews, the obtaining of legal advice and the making of recommendations to Suncorp/Vero. Ultimately she recommended that the claim be declined because there had been a non-disclosure in respect of the percentage of EPS.

[147] Early in her investigations Ms Kerr made a file note which recorded that she could not find anything confirming questions asked of the broker when the Vero policy was incepted. However, as she explained, this related to an initial search that she undertook on Protect at a time when she did not know how the policy had been incepted. She did not know at that stage that it had been incepted by a broker using the e2 system. She later ascertained this, engaged the assistance of Mr Zegarac and read his reports. She saw the screen dumps that Mr Zegarac had included in his reports and she understood these to mean that the TSQ had been asked.

[148] Ms Kerr impressed me as an honest witness. OIB's submissions criticised aspects of her evidence. However, there was no inconsistency between her evidence about initially having gone into the Protect system and her later evidence of having not gone into the e2 system and having relied upon what Mr Zegarac had given her. There was no inconsistency between her evidence in this regard and later evidence that she had seen the screen dumps.

[149] Ms Kerr's evidence about the questions that Ms Moore was asked were based upon what she understood as a result of Mr Zegarac's report and other investigations that were reported to her. She also asserted that Ms Moore had not asked the questions

of Kotku, and this is correct. I do not accept OIB's submission that Ms Kerr gave misleading oral evidence. On the contrary, I accept her evidence. This includes her evidence that she understood Mr Zegarac's reports, and the screen dumps in them, as reporting that the TSQ had been asked and answered by Ms Moore. She understood that the question was asked, and, in effect, the broker was told to ask the question of the insured, but had not done so. Mr Zegarac's screen dumps showed that the question had been asked of OIB and Ms Moore "inputted the answer" without ever asking the insured. The answer that was given amounted to a false answer and the fact that OIB had not asked the question of the insured gave Vero the right to decline the claim.

[150] On 31 October 2010 Ms Kerr signed a document styled "Home Summary of Claim". It became Exhibit 61. The document summarised the claim and findings made in the course of the investigation and as a result of interviews conducted with representatives of Kotku and OIB. It addressed policy issues and the duty of disclosure and concluded that OIB had failed in its duty of care to its client, Kotku, and in doing so had also failed in its duty of disclosure to Vero. Ms Kerr recommended that the claim be declined and the policy be cancelled. The Home Summary of Claim was not disclosed until late in the trial. Ms Kerr was not examined about its contents, and after it was disclosed to Kotku and OIB there was no request for her to be recalled for further examination or cross-examination.

[151] In their submissions Kotku and OIB placed reliance upon certain passages of Exhibit 61. Particular reliance is placed upon passages that are said to lead to the conclusion that the answer to the TSQ was pre-populated.

> "• Any questions that weren't asked on the Suncorp policy such as the trade specific questions regarding EPS will transfer across as zero or blank depending on the question because we do not know the answer as the question has never been asked before. It is up to the broker to ask the insured the question and then put an answer in the E2 system
>
> ...
>
> • The trade specific question regarding any percentage of EPS in an insured business is asked in the E2 system – the answer is cascading in that there are three choices – zero percent – 1 to 33 percent – over 33 percent
>
> • In relation to the Insure policy we know that the Broker, Mary Moore who incepted the policy **did not answer the trade specific questions relating to EPS** at the insured business – we know that the Broker Mary Moore **left the answer to the EPS question as zero** ...
>
> • As a result of the trade specific question **not being answered by the Broker, Mary Moore it was left as zero in the E2 system** and came across to Vero Protect as zero percent
>
> ...

- Screen dumps of the E2 system relating to the insured policy note that Mary Moore made two amendments to the new offer of insurance before accepting it. Mary Moore also mentions making changes to the offer at the time of her interview with our external Investigator – one can easily see that the Trade specific question relating to EPS on the E2 system – given that Mary Moore made two amendments on the E2 system for the policy she had to have seen the question relating to EPS but chose not to answer it". (emphasis added)

[152] The passages relied upon by OIB and Kotku are open to different interpretations. One is that Ms Kerr reached the conclusion that Ms Moore did not answer the TSQ because it was pre-populated. Another is that Ms Kerr reached the view that Ms Moore did not answer the TSQ after seeking an answer from the insured, and that the passages emphasised by them were poorly worded by Ms Kerr.

[153] The passages relied upon by Kotku and OIB, according to their ordinary meaning, are to the effect that Ms Moore did not answer the TSQ but left the answer as Zero. If this is the meaning that Ms Kerr intended to convey, then such a conclusion had no sound basis in the reports provided to her by Mr Zegarac, the reports of the investigator whose reports were summarised in the Home Summary of Claim or in any other source of information that Ms Kerr apparently had access to at the time. The wording of the Home Summary of Claim may have been undertaken without close attention to the contents of Mr Zegarac's report (which did not suggest that the answer to the TSQ had been pre-populated as Zero). Ms Kerr's report may have been badly worded and meant to convey the essential conclusion reached in Mr Zegarac's report of 29 September 2010 (Exhibit 17). This was that the question had been answered without confirming from Kotku that the answer to the question in relation to EPS was correct. This was also the substance of the interview undertaken by Vero's investigator with Ms Moore. The summary of the interview with Ms Moore contained in the Home Summary of Claim (Exhibit 61) was to the effect that Ms Moore could not recall seeing the question on the Vero policy, was not aware that there was EPS at Kotku's business and, unlike a butchery or an abattoir, did not think that there would be EPS there and did not have any discussions with Kotku about EPS in its business. Against this background Ms Kerr's report might be thought to be loosely worded and intended to convey the fact that after selecting a Zero answer to the EPS question, OIB did not ask the TSQ of its client and thereafter left the answer as "Zero Percent" before effecting the policy. This, however, is not the ordinary meaning of the relevant passages.

[154] In the absence of evidence from Ms Kerr about Exhibit 61 and the meaning that she intended to convey by the words that are relied upon by Kotku and OIB, I might proceed on the basis that Ms Kerr intended to convey the meaning that is conveyed by the natural and ordinary meaning of these words. The natural and ordinary meaning of the words is that Ms Moore left the response to the EPS question as "Zero Percent". The inference is that the question was asked and the answer was pre-populated as "Zero Percent". If this is what Ms Kerr intended to mean by her words then she had no reasonable basis to conclude that the answer was pre-populated. She did, however, have good reason to believe that the TSQ was asked and answered "Zero Percent".

[155] If, however, she intended to suggest that the answer was pre-populated by Vero then this does not have any significant implications for the outcome of the proceedings. If, on the basis of Exhibit 61, and contrary to all of the other evidence that the answer was not pre-populated, the conclusion was to be reached that the TSQ was pre-populated when Ms Moore processed the application, then Ms Moore still adopted that answer, and thereby selected it when processing the policy. Adopting the interpretation urged by OIB and Kotku in relation to Exhibit 61, the document constitutes an assertion by Ms Kerr that the TSQ answer was pre-populated as "Zero Percent". To the extent that it amounts to an admission by Vero that the answer to the TSQ was pre-populated, OIB and Kotku do not contend that the answer was pre-populated. Their cases are that the TSQ was not asked and therefore no answer was selected. Their alternative position is that if the TSQ or a differently-worded question was asked, the answer was left blank.

[156] If I was to find on the basis of Exhibit 61 that the TSQ answer was pre-populated (and no party contends that I should make such a finding) then such a finding would fall within Vero's pleading that the TSQ question was asked and the Zero Percent answer was selected. Vero was not asked to particularise the manner in which the answer was selected. Vero, however, adopted the forensic approach of seeking to prove that the answer was selected by Ms Moore either deliberately or inadvertently, and did not advance in evidence the scenario that the answer was pre-populated. If, however, I was to find that the answer was pre-populated then Vero would still have established its pleaded case about the question and its answer.

[157] Ms Kerr's Home Summary of Claim is an insufficient basis to conclude that the answer was pre-populated. Ms Kerr had no reasonable basis to form that view. Other evidence in the case does not support the conclusion that the answer was pre-populated. I decline to find that the TSQ answer was pre-populated. If, however, I had found that the answer was pre-populated (a finding which no party invites me to make) then Vero would succeed on the critical issue that, the TSQ having been asked on 22 February 2010, Ms Moore selected the answer Zero Percent.

[158] It is very unfortunate that Exhibit 61 was not disclosed sooner. It was relevant to the question of whether the TSQ was asked and answered by Ms Moore. Exhibit 61 might have been put to other witnesses. But if it had been then the value of any answers given by those witnesses would have depended upon the ultimate worth of Exhibit 61 as proving that the TSQ answer was pre-populated. No party asked for Ms Kerr to be recalled for further examination in relation to Exhibit 61 or for any other witnesses to be recalled so that Exhibit 61 could be put to them.

Conclusion – was the TSQ asked and did Ms Moore select Zero Percent?

[159] The evidence relied upon by Vero strongly supports the conclusion that the TSQ pleaded by it was asked at the time OIB completed the online application on 22 February 2010. The possibilities to the contrary pointed to by Dr Schatz in his report and in his oral evidence are simply possibilities. I am conscious that the issue is whether the Vero system operated as intended in the context of a policyholder whose details were transferred from the Suncorp system to the Vero system, and whose broker treated the application as if it was a renewal, not an application to Vero by a broker in respect of completely new business. The possibility exists that the Vero system operated as intended for an application for a new policy on behalf

of a customer that had not dealt with Suncorp/Vero in the past, but something went amiss in respect of policies transferred from Suncorp to Vero. However, the technical and other evidence called by Vero, and the concurrent evidence of Dr King and Dr Schatz, lead me to conclude that it is very unlikely that the Vero system did not operate as intended when Ms Moore used it on 22 February 2010.

[160] The evidence of Ms Moore and Ms Bristow does not persuade me otherwise. Ms Moore has no recollection of the transaction that is recorded in Vero's records. Given her knowledge of EPS and her belief that it was not generally used in bakeries, and the fact that the information to which she had regard did not suggest that this bakery had EPS in its internal construction, it is likely that Ms Moore believed on 20 February 2010 that the Kotku bakery did not contain EPS.

[161] Ms Bristow's evidence raises a doubt about the form of words in which the TSQ appeared on 21 October 2010. However, there is no documentary evidence of the form of the question that was read by Ms Bristow, such as a print-out of the screen that appeared that day or a file note by Ms Bristow as to its terms. Mr Zegarac's reports, including screen dumps of exercises he performed on 27 and 28 September 2010 (Exhibits 49 and 50) show that the TSQ contended for by Vero, not some different wording, was asked a few weeks before Ms Moore and Ms Bristow accessed Kotku's file and performed a similar exercise on 21 October 2010. The Vero records do not record any change in the wording of the TSQ between 22 February 2010 and the date that Ms Bristow made her observation (save for the correction of the spelling of the word "percentage").

[162] Mr Zegarac's reports in September 2010 about the questions that Ms Moore would have been asked, particularly Exhibits 49 and 50, indicate that the TSQ was asked. His report of 29 September 2010 (Exhibit 17) does not support a different conclusion.

[163] I conclude that the TSQ pleaded by Vero was asked at the time OIB completed the online application on 22 February 2010.

[164] I also conclude that Ms Moore selected "Zero Percent". Vero's records of the history of the transaction show that she did. It is very unlikely that the records would show this if "Zero Percent" was not selected. Ms Moore did not know that the answer was false, and in the course of processing what she treated as a routine "renewal" she probably selected "Zero Percent" from the three options that appeared in response to a question that had to be answered for her to process the renewal. The system required one of these responses to be selected, and Ms Moore probably selected "Zero Percent" in the absence of any ground to believe that the Kotku bakery, or bakeries in general, had EPS in their internal construction.

[165] The possibility that "Zero Percent" was inadvertently selected exists, but it is more probable that Ms Moore deliberately selected it.

[166] The possibility also exists, on the basis of Exhibit 61, that the answer to the TSQ was pre-populated. While the terms of Exhibit 61 supports this conclusion, other evidence, including the information available to the author of Exhibit 61, does not support this conclusion. If, however, the answer "Zero Percent" had been pre-populated as the default response to the TSQ, Ms Moore still selected that response when she did not alter it in the course of processing the application.

[167] In summary, Vero has proven that the TSQ alleged by it was asked and answered "Zero Percent" by OIB on 22 February 2010.

Was the answer a misrepresentation or made in breach of Kotku's duty of disclosure?

[168] The answer Zero Percent was a misrepresentation because there was a substantial amount of EPS in the internal construction. Subject to certain issues raised by OIB in relation to Vero's knowledge and the content of Kotku's duty of disclosure in the light of this alleged knowledge, the answer Zero Percent also amounted to a breach of Kotku's duty of disclosure.

The issue of Vero's knowledge

[169] OIB contends that, on the basis of the information provided by Comsure in 2006, the existence of a substantial amount of EPS was already known to Vero so that no duty of disclosure arose in relation to that matter. The duty of disclosure that an insured has by virtue of s 21(1) of the Act does not require the disclosure of a matter "that the insurer knows or in the ordinary course of the insurer's business as an insurer ought to know".[2]

[170] As noted, Kotku, through Comsure, informed Suncorp in April 2006 of the existence of "insulated panelling" when Comsure approached Suncorp for a quotation in respect of what was represented to be new business.

[171] OIB accepts that authorities such as *Macfie v State Government Insurance Office (Qld)*[3] establish that the mere fact that information was held on files somewhere within an insurance company is insufficient to fix that insurer with knowledge of the information for the purposes of the duty of disclosure, unless the information can "reasonably be said to be in the minds of those officers of the insurer who are responsible for the decision whether to contract." Derrington J in that case acknowledged that "the march of the computer" would be likely to have an effect on how and when the insurer could be fixed with knowledge, and OIB's submissions observe that the computer has marched a long way since then.[4] However, the principles remain unchanged. The march of the computer may mean that certain information within an insurance company is held in electronic, rather than hard copy form. However, this fact and the ability to search databases does not alter the relevant principles. These principles are helpfully stated in Derrington and Ashton, *The Law of Liability Insurance*.[5] They include the following:

> "... if the information is supplied to an officer authorised to receive it for one purpose, it cannot be said that the insurer has received it for another purpose for which a different officer is authorised to receive it. The relevant matter must be known to an appropriate officer or agent ordinarily handling the matter, or it must be contained in its official records. This is particularly so in the case of a large

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2 *Insurance Contracts Act* 1984 (Cth), s 21(2)(c).
3 (1985) 3 ANZ Ins Cas 60-606 at 78,688.
4 Ibid at 78,689.
5 Second edition, Lexis Nexis 2005 at 4-99 to 4-107.

> organisation where the knowledge may be held only by someone not involved in or aware of the proposed cover."[6]

The authors cite authority for the proposition that in assessing a corporation's knowledge it is not permissible to aggregate the knowledge of its officers and agents. They observe that where there is non-disclosure but the insurer has "hidden deep in its records, details of the fact, but no indication of any connection with the current proposal for the policy" it often cannot be said that the insurer has knowledge which would amount to disclosure.[7] They continue:

> "The complexity of business in a large insurance office and the division of tasks is not to be taken advantage of by the proponent, the more so in the case of a cover note where, for the benefit of the insured, the insurer quickly and informally provides cover without the protection of a proposal and without time to investigate the application. To attribute knowledge to the insurer in such circumstances because of information remotely contained in its files or known to an agent, but disconnected from the application for and the issue of the policy, is to encourage abuse of the complexity and necessary division of work of any large insurer and defeats the purpose of the doctrine of fidelity; which is, as indicated above, designed to place the insurer in an equal bargaining position by ensuring that it has a real opportunity for full knowledge. It is knowledge, not information, which is relevant. The possession of information is not necessarily knowledge and it is necessary in each case to determine as a matter of fact the extent to which the former gives rise to the latter."[8]

[172] The governing principles, and the terms of s 21 of the Act, show that the issue relates to the knowledge of the insurer of a matter. The focus is upon knowledge, not the mere possession of information. A corporation can act only through its employees or agents. As Hayne J stated in *Esanda Finance Corporation Ltd v Colonial Mutual General Insurance Co Ltd*:[9]

> "To speak of the corporation being aware of something invites attention to how that 'awareness' may come about."

His Honour followed earlier authority in respect of knowledge for the purposes of s 21(2)(c) to the effect that "before an insurer can be said to have knowledge of a particular matter, it must be established that the knowledge was possessed by a responsible officer of the company who either appreciated the significance of the knowledge, or should have appreciated its significance."[10]

[173] Authorities emphasise that each case must be decided on its own facts.[11] The foregoing principles fall to be applied in circumstances in which the information in question was provided in respect of a business that was represented to be new

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6 Ibid at 4-100.
7 Ibid at 4-106.
8 Ibid at 4-107.
9 (1993) 217 ALR 180 at 187.
10 *Evans v Sirius Insurance Co Ltd* (1986) 4 ANZ Ins Cas 60-755 at 74,555.
11 *Gaiform v Suncorp* (1992) 7 ANZ Ins Cas 61-143.

business, not an existing client. OIB submits that the information provided pertained to an existing client. That is true, but Suncorp had no reason at the time to think this, since it was told that it was new business. It acted accordingly. In the circumstances, it had no reason to place the information on an existing Kotku file for future use in respect of a renewal or for some other purpose in respect of an existing policy. The fact that it would have been possible for Suncorp officers in 2006 to ascertain that Kotku was an existing client does not mean that they had any reason to undertake such a search. The fact that Exhibit 36 was disclosed in the proceedings on 9 February 2011 does not prove, as OIB submits, that the information was "obviously readily obtainable by any responsible officer caring to conduct a cursory search."

[174] The transaction in respect of which the information was provided by Comsure was not related to an existing Suncorp policy. It was given in respect of a potential new business transaction that was never completed. Such information might have been expected to be archived in the ordinary course of business. There is no evidence that the Suncorp employees who dealt with the matter in 2006 appreciated that the information related to an existing client and should be placed with the existing client's file for the purpose of a renewal. The march of the computer does not require insurers to undertake costly searches throughout their records, at a cost which is likely to be passed on to policyholders, to locate information that was acquired years earlier in respect of a proposed transaction that came to nothing in respect of an entity which was not thought to be a client.

[175] The information in question was supplied to Suncorp in 2006 for the purpose of quoting on new business. It cannot be said that Suncorp received it for other purposes. The information that was acquired by Suncorp employees in April 2006 for the purpose of quoting to Comsure cannot be aggregated with the knowledge of Suncorp/Vero employees who were concerned in 2010 with the transition of the business of policyholders such as Kotku from Suncorp to Vero and applications to Vero for a new policy.

[176] Subject to the implications of letters sent by Vero in early February 2010 to Kotku and OIB, I do not consider that the information provided by Comsure in 2006 about the existence of insulated panelling in the interior walls of the building constitutes knowledge that Vero had in 2010 for the purpose of transacting the application initiated by OIB on 22 February 2010. The employees of Vero who were concerned with the transitioning of Suncorp policies to Vero and in considering information disclosed on Kotku's behalf in respect of a proposed new policy with Vero did not know, and could not reasonably be expected to have known, that another broker had provided information with respect to those premises in 2006 in respect of a transaction that did not proceed.

[177] OIB relies upon the contents of letters dated 1 February 2010 that informed OIB and Kotku that Suncorp was not prepared to offer renewal terms, but that Vero was prepared to offer a replacement new business policy. The letter is quoted in [43] above. The letter reminded OIB and Kotku of Kotku's duty of disclosure. It stated that in offering a new policy, Vero would not require a new business application form, and would "rely on the information given to Suncorp when the insurance was first taken out, as well as any other information provided to Suncorp." OIB observes in these proceedings that the statement that Vero would rely on "any other information provided to Suncorp" was not qualified or withdrawn. It submits that

this amounted to an offer that was capable of acceptance and extended to the information provided to Suncorp by Comsure in 2006.

[178] The terms of Vero's letter dated 1 February 2010 fall to be interpreted in their context. OIB's witnesses did not suggest that this letter was relied upon by OIB as a waiver of Kotku's duty of disclosure. Of course, OIB did not know that Comsure had provided any information to Suncorp in 2006. The words "any other information provided to Suncorp" do not extend to any information from any source provided at any time. In their context they refer to information provided to Suncorp in respect of the insurance that was taken out with Suncorp. Arguably, they extend to information provided to Suncorp by Kotku or Kotku's agents in respect of the business and the risk to be insured, and are not confined to information provided to Suncorp by OIB in the course of renewing or amending the policy with Suncorp. It is unlikely that the words would be reasonably interpreted by someone in OIB's position as extending to information provided to Suncorp by another broker in respect of a possible policy, being an approach that came to nothing and did not find its way onto the file or records associated with the existing business and which Suncorp could not reasonably be expected to access for the purpose of the administration of that policy.

[179] In the circumstances, I am not persuaded that the information that was provided by Comsure to Suncorp in 2006 were matters that Vero knew or in the ordinary course of its business as an insurer ought to have known in February 2010 for the purpose of transacting a new business policy with Kotku pursuant to the arrangements outlined in the letter of 1 February 2010.

[180] If, however, these matters were known to Vero, or in the ordinary course of its business as an insurer it ought to have been known to them, this meant that the duty of disclosure under s 21 of the Act did not require the disclosure of those matters. This requires attention to the relevant matter. The information provided by Comsure to Suncorp in 2006 was that there was "insulated panel" of an unknown type and unspecified extent. This does not amount to knowledge that the panel consisted of EPS, or its extent. Suncorp was not provided with information about the quantity of insulation, expressed as a percentage of the internal construction of the building.

[181] If Vero is taken to have known of the information provided to Suncorp, then such knowledge fell short of knowledge that the percentage of EPS constituting the internal construction was more or less than 33 per cent. This was the matter about which disclosure was sought and which gave rise to Kotku's duty of disclosure. The information held somewhere in Suncorp's files did not supply the answer to the TSQ. The information archived in Suncorp's records of quotes for new business in 2006 would not have told Vero the answer to the TSQ. Accordingly, Kotku still had an obligation to disclose the correct answer to the TSQ. The information did not refer in terms to EPS. However, assuming that the reference to "insulated panelling" would have been understood by Suncorp to refer to EPS rather than some other form of insulation, the information did not disclose the existence of a substantial amount of EPS. Suncorp/Vero was not to know whether it was more or less than 33 per cent of the internal construction.

[182] I conclude that the information provided to Suncorp in 2006 by Comsure was not known by Vero for the purposes of transacting the application made by OIB on

behalf of Kotku for a new business policy to replace the existing policy with Suncorp. The information was not provided to Suncorp in connection with the existing policy in 2006. Although the information was provided to officers of Suncorp which dealt with inquiries from brokers and referred to Ms Johnson as an underwriter to consider, it was provided for the purposes of considering new business and Suncorp would not be taken to have known of that information for the purposes of future transactions with OIB in respect of its existing customer, Kotku. The information provided to Suncorp in 2006 was not information provided to it in respect of that existing policy and Vero's letter of 1 February 2010 should not be interpreted as a promise to rely upon such information. I conclude that Vero did not know of the matters communicated by Comsure to Suncorp in April 2006. I am not satisfied that in the ordinary course of its business as an insurer Vero ought to have known these matters in February 2010.

[183] I conclude that the existence and extent of EPS had to be disclosed in answer to the TSQ as part of Kotku's duty of disclosure. Kotku's duty of disclosure was not qualified in the circumstances in respect of the information provided by Comsure. As a consequence, Kotku was under a duty to disclose information in response to the TSQ.

[184] In any event, had s 21(2)(c) of the Act applied in respect of the information provided to Suncorp in 2006 by Comsure this simply meant that Kotku's duty of disclosure did not require it to disclose that internal walls consisted of insulated panelling. It did not relieve it of its duty of disclosure to respond to the TSQ and to provide the specific information sought by the TSQ in relation to the percentage of EPS that was comprised in the building's internal construction. Information about insulated panelling in walls in 2006 would not inform Vero of the percentage of EPS that formed part of the internal construction of the building in February 2010.

Was the correct answer to the TSQ "1 to 33 Percent"?

[185] Vero submits that the answer given to the TSQ was a misrepresentation and that the percentage of EPS substantially exceeded 33 per cent. Kotku did not plead that the percentage of EPS was less than 33 per cent, but submits that Vero has the onus of proving that the answer was inaccurate and inaccurate in a way that would have caused Vero to decline the proposal. Kotku did not call evidence in support of the proposition that the correct answer to the TSQ was "1 to 33 Percent", and would not have been permitted to do so without leave in the light of its non-admission. OIB did not clearly assert in its defence that the correct answer was "1 to 33 Percent". However, its amended defence placed whether Vero was misled in issue. In its submissions OIB contends that the correct answer to the TSQ was "1 to 33 Percent" so that, even if the correct answer had been given, Vero would have accepted the risk without further steps.

[186] After the fire Vero engaged an experienced quantity surveyor, Mr Roberts, who inspected the premises. He reported about the extent of EPS in the internal construction of the building. He identified that save for some ceilings within the office space, the entire ceiling of the building was EPS. He undertook a calculation of the percentage of EPS. OIB submits that Mr Roberts did not address himself to the question posed by the TSQ, but took his instruction from an email which asked him what percentage of EPS was inside the insured building at the time of the fire. Mr Roberts clarified in a supplementary report the question that he addressed. This

appears as Attachment D in Exhibit 71. That question is in terms of the TSQ. Despite that, OIB submits that the question that he addressed was not in accordance with the TSQ but was the different question to which he referred in his oral evidence. I do not accept this submission. On 28 September 2010 Mr Roberts received initial email instructions to ascertain what percentage of EPS was inside the building and to liaise with the assessor. On 30 September 2010 he received the email which is Attachment D to Exhibit 71 and, accordingly, undertook a calculation based upon his understanding of the meaning of the TSQ. In doing so he noted that there was also an area of 119.67m² which he considered was "probably EPS walls" although there was a possibility that it could be another product called EIR.

[187] Adopting a conservative approach (excluding the 119.67m²), he initially considered the total EPS component by way of area was 1657.13m² of a total of 2331.38m². This equated to a percentage of 67.61%. If the area of 119.67m² was in fact EPS, then the total percentage would be 72.49%. After viewing some additional drawings which were provided to another expert, he subsequently undertook some further calculations for his supplementary report which put the conservative calculation at 67.38%. Adding in the 119.67m² EPS would equate to 72%.

[188] OIB criticises Mr Roberts' approach to the issue of "internal construction". It submits that this approach ignores the internal side of outer walls, the roof and the floor and that the approach is "deeply flawed". OIB submits, amongst other things, that the floor of the building should be included in the calculation. I do not agree with OIB's contentions and consider that Mr Roberts adopted a rational and reasonable approach to the question that he was asked to consider, being one about "internal construction". Such a term obviously is in distinction to the building's external construction. Mr Roberts cannot be criticised for adopting an approach to measurement that conformed with quantity surveying practice. OIB called no evidence to the contrary as to that practice. Instead, late in the trial OIB obtained a report from another quantity surveyor, Mr O'Connor, who was instructed to undertake further calculations which included the internal side of the external wall (which is a concrete slab) and the floor area. Mr O'Connor did not contradict Mr Roberts' evidence about the standard method of measurement adopted by surveyors in measuring a building's internal construction. Instead, his engagement was limited to essentially a calculation exercise. This was one of the reasons that I permitted his report to be put into evidence in the closing stages of the trial.

[189] Ultimately, of course, it is not for Mr Roberts, Mr O'Connor or any other witness to say what the correct interpretation of the TSQ is and what the correct answer to it is. However, my conclusions in relation to the correct answer are assisted by Mr Roberts' evidence and what I regard to be the reasonableness of his approach to calculation.

[190] In his calculations, Mr O'Connor included as part of his calculations an area above the mezzanine floor consisting of foil insulation under the roof sheeting. He also undertook a calculation of the external walls but without making any allowance for the various windows, doors and other openings which he was prepared to accept was 106m². Mr Roberts observed the premises after the fire. Mr Roberts' supplementary report confirms that the area above the mezzanine floor did not consist of a ceiling. The foil was part of the roof cladding, sat under the metal roof

and above the roof structure. Mr Roberts confirmed that an allowance of 106 m² for door and window openings (to be excluded from the total area) was appropriate.

[191] It is necessary to adjust Mr O'Connor's calculations because he did not make any allowance of 106 m² for the openings and because I accept Mr Roberts' evidence about the area above the mezzanine floor. It also may be necessary to make some adjustments to Mr Roberts' calculations in relation to certain relatively minor matters that were raised in OIB's submissions in response (but which were not put to Mr Roberts in cross-examination) in relation to vents, rails and conveyor belts that are said by OIB to go through internal walls. Reference is also made by OIB in relation to steel columns. However, the issue of substance is whether Vero is correct in submitting that the percentage of EPS was more than 33 per cent and whether areas such as floors should be included in the calculation of "internal construction" in answering the TSQ.

[192] The floor that was constructed was a concrete slab and was an integral part of the external construction. It was there before any internal construction was carried out. The TSQ uses the term "internal construction". The matters that are given within the TSQ as examples of internal construction are only examples, and not an exhaustive list. However, it is notable that the example does not include floors. Despite this, OIB argues that the floor space should be included in any calculation. It notes that the floor was coated with epoxy and says that this was clearly part of the fitout. Its argument is that since the floor was lined with epoxy as part of the fitout, it cannot be ignored in the calculation of "internal construction". It argues that, in any event, the floor is internal construction. I do not accept OIB's contention. OIB's arguments about these matters treat surfaces that are inside the building such as the walls of the building and its floor as part of the building's "internal construction". OIB's submissions tend to interpret the TSQ as if it was asking about the fitout of the building (and thereby includes things like the floor coverings) rather than being a question about "internal construction". The word "internal" qualifies the word "construction" and draws a contrast with "external construction". The question is asking about construction inside the building, not its fitting out. The main walls of the building were constructed as concrete slabs and did not form part of its internal construction.

[193] OIB pursues other points in an attempt to establish that the percentage of EPS was less than 33 per cent. It is unnecessary to refer to them all because I do not accept OIB's approach to the proper interpretation of the TSQ or the approach which it instructed Mr O'Connor to take in undertaking his calculations. In addition, some of these matters were not put to Mr Roberts. These include the proposition that the surface area of machines such as dishwashers and dough-kneading machines should have been included in the calculation of "internal construction". I do not accept this proposition. A dishwasher may form part of a building's fitout but it is not part of its "internal construction". The TSQ is about "internal construction", not "internal surfaces". It is a question about "construction", including construction that forms part of the general fitout. It would include built-in cupboards and other built storage areas. But it is not a question about fitout in general.

[194] It is unnecessary for me to arrive at a precise percentage of the internal construction that comprised EPS in February 2010. Even making some adjustments to the calculations undertaken by Mr Roberts, the percentage was substantially in excess of 33 per cent and in the vicinity calculated by Mr Roberts. The calculation

undertaken by Mr O'Connor was based upon instructions that did not reflect a proper approach to the calculation of the internal construction comprised by EPS.

[195] OIB's submissions (and the basis upon which its solicitors asked Mr O'Connor to calculate matters) involve an unreasonable interpretation of the TSQ, and one unlikely to have been adopted by Kotku, OIB or a quantity surveyor if called upon to answer the question in February 2010. Incidentally, Mr Hamill in describing the building's external construction in 2006 included the concrete floor as part of his description of the external construction, and there is no evidence from OIB that it would have adopted a different view in this regard to the calculation of external/internal construction in 2010. On any reasonable interpretation of the TSQ the percentage of the internal construction that comprised EPS exceeded 33 per cent. If Kotku or OIB had been in doubt about the correct answer to the question in February 2010 and engaged a quantity surveyor to provide advice about the correct answer to the question then the answer probably would have been a figure much greater than 33 per cent. Significantly, Mr O'Connor did not say in his report, and was not otherwise asked, what advice he would have provided had he been asked in February 2010 to answer the TSQ.

[196] I turn to the evidence of Mr Cavus as to what answer he would have provided in February 2010 if asked by OIB about the percentage of the internal construction that comprised EPS (Sandwich Panelling). Mr Cavus provided a coloured version of a plan depicting areas of EPS (Exhibit 3) and readily accepted in his evidence that the amount of EPS was more than 33 per cent. I accept Mr Cavus' evidence on this issue and on other issues. He was an honest and reliable witness. His evidence supports the proposition that, if OIB had sought information from Kotku prior to answering the TSQ, Kotku's estimate would have been more than 33 per cent. It also lends some support to the conclusion that the correct answer to the TSQ was more than 33 per cent. Mr Cavus would have addressed the question in 2010, and while not being in a position to give a precise percentage without engaging a builder to make calculations, probably would have told OIB that it was more than 33 per cent.

[197] The evidence given by Mr Roberts indicates that there may be no single correct percentage in answer to the TSQ. Also, the inclusion or exclusion of the area of about 120 m² which Mr Roberts thought was "probably EPS walls" may make a difference.

[198] The addition of relatively small amounts to the area that Mr O'Connor calculated as not including EPS or the exclusion from his calculation for windows, doors and other openings in external walls will make a difference and these kind of adjustments would increase the figure arrived at on the basis of the assumptions made by Mr O'Connor to a figure above 33 per cent.

[199] The principal difference between the calculation undertaken by Mr Roberts and that undertaken by Mr O'Connor derives from the assumptions that Mr O'Connor was asked to make. I do not consider that it was appropriate to include in any calculation the internal side of the building's outer walls or the floor area. The exterior walls and the floor slab were constructed as part of the external construction of the building, and should not have been treated as part of its "internal construction" for the purpose of answering the TSQ. The TSQ was not directed at a

measurement of the fitout of the building or its interior surfaces. The TSQ was directed to a different topic, namely its "internal construction".

[200] Vero has proven that the percentage of the internal construction that comprised EPS was substantially in excess of 33 per cent as at February 2010 and that the correct answer to the TSQ was "Over 33 Percent".

Would Vero have declined the risk if the TSQ had been correctly answered?

[201] If the TSQ had been answered "Over 33 Percent" then OIB's application for the policy on behalf of Kotku would have been automatically declined by the Vero system on 22 February 2010. In that event, it is probable that OIB would have sought and obtained cover from another insurer. The availability of alternative cover was identified by Ms Moore in her evidence. There was other evidence including evidence from an insurance broker, Mr Pearce, from Mr Hamill of Comsure and from Vero underwriters that insurance cover was available if the amount of EPS exceeded 33 per cent and even if it was as high as 70 per cent.

[202] As part of its case Kotku advanced the alternative position that Vero might have agreed to issue the policy, subject to terms based upon a reasonable proposal for the removal of EPS. It points to evidence given by senior underwriters at Vero, Mr Harvey and Mr Stallard, which opened the possibility that Vero might have been flexible in relation to the terms upon which it would insure the risk. One possibility was that it might have agreed to insure the risk, subject to Kotku agreeing a program for the removal of EPS or a reduction in its amount to under 33 per cent. Vero's submissions on this point are that the relevant passages of evidence given by Mr Stallard and Mr Harvey do not support such a conclusion. Vero points to a number of matters, including Vero's awareness that there were other underwriters to whom Kotku might go for insurance and Vero's underwriting policies, as indicating that Vero would not have accepted the risk. At best, it might have issued a policy when the EPS had been removed.

[203] It is probably unnecessary for me to resolve these points of contention in relation to Kotku's alternative case on loss. This is because in the face of a hard decline from Vero's system and any significant reluctance on Vero's part to insure the risk if OIB pursued the matter with Vero underwriters (of which there would have been), alternative cover was readily available. Ms Moore says that she could have obtained it within 24 hours. Kotku would not have been put to the trouble and expense of removing EPS if it obtained such alternative cover.

[204] If OIB had taken the matter up with Vero underwriters, they would have confirmed the Suncorp Group's position to decline on EPS levels above 33 per cent, even in respect of an insured with a history of being insured with Suncorp for several years. Mr Harvey was cross-examined in general terms that underwriters in Suncorp/Vero will make a business decision on a case-by-case basis, and in appropriate circumstances provide some accommodation to an insured who proposes "a compliance program to get it across the line". A proposal to install a sprinkler system or to remove EPS might change Suncorp/Vero's attitude to the risk and present a satisfactory outcome. However, only senior underwriters like Mr Harvey or Mr Stallard had authority to override the 33 per cent restriction, but even at that level Suncorp/Vero would not have placed cover for premises that had more than 33 per cent EPS. Mr Stallard's evidence, which I accept, is that they would not go

on risk while the level was above 33 per cent. He acknowledged under cross-examination the possibility that Suncorp/Vero would try to accommodate a modern bakery that was prepared to reduce the EPS to below 33 per cent within a reasonably short period of time, such as a period of months. However, this general evidence of a preparedness to look at each case on its merits fell short of proving that Vero would have been prepared to go on risk with Kotku before the level of EPS was reduced to an acceptable level or removed entirely. Having regard to the evidence of Mr Harvey and Mr Stallard, I conclude that they would not have been prepared to go on risk in such circumstances. One reason is that there were other insurers in the market who were prepared to cover an insured with EPS levels above 33 per cent.

[205] In the circumstances, the best that Suncorp/Vero would have offered OIB/Kotku would have been to consider placing cover once the EPS was removed to below 33 per cent and a survey of the premises had been undertaken to confirm this.

[206] Kotku would not have been prepared to be uninsured over a period of weeks and months during which the EPS was removed in order to satisfy any requirement that Vero might have imposed as a term of later granting cover. Kotku would have sought and obtained alternative cover, and avoided the substantial cost of removing the EPS.

[207] I conclude that if the correct answer to the TSQ had been given, Vero would have declined to insure the risk and Kotku would have obtained alternative cover from another insurer.

Conclusion – proceedings against Vero

[208] Vero was entitled pursuant to s 28(3) of the Act to reduce its liability under the policy to nil. Kotku's claim for indemnity against it therefore fails.

Was OIB negligent or in breach of contract in failing to obtain the requested cover?

[209] As noted, there is no dispute that if the TSQ was asked:

(a) OIB in the discharge of its retainer was obliged to ascertain Kotku's answer to the TSQ before submitting the same to Vero; and

(b) OIB did not conduct its own inquiries or ask Kotku if EPS/Sandwich Panelling was present.

Also, there is no dispute that if OIB on behalf of Kotku was asked the TSQ and the answer given was "Zero percent", whereas the correct response was "Over 33 percent", then:

(a) the answer was wrong and a misrepresentation by Kotku for the purposes of s 28 of the Act; and

(b) in giving that answer OIB would have failed to discharge its duty to Kotku.

[210] OIB has raised questions about the loss that flowed from the misrepresentation constituted by the answer to the TSQ. I have earlier addressed certain issues that arise in this context. I have not accepted that the correct answer to the TSQ was

"1 to 33 Percent", such that Vero would have accepted the risk if that answer had been given. I have not accepted OIB's argument that Kotku's duty of disclosure had previously been fulfilled as a result of Kotku, through Comsure, having disclosed the existence of a substantial amount of insulated panelling in 2006.

[211] It is necessary to address some other issues raised in OIB's submissions about the scope of OIB's duty to its client and the content of Kotku's duty of disclosure in the circumstances.

[212] Vero's case in relation to the duty of disclosure was based upon the TSQ, and not on a wider basis. It did not plead that, absent the TSQ, Kotku was obliged to disclose the existence and extent of EPS because OIB, as Kotku's agent, knew this to be a matter relevant to the decision of Vero whether to accept the risk and, if so, on what terms. However, the content of OIB's duty to its client was not constrained by the manner in which Vero chose to conduct these proceedings. There was substantial evidence that as at February 2010 the existence of EPS in commercial premises, including bakeries, was a matter that was relevant to the decision of an insurer such as Vero whether to accept the risk and, if so, on what terms. The relevance of EPS was known within the insurance industry and would have been known to a reasonably competent broker in OIB's position by 2009-2010. The significance of EPS to insurers, and Vero in particular, was not, however, known to Kotku. It relied upon OIB to inform it of such matters.

[213] The content of Kotku's duty of disclosure informs the content of OIB's contractual and tortious duties to its client.

[214] The duty of care of a broker in Kotku's position has been summarised by Kirby P (as his Honour then was) in *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd.*[12] It has also been conveniently stated by learned authors.[13] A broker is not under a general duty to ensure that its client "is impervious to loss or risk of loss through the absence of insurance".[14] As Derrington and Ashton observe, the extent and nature of the duty depends on the terms of the contract, but it is determined in a sensible and practical way consistent with the exercise of reasonable care and skill in the circumstances of the case.[15]

[215] In the circumstances of this case OIB was not simply under a duty to warn or advise its client that EPS was a matter of interest to insurers such as Vero. In carrying out its retainer in respect of the placement of insurance in 2010, OIB had a duty to inquire about matters in respect of which it had not made adequate inquiry in previous years. In particular, it had a duty to inquire about the internal construction of the bakery and, if necessary, to inspect the premises.

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12 (1991) 25 NSWLR 541 at 555-556.

13 Sutton, *Insurance Law in Australia*, Third Edition, LBC 1999 paras 5.10 – 5.18; Derrington and Ashton, *The Law of Liability Insurance* (supra) at 4-99 to 4-107.

14 *Marvin Manufacturers (Aust) Pty Ltd v Chamber of Manufacturers Insurance Ltd* (1992) 7 ANZ Ins Cas 61-122 at 77, 611.

15 *The Law of Liability Insurance* (supra) at 13-396.

[216] It was not necessary for Kotku to call expert evidence about what a reasonably careful broker would have done in the circumstances.[16] The failure of OIB to make proper inquiries with a view to ascertaining the internal construction of the bakery is so rudimentary that expert evidence of broker practice was not necessary. Inquiry about the internal construction of the premises and, if necessary, inspection of them was required in the exercise of reasonable care and skill in the circumstances. The evidence establishes that EPS was a matter of concern in the insurance industry. OIB routinely dealt with Suncorp and Vero and by 2009-2010, if not earlier, Mr Osman was aware of issues in relation to EPS. The discharge by OIB of its contractual and general law duties to its client required it to at least inquire about the internal construction of the building and about EPS/insulated panelling in particular. Mr Hamill's conduct in 2006 exemplified what an "attacking broker" would do in the context of obtaining a quotation. His evidence was that if he was engaged to place the cover he probably would have inspected it.

[217] Kotku's case against OIB was not that OIB was obliged to "discover whether EPS was in use". Kotku did not make that contention. Its case against OIB concerning the scope of OIB's duty was as pleaded in its statement of claim and as formulated in its submissions. In summary, Kotku's case was that OIB had a duty, as a competent broker, to warn Kotku, which OIB knew relied upon it, that EPS was a matter of interest to an insurer. It should have inquired about the existence and extent of EPS in the building and inspected the premises itself so that it was capable of answering any questions asked of it by Vero and making appropriate disclosure on Kotku's behalf. If it did not inspect the premises it should at least have obtained plans that were readily available from the client about the state of the internal construction of the building.

[218] I do not accept OIB's submission that the scope of its duty and issues of breach of duty are affected by Suncorp/Vero's announcement about the transition of policies or what Mr Yilmaz had been told by Mr Hamill. Vero's advice about the transition process did not alter OIB's duty to its client in response to Vero's TSQ or more generally in disclosing the existence and extent of EPS in the internal construction. OIB did not know of any dealings between Kotku and Comsure in 2006 or what information Comsure had provided to Suncorp. OIB, however, did know that it had never made a disclosure to Suncorp about the existence or extent of EPS or anything else about the building's internal construction, and had no reason to suppose that its client or anyone else had. Reminders to Kotku about its duty of disclosure under the Act, coupled with Kotku's knowledge of the building's internal construction, did not relieve OIB of the duty to advise Kotku of something that OIB knew but Kotku did not. This was that EPS was treated by Vero and other insurers as a significant risk, and that the extent of EPS in the building's internal construction should be disclosed. OIB owed its client a duty to inquire about these things and the building's internal construction.

[219] I find that OIB failed to take reasonable steps to ascertain the internal construction of the building, and the extent of EPS in particular, prior to placing the 2010 policy. It failed to make adequate inquiries and to obtain appropriate information. In failing to do these things it breached its contract and its duty of care. Kotku's case against

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16 *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (supra) at 556; *Geoffrey W Hill & Associates (Insurance Brokers) Pty Ltd v Squash Centre (Allawah North) Pty Ltd* (1996) ANZ Ins Cas 61-012.

OIB is not limited to a failure to warn. But OIB in fact failed to warn Kotku that the presence of EPS was a matter that was relevant to the decision of the insurer whether to accept the risk and, if so, on what terms.

[220] OIB argues that Kotku was aware, from its discussions with Comsure, that the extent of EPS in the building was a fact which might affect Vero's decision to accept the risk, and, as a result, no loss flowed from its omission to inform Kotku of such matters. It submits that its duty was, at most, to advise Kotku that it should disclose the existence of EPS, and this was something that Kotku already knew, such that there is no causative link between any failure on its part and Kotku's loss. I am not satisfied that Kotku knew that it should disclose the existence of EPS. As earlier discussed, OIB's submissions in this regard turn on the dealings between Mr Yilmaz and Mr Hamill in 2006. For reasons earlier given, OIB has not proven that as at February 2010 Kotku, by Mr Yilmaz, knew that the premises contained "substantial amounts of EPS" and that this was a matter of significance to insurers in deciding whether to accept a risk. It knew about the presence of insulated panelling and its extent. But it did not know of it as EPS and the significance of EPS in the insurance industry.

[221] By reason of the TSQ, and even in the absence of the TSQ, it was the obligation of a broker in OIB's position in dealing with Vero to inquire of its client about the extent of EPS in the construction of the building. Given the evidence of what was known in the insurance industry, including by Mr Osman, OIB should have told Kotku that EPS was a matter of concern to insurers and asked whether its premises consisted of EPS and if so how much. Its contractual duties required it to do so. If Kotku had been asked about these matters then it probably would have told OIB about the existence of insulated panelling in the internal construction of the building, just as Mr Yilmaz had told Mr Hamill about this in 2006. If Mr Osman or someone else from OIB had belatedly made this inquiry in 2010 then there is no reason to suppose that the directors and staff of Kotku would not have responded honestly and reasonably to the inquiry. If they had been asked to produce construction plans then they would have probably done so.

Conclusion – OIB's breach of contract and negligence

[222] In giving the answer to the TSQ, OIB failed to discharge its contractual duties to Kotku and also breached the duty of care that it owed Kotku under the general law.

[223] In addition, OIB failed to discharge its contractual and general law duties by failing to take reasonable steps to consult Kotku about the internal construction of the building and the presence of EPS in particular, to make proper inquiries or adequate inspection about these subjects and to disclose the presence of EPS in the internal construction of the building in obtaining the policy in 2010.

[224] OIB's failure to correctly answer the TSQ entitled Vero to reduce its liability under the policy to nil. If OIB had performed its contractual obligations and not been negligent in answering the TSQ, then Vero would have declined to issue the requested policy, and OIB would have obtained the same cover from another insurer.

[225] Issues of contributory negligence were raised in the pleadings but were not pursued in submissions. I should add that there is no basis to reduce the damages to which Kotku is entitled on the grounds of contributory negligence.

Kotku's loss

[226] As previously noted, OIB submit that any damages for which it is liable should take account of the cost of replacing the EPS with some other material. However, that argument is without merit. Kotku would only have taken steps to remove the EPS and replace it with other material if it had been told that the amount of EPS was an obstacle to obtaining insurance. The evidence, including OIB's own evidence, is that the presence of EPS was not an obstacle to obtaining insurance.

[227] OIB attempts to argue, on the basis of Mr Cavus' evidence, that he would have gone to the trouble and expense of removing EPS even if he had been told that alternative insurance cover was readily available on similar terms without the need to remove the EPS. This submission is not supported by the evidence. Mr Cavus' evidence about removing EPS was in support of Kotku's alternative position on loss in the event that OIB established its pleaded case that insurance was not available to Kotku at all, a pleading that was at odds with OIB's own evidence.

[228] Contrary to the complexion which OIB's submissions seek to place on Mr Cavus' evidence, he did not give evidence that he would have replaced the EPS with some other material to avoid a high fire risk, and even if alternative insurance cover was available. His evidence about removing EPS was in relation to what he would have done if there had been difficulty in obtaining insurance. But there would not have been such a difficulty.

[229] There is no dispute that if cover had been declined by Vero because of the presence and level of EPS, alternative insurance cover was available on some terms. Ms Moore's evidence was that alternative cover could have been placed within 24 hours. She did not say that such cover would have required a higher premium. The evidence of Mr Pearce suggested that a higher premium would have been payable had EPS been at a high level.

[230] Kotku has the onus of proving the quantum of its damages. The evidence leaves open the possibility that alternative cover would have required the payment of an increased premium. Notably, Ms Moore did not suggest that the premium would be substantially higher. She might have been expected to say so when examined on the issue of alternative cover or at least in re-examination.

[231] It is not the law that a plaintiff must produce evidence from which the extent of its loss can be precisely calculated. The tribunal of fact must do the best it can in assessing damages.[17]

[232] Although the evidence leaves open the distinct possibility that the premium that Kotku would have been required to pay for cover with an alternative insurer would have been the same or not significantly more than that which Vero charged, I will take a conservative approach and conclude that the premium would have been

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[17] *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23 at 26, cited with approval in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 661; [2004] HCA 54 at [47].

$10,000 more. I note that the policy was not confined to fire and covered Kotku for a range of other risks including public liability. Taking a conservative approach to the assessment of damages, I will deduct from the damages claimed by Kotku the sum of $10,000 on account of a higher premium from an alternative insurer. Kotku would have been prepared to pay any additional premium rather than run the risk of having its business uninsured against the risk of fire or having to pay the substantial costs of removing EPS.

[233] By reason of OIB's breach of contract and negligence, Kotku did not obtain indemnity against the risk of fire. It would have obtained indemnity from an alternative insurer in the same amount as the value of the indemnity assessed by Vero, namely $2,716,300. Accordingly, I assess Kotku's damages by deducting $10,000 from this figure.

Conclusion

[234] There will be judgment for Kotku in its claim against OIB for $2,706,300, together with interest. I propose to award interest at the rate of 10 per cent per annum from the date that Kotku would have received payment to the date of judgment.

[235] I will hear the parties in relation to the period of interest, the rate of interest and any issues in relation to costs. My provisional view on costs is that OIB should pay Kotku's costs and also pay Vero's costs.