SUPREME COURT OF QUEENSLAND

CITATION:	*Fulcher & Ors v Knott Investments Pty Ltd & Ors* [2012] QSC 232
PARTIES:	**RAYMOND FULCHER AND KERYN EILEEN FULCHER (A PARTNERSHIP TRADING UNDER THE FIRM STYLE OR NAME OF RAYMOND FULCHER AND KERYN EILEEN FULCHER)** (first plaintiffs) and **R & KE FULCHER PTY LTD (ACN 011 059 644)** (Second plaintiff) **v** **KNOTT INVESTMENTS PTY LTD (ACN 000 596 798)** (First defendant) and **AROUND AUSTRALIA MOTOR HOMES PTY LTD (ACN 096 161 161) TRADING AS BRISBANE MOTOR CAMPER CENTRE** (Second defendant) and **COAST RV PTY LTD (ACN 101 461 330) TRADING AS COAST TO COAST RV SERVICES** (Third defendant)
FILE NO:	325 of 2004
DIVISION:	Trial Division
PROCEEDING:	Claim
DELIVERED ON:	22 June 2012 and 28 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	13, 14, 15, 16, 17, 20, 21, 22, 23, 28, 29 February 2012
JUDGE:	Peter Lyons J
ORDER:	[1] Order is as per appendix
CATCHWORDS:	TRADE AND COMMERCE - COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION - CONSUMER PROTECTION - CONDITIONS AND WARRANTIES IN CONSUMER TRANSACTIONS - OTHER MATTERS - where second plaintiff entered contract of sale with second defendant for the purchase of a Winnebago - where a fire occurred in the shed in which the Winnebago was parked - whether purpose of Winnebago for use as a motor home was made known to

second defendant such that a condition that the Winnebago be reasonably fit for the purpose was implied in the contract of sale - whether there was an electrical fault in the Winnebago which caused the fire such that the Winnebago was not reasonably fit for the purpose of use as a motor home - whether there was an electrical fault in the Winnebago which caused the fire such that the Winnebago was not of merchantable quality

TORTS - NEGLIGENCE - ESSENTIALS OF ACTION FOR NEGLIGENCE - GENERAL MATTERS - where second plaintiff entered contract of sale with second defendant for the purchase of a Winnebago - where the first defendant manufactured the Winnebago purchased by the second plaintiff - where the third defendant imported the air conditioning unit that was installed in the Winnebago purchased by the second plaintiff - where a fire occurred in the shed in which the Winnebago was parked - whether seller of Winnebago was negligent - whether manufacturer of Winnebago was negligent - whether the importer of the air conditioning unit was negligent

TRADE AND COMMERCE - COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION - CONSUMER PROTECTION - LIABILITY OF MANUFACTURERS OR IMPORTERS FOR DEFECTIVE GOODS - where the first defendant manufactured the Winnebago purchased by the second plaintiff - where a fire occurred in the shed in which the Winnebago was parked - whether purpose of Winnebago for use as a motor home was made known to the first defendant - whether there was an electrical fault in the Winnebago which caused the fire such that the Winnebago was not reasonably fit for the purpose of use as a motor home - whether there was an electrical fault in the Winnebago which caused the fire such that the Winnebago was not of merchantable quality

TRADE AND COMMERCE - COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION - CONSUMER PROTECTION - LIABILITY OF MANUFACTURERS OR IMPORTERS FOR DEFECTIVE GOODS - where first defendant manufactured the Winnebago purchased by the second plaintiff - where first defendant produced a brochure given to the plaintiffs - where the brochure contained representations relating to the safety of the Winnebago - whether the representations amounted to an absolute representation of the safety of the Winnebago

TRADE AND COMMERCE - COMPETITION, FAIR TRADING AND CONSUMER PROTECTION

LEGISLATION - CONSUMER PROTECTION - LIABILITY OF MANUFACTURERS OR IMPORTERS FOR DEFECTIVE GOODS - where third defendant imported air conditioning unit that was installed in the Winnebago purchased by the second plaintiff - where a fire occurred in the shed in which the Winnebago was parked - whether purpose of air conditioning unit for use as part of a motor home was made known to the third defendant - whether there was a defect in the air conditioning unit such that it was not fit for the purpose of use as part of a motor home - whether there was a defect in the air conditioning unit such that it was not of merchantable quality

TRADE AND COMMERCE - COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION - CONSUMER PROTECTION - LIABILITY OF MANUFACTURERS OR IMPORTERS FOR DEFECTIVE GOODS - where the first defendant manufactured the Winnebago purchased by the second plaintiff - where a fire occurred in the shed in which the Winnebago was parked - whether the safety of the Winnebago was not such as persons generally are entitled to expect

TRADE AND COMMERCE - COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION - CONSUMER PROTECTION - LIABILITY OF MANUFACTURERS OR IMPORTERS FOR DEFECTIVE GOODS - where the third defendant imported the air conditioning unit that was installed in the Winnebago purchased by the second plaintiff - where a fire occurred in the shed in which the Winnebago was parked - whether the safety of the air conditioning unit was not such as persons generally are entitled to expect

TRADE AND COMMERCE - COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION - CONSUMER PROTECTION - LIABILITY OF MANUFACTURERS OR IMPORTERS FOR DEFECTIVE GOODS - where a fire occurred in the shed in which the Winnebago was parked - where the shed was destroyed - whether the shed was a building or fixture ordinarily acquired for private use

TRADE AND COMMERCE - COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION - CONSUMER PROTECTION - LIABILITY OF MANUFACTURERS OR IMPORTERS FOR DEFECTIVE GOODS - where a fire occurred in the shed in which the Winnebago was parked - where various goods were destroyed in the fire - whether the goods were of

a kind ordinarily acquired for personal, domestic or household use

TRADE AND COMMERCE - COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION - ENFORCEMENT AND REMEDIES - ACTIONS FOR DAMAGES - LIMITATION PERIOD - WHEN CAUSE OF ACTION ARISES - where a fire occurred in the shed in which the Winnebago was parked on 9 February 2004 - where the plaintiffs filed the claim for damages in relation to the fire on 5 March 2007 - where, pursuant to s 74J of the *TPA*, a claim made under ss 74B or 74D of the *TPA* is barred unless commenced within three years after the day on which the cause of action accrued - whether the plaintiffs were aware, or ought reasonably to have been aware, prior to 5 March 2004 that the Winnebago was not fit for the purpose of use as a motor home - whether the plaintiffs were aware, or ought reasonably to have been aware, prior to 5 March 2004 that the Winnebago was not of merchantable quality - whether the plaintiffs were aware, or ought reasonably to have been aware, prior to 5 March 2004 that the air conditioning unit was not fit for the purpose of use in a motor home - whether the plaintiffs were aware, or ought reasonably to have been aware, prior to 5 March 2004 that the air conditioning unit was not of merchantable quality

TRADE AND COMMERCE - COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION - ENFORCEMENT AND REMEDIES - ACTIONS FOR DAMAGES - LIMITATION PERIOD - WHEN CAUSE OF ACTION ARISES - where a fire occurred in the shed in which the Winnebago was parked on 9 February 2004 - where the plaintiffs filed the claim for damages in relation to the fire on 5 March 2007 - where, pursuant to s 74AO of the *TPA*, a claim made under ss 74AF or 74AG of the *TPA* is barred unless commenced within three years after the day on which the plaintiffs were aware, or ought reasonably to have been aware of the loss, the defect and the identity of the person who manufactured the action goods - whether the plaintiffs were aware, or ought reasonably to have been aware, prior to 5 March 2004 of the loss, the defect in the Winnebago and the identity of the person who manufactured the Winnebago - whether the plaintiffs were aware, or ought reasonably to have been aware, prior to 5 March 2004 of the loss, the defect in the air conditioning unit and the identity of the person who manufactured the air conditioning unit

LIMITATION OF ACTIONS - LIMITATION OF PARTICULAR ACTIONS - ACTIONS TO RECOVER MONEY RECOVERABLE BY VIRTUE OF AN

ENACTMENT - where a fire occurred in the shed in which the Winnebago was parked on 9 February 2004 - where the plaintiffs filed the claim for damages in relation to the fire on 5 March 2007 - where, pursuant to s 74J of the *TPA*, a claim made under ss 74B or 74D of the *TPA* is barred unless commenced within three years after the day on which the cause of action accrued - whether the plaintiffs were aware, or ought reasonably to have been aware, prior to 5 March 2004 that the Winnebago was not fit for the purpose of use as a motor home - whether the plaintiffs were aware, or ought reasonably to have been aware, prior to 5 March 2004 that the Winnebago was not of merchantable quality - whether the plaintiffs were aware, or ought reasonably to have been aware, prior to 5 March 2004 that the air conditioning unit was not fit for the purpose of use in a motor home - whether the plaintiffs were aware, or ought reasonably to have been aware, prior to 5 March 2004 that the air conditioning unit was not of merchantable quality

LIMITATION OF ACTIONS - LIMITATION OF PARTICULAR ACTIONS - ACTIONS TO RECOVER MONEY RECOVERABLE BY VIRTUE OF AN ENACTMENT - where a fire occurred in the shed in which the Winnebago was parked on 9 February 2004 - where the plaintiffs filed the claim for damages in relation to the fire on 5 March 2007 - where, pursuant to s 74AO of the *TPA*, a claim made under ss 74AF or 74AG of the *TPA* is barred unless commenced within three years after the day on which the plaintiffs were aware, or ought reasonably to have been aware of the loss, the defect and the identity of the person who manufactured the action goods- whether the plaintiffs were aware, or ought reasonably to have been aware, prior to 5 March 2004 of the loss, the defect in the Winnebago and the identity of the person who manufactured the Winnebago - whether the plaintiffs were aware, or ought reasonably to have been aware, prior to 5 March 2004 of the loss, the defect in the air conditioning unit and the identity of the person who manufactured the air conditioning unit

DAMAGES - GENERAL PRINCIPLES - MITIGATION OF DAMAGES - where re-establishing the tomato producing operation would have required that a substantial sum of money be borrowed - where significant funds for the operation would be required before returns from the operation could be expected - where business involved inherent risk - where it would have taken time to re-establish suitable team of employees - whether it was not reasonable for the plaintiffs not to reinstate the tomato producing operation

DAMAGES - GENERAL PRINCIPLES - OTHER MATTERS - where plaintiffs made decision not to

recommence tomato growing subsequent to the fire - where agreement was entered into to sell the farms subsequent to the fire - whether the decision not to recommence tomato growing and to sell the farm was a consequence of circumstances produced by the fire

INTEREST - RECOVERABILITY OF INTEREST - IN GENERAL - where the defendants allege that there were periods of delay by the plaintiffs in prosecuting their claim that amounted, in aggregate, to 13 months - whether the plaintiffs' delay was unreasonable so as to warrant a reduction of the interest to be awarded

INTEREST - RATE OF INTEREST AND COMPOUND INTEREST - RATE IN OTHER CASES - where annual losses have been identified - where the number of years of losses is not great - whether it is appropriate to allow interest from the end of each year, for which the loss has been calculated, with a separate calculation of interest from that year to judgment, making allowance for the fact the second plaintiff would have paid tax progressively in each year

Civil Liability Act 2003 (Qld), s 9
Evidence Act 1977 (Qld), s 92
Sale of Goods Act 1896 (Qld), s 17
Trade Practices Act 1974 (Cth), ss 4B, 71, 74A(4), 74B, 74D, 74G, 74J, 75, 75AC, 75AF, 75AG, 75AK, 75AO, 75 AR

AHR Constructions Pty Ltd v Maloney [1994] 1 Qd R 460, considered
Australian Competition and Consumer Commission v Glendale Chemical Products Pty Ltd (1998) 40 IPR 619, followed
Australian Knitting Mills Ltd v Grant (1933) 50 CLR 387, followed
Banco de Portugal v Waterlow & Sons Ltd [1932] AC 452, followed
Briginshaw v Briginshaw (1938) 60 CLR 336, followed
Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd [2004] FCA 853, distinguished
Cashmere Bay Pty Ltd v Hastings Deering (Australia) Ltd (No 2) [2011] QSC 134, distinguished
Cullen v Trappell (1980) 146 CLR 1, considered
Freemantle's Pastoral Pty Ltd v Hyett [1999] VSC 129, considered
Grant v Australian Knitting Mills Ltd (1935) 54 CLR 49, followed
Haines v Bendall (1991) 172 CLR 60, followed
HK Frost Holdings Pty Ltd (in liq) v Darvall McCutcheon (a firm) [1999] FCA 795, considered
Hoad v Scone Motors Pty Ltd [1977] 1 NSWLR 88,

considered
Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd (1978) 140 CLR 216, considered
Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3) [2003] 1 Qd R 26, considered
Jefford v Gee [1970] 2 QB 130, considered
Medlin v The State Government Insurance Commission (1995) 182 CLR 1, considered
Metal Fabrications (Vic) Pty Ltd v Kelcey [1986] VR 507, considered
Nguyen v Cosmopolitan Homes [2008] NSWCA 246, considered
Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd [1976] 1 NSWLR 5, considered
Serisier Investments Pty Limited v English [1989] 1 Qd R 678, considered
Tate & Lyle Food and Distribution Ltd v Greater London Council [1982] 1 WLR 149, considered
TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd (1963) 180 CLR 130, followed
Thomas v Southcorp [2004] VSC 34, considered

COUNSEL: P Hastie for the plaintiffs
R Bain QC with C Jennings for the defendants

SOLICITORS: ClarkeKann for the plaintiffs
HWL Ebsworth Lawyers for the defendants

[1] Prior to February 2004, the plaintiffs had conducted a successful tomato growing and packing operation. Early in the morning of 9 February 2004, a fire broke out in or on a newly-purchased Winnebago motor home which was parked in the packing shed on the property where the operation was conducted. The shed and its contents were substantially destroyed. The plaintiffs have sued the defendants in negligence, contract, and under provisions of the *Trade Practices Act* 1974 (Cth) (*TPA*) for the resultant loss.

[2] The defendants respectively are the manufacturer of the Winnebago; the dealer who sold it to Mr and Mrs Fulcher; and the importer of an air conditioning unit which had been installed in the Winnebago at the time of its purchase.

[3] Reasons for judgment were delivered initially on 22 June 2012. The parties were invited to make submissions as to the orders to be made, including as to interest and costs. That has led to some reconsideration of matters dealt with in the initial reasons. These reasons consolidate the initial reasons, with an agreed change; together with reasons dealing with the matters raised by the further submissions.

Background

[4] Mr and Mrs Fulcher commenced a small tomato farming operation in about 1984. Initially, the tomato growing operation was conducted on leased land. In 1988, Mr and Mrs Fulcher purchased a one acre property at 245 Wises Road, Alloway, near Bundaberg. Their house was located on this property.

[5] From about 1990, the business was conducted by the second plaintiff. In about 1990, a packing shed was constructed, which was expanded over time. In about 1993 a computerised packing plant was constructed in the shed. The packing plant was also upgraded, over time.

[6] Between 1994 and 2002, a number of nearby properties were purchased, and the farming operation was expanded. Some idea of the size of the operation is apparent from the fact that at times there were up to 200 employees engaged, though the work was seasonal, and the numbers accordingly fluctuated. The major market for the tomatoes was in Melbourne.

[7] Mrs Fulcher had primary responsibility for the packing shed, marketing, and the keeping of records. Mr Fulcher was primarily responsible for general farming operations and maintenance.

[8] At times some of the land was used to grow sugar cane. In about 2001, a greenhouse was constructed on the land, used in connection with growing roses. A second greenhouse was constructed in about 2003. The rose growing operation was initially conducted by the second plaintiff, but in 2005 was transferred t Fulcher Roses Pty Ltd.

[9] From about 2000, the Fulchers developed an interest in go-kart racing. They acquired a number of go-karts. Their son Ryan, and Kelly Treseder, who was for a time the boyfriend of their daughter Kirsten, drove the karts in races with considerable success. Mr Treseder had conducted a small business, Kel's Karts and Parts (*KKP*). This business was purchased, primarily to enable the family to conduct kart racing at lower cost, and the KKP business was initially conducted from the packing shed. However, by a contract dated 30 January 2004, Mr and Mrs Fulcher as the trustees of their superannuation fund purchased a property at 15 Walla Street, Bundaberg which was then leased to provide premises for the business of KKP. The business was conducted by the second plaintiff until 2005, when it was transferred to Fulcher Roses.

[10] The second plaintiff purchased the Winnebago by a contract dated 30 January 2004. It would appear that delivery was taken on that day. The Fulcher family used the Winnebago to travel to Ipswich for a go-kart racing event on 7 February 2004, returning home on Sunday 8 February 2004. As has been mentioned, the fire occurred early on the following morning.

[11] At the time of the fire, land had been prepared for the planting of the next crop of tomatoes. Planting was due to commence within the next few days. A decision was made not to proceed with the planting on that occasion, the supplier being asked to sell the seedlings elsewhere.

[12] Promptly after the fire, Mr Fulcher retained solicitors to act in relation to a potential claim for the loss occasioned by it. On 19 July 2004, a claim and statement of claim were filed (*July 2004 claim documents*).

[13] Shortly thereafter, Bundaberg Sugar Ltd expressed interest in purchasing Mr Fulcher's land. By about September, an agreement had been reached for the sale of the land, save for the block on which the house was constructed; and for a small area of land to be excised by subdivision, to accommodate the rose-growing enterprise. The contract was completed early in 2005.

[14] In September 2004, Mr and Mrs Fulcher entered into a contract to purchase a unit at Bargara, some 15 to 20 kilometres from the farm. They moved there shortly thereafter, and lived at the unit for some years. Mr Fulcher used to drive from there to the farm to continue farming operations.

Overview of pleaded liability issues

[15] There was a direct contractual relationship between the second defendant as the seller of the Winnebago, and the second plaintiff, as its buyer. The second plaintiff alleged that the contract included conditions implied both by s 71 of the *TPA* and s 17 of the *Sale of Goods Act* 1896 (Qld) (*SGA*). Those conditions were that the Winnebago would be reasonably fit for the purpose of being used as a motor home, and that it would be of merchantable quality. It alleged that the conditions were breached, there being a defect, in essence an electrical fault, in the air conditioning unit, which caused the fire. The second defendant denied that conditions were implied into the contract by s 71 of the *TPA*, on the ground that the second plaintiff was not a consumer, the Winnebago not being goods "of a kind ordinarily acquired for personal, domestic or household use or consumption"[1]. It also alleged that terms otherwise implied by s 17 of the *SGA* were excluded by cl 8 of the contract. It asserted that the Winnebago was reasonably fit for the purpose for which it was supplied, and was of merchantable quality.

[16] The plaintiffs alleged that the second defendant owed them a duty of care, breached because the second defendant supplied a Winnebago with an electrical fault. The second defendant denied the duty of care alleged by the plaintiffs on the ground that the relationship of seller and buyer of the Winnebago did not give rise to such a duty of care. It also denied the existence of the electrical fault, and that it caused the fire. It alleged that the Winnebago was as safe as persons are generally entitled to expect.

[17] The plaintiffs alleged that goods which were personal, domestic or household goods were destroyed by the fire, as a result of which they suffered loss. On that basis, they alleged that the first defendant is liable for such loss under s 75AF of the *TPA*. They also alleged that buildings or fixtures ordinarily acquired for private use were destroyed by the fire, because of which they have suffered loss. They claimed compensation for that loss under s 75AG of the *TPA*.

[18] The first defendant put in issue whether goods damaged or destroyed were personal, domestic or household goods. It denied that the Winnebago had a defect. It also denied that any defect caused the loss claimed by the plaintiffs. The first defendant made similar allegations in relation to the claim under s 75AG, the principal difference being that it alleged that buildings and fixtures damaged or destroyed by the fire were not used or intended to be used for the private use of the plaintiffs, but

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1 See s 4B of the *TPA*.

rather for a commercial or business use in relation to the tomato growing operation of the plaintiffs.

[19] The plaintiffs alleged that the first defendant, as manufacturer of the Winnebago, owed them a duty of care, breached by its failure to ensure the absence of electrical fault from the Winnebago, and in other related respects. They also relied on the doctrine of *res ipsa loquitur* in respect of their claim in tort. The first defendant alleged that its only liability (if any) is under the provisions of the *TPA*, relying on the doctrine of statutory pre-emption. Alternatively it admitted a limited duty of care to a user of the Winnebago, though not to the second plaintiff; and denied breach of any duty of care, its obligation being only to take reasonable care. It pleaded that electrical checks were carried out prior to the Winnebago being supplied to the second defendant, and that Australian Standards were complied with. It alleged that the doctrine of *res ipsa loquitur* does not apply.

[20] The second plaintiff also made claims against the first defendant relying on s 74B, s 74D and s 74G of the *TPA*. It alleged that it made known to the first defendant by implication from the usual purpose for which such vehicles are manufactured, sold, and acquired, that the Winnebago was acquired by it for the purpose of being used as a motor home; and accordingly, the first defendant is liable to compensate it under s 74B, the Winnebago not being reasonably fit for that purpose. It also claimed to be entitled to loss resulting from the fact that the Winnebago was not of merchantable quality, under s 74D of the *TPA*. In each case, the second plaintiff relied on the fact that the Winnebago was at risk of catching fire, and that it contained an air conditioning unit with an electrical fault. The first plaintiffs also alleged that, by a brochure provided at the time of the purchase of the Winnebago, the first defendant warranted that it was safe; and because it was not, the first defendant is liable for loss suffered by the second plaintiff under s 74G of the *TPA*.

[21] The first defendant denied that there was a defect in the air conditioning unit. It alleged that the Winnebago was safe. It also alleged that it gave an express warranty that the Winnebago was free from defects in material and workmanship, which excluded parts or equipment supplied and fitted outside its own factory; and with respect to parts not manufactured by it but fitted as original equipment, it undertook to transfer the benefit of warranties given to it, without undertaking further liability. It alleged also that the warranty was limited to replacement or repairs of parts, and did not cover loss or damage resulting from any cause beyond its control. It again denied the applicability of these provisions on the basis that the Winnebago was not a chattel of a kind ordinarily acquired for personal, domestic or household use.

[22] In respect of the claims made under s 75AF and s 75AG of the *TPA*, added by amendment to the statement of claim on 5 March 2007, the first defendant alleged that the plaintiffs were aware, or ought reasonably to have been aware, of the defect on about 9 February 2004 and accordingly the claim is statute barred by s 75AO of the *TPA*. With respect to the claims made under s 74B and s 74D of the *TPA*, the first defendant alleged that the second plaintiff became aware, or ought reasonably to have become aware, on about 9 February 2004 that the Winnebago was not reasonably fit for the purpose relied on by the second plaintiff, and that it was not of merchantable quality, and accordingly the claim is statute barred by s 74J of the *TPA*.

[23] The plaintiffs alleged that the third defendant owed them a duty of care in relation to the manufacture and supply of the air conditioning unit. They alleged that the third defendant breached its duty of care by failing to ensure that the air conditioning unit was free from defects, that it was manufactured in accordance with Australian Standards and in a good and tradesman like manner, that it failed to ensure that the air conditioning was fit for use in Australian conditions, and that the doctrine of *res ipsa loquitur* applies. Like the first defendant, the third defendant relied on the doctrine of statutory pre-emption, contending that it owed no duty of care to the plaintiffs. Alternatively, it alleged that its duty of care was limited by the criterion of reasonableness, and by matters relating to its position as a re-seller of the air conditioning unit. It denied that it breached that duty, relying on s 9 of the *Civil Liability Act* 2003 (Qld).

[24] The plaintiffs alleged that the third defendant, as the importer of the air conditioning unit, is, by virtue of s 74A(4) of the *TPA*, deemed to be the manufacturer of that unit, the manufacturer not having a place of business in Australia. They alleged that, by reason of the defect in the air conditioning unit, the third defendant is liable to compensate them under s 75AF of the *TPA* for destruction of or damage to goods used for personal, domestic or household use. Similarly, they alleged that the third defendant is liable to compensate them for buildings and fixtures acquired for private use, under s 75AG of the *TPA*. They also alleged that the air conditioning unit was not reasonably fit for the purpose for which it was acquired, as a result of which the second plaintiff is entitled to be compensated under s 74B of the *TPA*. They also alleged that the air conditioning unit was not of merchantable quality, by reason of the defect, and accordingly the second plaintiff is entitled to be compensated under s 74D of the *TPA*.

[25] The third defendant denied that there was a defect in the air conditioning unit. It accordingly denied liability under each of the sections of the *TPA* relied on by the plaintiffs. It relied on the limitation provisions, also relied on by the first defendant, and for similar reasons.

[26] At the hearing, the issues narrowed somewhat. I was told that the defendants relied only on the issues referred to in their written submissions. For example, they did not contend that the operation of s 17 of the *SGA* was affected by the terms of the contract, nor that the purchase of the Winnebago by the second plaintiff was not a purchase by a consumer, under the *TPA*.

[27] Critical to the plaintiffs' success on each of the causes of action alleged is the cause of the fire.

How the fire started

[28] In the early hours of 9 February 2004, Mrs Fulcher was awakened by a noise. She went to the window of the bedroom, and saw a red glow coming from the direction of the shed. She screamed "Fire! fire!", jumped out the window and ran to the shed. She saw fire on the roof of the Winnebago. She opened the driver's side door of the driving compartment, and searched for the keys, by feeling for them. She intended to drive the Winnebago out of the shed. When she could not find the keys, she ran around to the other side of the Winnebago, intending to get into the accommodation section, but thought it was too dangerous. That was because of the fire on the top of the Winnebago. Throughout this time, the fire was on top of the accommodation

section of the Winnebago. She then ran back to the driver's door, and again tried to find the keys, without success. During this period, Mrs Fulcher did not see any fire within the Winnebago itself. She then ran to find a telephone, and called the emergency telephone number.

[29] Mr Fulcher was woken by his wife screaming out, "Fire". He ran outside, and saw fire on the top of the Winnebago. He then attempted to use a hose and a fire extinguisher to control the fire, without success. When he went into the shed, the flames were on the roof of the Winnebago, but he saw none inside it. There were no flames in the vicinity of the gas bottles, which were located behind a door in the lower part of the driver's side of the accommodation section of the Winnebago.

[30] Mr Treseder was staying in the Fulchers' house on the night of the fire. He was woken up by screams from Mrs Fulcher. As he went into the shed, he could see flames on the top of the Winnebago. He did not see flames from any other part of the Winnebago, or anywhere else. He assisted with attempts to control the fire.

[31] The Fulchers' son, Ryan, was about 15 years of age at the time of the fire. He, too, was woken by his mother's screams. When he got to the shed, the whole roof of the Winnebago was on fire. He could only remember fire on the roof of the Winnebago, and could not remember whether there was fire visible anywhere else. The Fulchers' daughter, Kirsten, had no useful recollection of the early stages of the fire.

[32] Before considering the expert evidence about the cause of the fire, it is necessary to refer to some additional background circumstances.

[33] The Winnebago comprised a driving compartment, with seats for the driver and a passenger; and what I have referred to as the accommodation compartment. There was a large opening between the driving compartment and the accommodation compartment, though a curtain could be pulled across this opening. Fittings in the accommodation compartment included a gas stove, and a hot water system, a refrigerator and other electrical equipment. The air conditioning unit was mounted on the roof of the accommodation compartment, above the accommodation section. The roof of the Winnebago was metal, though the air conditioning unit was connected through the roof to the ducting system within the Winnebago itself.

[34] The electrical equipment could be operated from an external 240 volt power supply; or from the rechargeable 12 volt batteries within the Winnebago. The battery charger was located low on the passenger's side of the Winnebago, forward of the entry door to the driving compartment. I have previously referred to the storage of gas bottles in the lower part of the Winnebago. There were a number of windows, including two larger windows, on each side of the accommodation compartment. A smaller window was located in the side door giving entry to the accommodation compartment, on the passenger's side of the vehicle.

[35] The air conditioning unit had been manufactured in the United States by a company called Airxcel Inc, which did not have a place of business in Australia. It was imported by the third defendant, and supplied to the first defendant in July 2003. The air conditioning unit arrived from the United States as a fully assembled unit, packaged in a box. It was supplied in that form, together with a thermostat, heater element and mounting frame, fixings and a manual, by the third defendant to the

first defendant. It was subsequently bolted as a modular unit to the roof of the Winnebago. Prior to the delivery of the Winnebago, checks were carried out, including some electrical testing of the air conditioning unit. So far as the records reveal, the checks were primarily intended to ensure that the air conditioning unit would operate.

[36] In the period of about 10 days between when the Fulchers took possession of the Winnebago and when the fire occurred, they used it to travel to a go-kart racing event at Willowbank, near Ipswich, on 7 February 2004. The Fulcher family and Mr Treseder slept in the Winnebago that night, the air conditioning unit being in operation. They returned to the farm on 8 February 2004. Mr Fulcher and his son then cleaned the outside of the Winnebago. Mrs Fulcher cleaned the inside of the Winnebago. While she did not specifically recall having the air conditioning unit on at this time, she thought it likely, because of the hot weather. If she had used the air conditioning unit while cleaning, in the normal course of things she would have turned it off when she finished.

[37] Mr Fulcher then drove the Winnebago into the shed. He connected the Winnebago to a power point on a switchboard, referred to as a sub switchboard in the shed, in order to charge the batteries in the Winnebago. He turned the power on. He does not recall hearing a noise such as the air conditioning unit would make, if it were operating.

[38] Electrical work was done at the shed on 21 January 2004 by a Mr Quaite, an electrician employed by Geoff Hall Projects Pty Ltd. He gave evidence that the sub switchboard and the main switchboard both had circuit breakers fitted to them. The sub switchboard had been installed "in recent years". Each circuit operating off the sub switchboard included a residual current device (*RCD*). Both switchboards were of an industrial or commercial standard. It has not been suggested that a fault in the electricity system within the shed was the cause of the fire.

[39] After the fire, the fire-damaged remains of the air conditioning unit were found on the chassis of the Winnebago, in a position approximately below that where it was located prior to the fire. It was subsequently inspected by Mr Paul Austin, and removed for testing. Some time later, it was in the possession of another witness, Professor Darveniza, and was subsequently lost in the premises which he had been using. Professor Darveniza's health was such that he was not able to give evidence orally.

[40] Mr Austin was a fire scene examiner with the Queensland Fire and Rescue Service. He died prior to the trial. He prepared a Fire Investigation Report which was admitted into evidence under the provisions of s 92 of the *Evidence Act 1977* (Qld). Mr Austin examined the scene of the fire on 9 February 2004. He expressed the view that the fire originated within the air conditioning unit capacitor/controller housing for the compression fan (referred to elsewhere as the *relay enclosure*). His view about the location where the fire commenced was based on his observation of distortion of the roof trusses above where the Winnebago was positioned; a "V" pattern with severe distortion located high on the iron wall sheeting of the packing plant beside the Winnebago; the extent of charring close to the pre-fire location of the air conditioning unit; and distortion and lines of demarcation on the upper section of the external metal housing of the air conditioning unit, with the underside of the unit showing much less heat and flame damage.

[41] Mr Murray Nystrom, a very experienced fire investigator, was appointed by the Fulchers' insurer to investigate the fire. On 11 February 2004 he inspected the shed. By this time, the air conditioning unit had been removed. However, he saw it the following day at the Bundaberg headquarters of the Queensland Fire and Rescue Service. His examination led him to conclude that the fire had not spread upwards into the air conditioning unit from the cabin below. He arranged for subsequent inspection of the air conditioning unit by Mr Marty Denham of QEC Services.

[42] Mr Denham inspected the remains of the air conditioning unit on 4 March 2004. He identified signs of electrical arcing within the relay enclosure. This indicated to him that the fire originated within this enclosure, near a relay device. He was unable to identify the electrical fault which caused the initial ignition.

[43] Mr Denham inspected the air conditioning unit in the company of Mr Brian Richardson, a fire investigator with the Electrical Safety Office, Office of Fair and Safe Work, Queensland. In an Electrical Inspection Report prepared shortly after his inspection, Mr Richardson identified that arcing had occurred on wiring of the capacitor housing/controller, welding it to the wall of the enclosure. He recorded that there was "splatter" inside the top of the enclosure, in the area above where the weld had occurred. He identified no other arcing. He concluded that the fire originated from the air conditioning unit, but that the exact component or part which was the point of origin was not able to be determined. His oral evidence explained why arcing would only occur once, because the circuit breaker would prevent further current flow. It also identified, by reference to a photograph[2], the features of the appearance of the wire which he described as having been welded to the wall of the enclosure. He also gave evidence that at the time of his inspection in March of 2004 he observed small droplets of copper, of the kind produced by the extremely high temperatures associated with arcing. He described the difference between the effect of an arc (where current jumps from one conductor through air to another conductor), and the effect of heat from a fire, on copper wire.

[44] Professor Darveniza provided reports expressing views about the cause of the fire. In a report dated 10 August 2005 he concluded that the fire originated inside the relay enclosure, and propagated out from there. He also considered that electrical arcing was a reasonable explanation for the spots or "splatter" identified by those who saw the air conditioning unit shortly after the fire. He concluded that the only credible cause of the arcing and the fire was a failure in the air conditioning unit, most likely to have occurred within the relay enclosure. He also noted that closing the switch to activate the charger would connect 240 volt electric power to the air conditioner. He also stated that it was only possible "to speculate on the faults that may have caused the failure and initiated a fire".

[45] By an affidavit sworn on 7 April 2009, Professor Darveniza confirmed answers given by the plaintiffs to interrogatories delivered on behalf of the third defendant. He confirmed the presence of "splatter" in the relay enclosure, as well as welding which provided evidence that arcing had occurred. However, while he had not observed direct evidence of a loose or bad connection at a wiring junction in the small enclosure, he considered that this was one of two probable causes of the fire.

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[2] Found in the lower part of p 7 of tab 2 of exhibit 6.

[46] In 2009, Professor Darveniza inspected an air conditioning unit which had been previously inspected by Dr Grantham. He considered the standard of manufacture of the unit and the quality of its components to be high. He was not satisfied that the air conditioning unit which he then inspected was identical with that involved in the fire. However, he thought the relay enclosure of the inspected unit was an unlikely source of a fire, because there were few readily combustible components, and because of the difficulty in a fire spreading from the enclosure because of its metal walls and small wiring openings.

[47] In a further statement dated 9 December 2009, Professor Darveniza considered a number of possible causes of the fire. More likely causes were the air conditioning unit, or defective insulation of an electrical conductor. He concluded that he was unable to state the precise cause of the fire, but that some electrical fault in the Winnebago was more than likely its source.

[48] The defendants called evidence from Dr Grantham. Ultimately, his view was that neither the cause of the fire or the place where it commenced could be identified. In particular, he considered that it was common for electrical arcing to occur in the course of a fire, and this did not necessarily indicate the place where the fire commenced. He considered that the enclosure and the small holes penetrating its walls made it unlikely for a fire which started in this area to spread beyond it, thus it was an unlikely place for the commencement of the fire. He considered that the charging equipment for the batteries may have been the cause of the fire, or the refrigerator. He also suggested that the use of a 10 amp cord, instead of a 15 amp cord, to connect the Winnebago to the electricity supply, might have been the cause of the fire. He considered that the fire might have started within the Winnebago itself, with flames then penetrating a hole in the base of the air conditioning unit, before spreading to the shed. He also suggested a gas leak might have explained the commencement of the fire.

[49] Dr Grantham subsequently identified a further reason for his rejection of the view that arcing occurred within the relay enclosure. A photograph of a similar enclosure[3], showed an earth wire connected to the top of the enclosure wall, to the left side of the photograph. A photograph of the fire-damaged enclosure identified the site of the arcing at the top of a wire, somewhat similarly located[4]. It appeared to be common ground that arcing would not be associated with an earth wire. Unlike Mr Nystrom, Dr Grantham attributed damage to the air conditioning unit to the mechanical effect of its falling to the floor of the Winnebago; together with damage from burning debris after it fell. Dr Grantham also expressed the view that the RCD on the circuit which served the air conditioning unit would have prevented arcing from occurring within the relay enclosure during a fire. He also relied on the quality of the design and manufacture of air conditioning units produced by the United States supplier.

[50] In my view, the evidence demonstrates that the fire commenced on the roof of the Winnebago. The evidence of Mrs Fulcher particularly supports this conclusion. It is unlikely that if the fire had commenced within the accommodation compartment, and spread through a rather small aperture to the air conditioning unit, Mrs Fulcher

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3 The upper photograph at p 10, tab 13, exhibit 6. In the photograph the wire appears to be covered in blue insulation. The colour appears to be the result of faulty reproduction, the original being green.

4 The lower photograph at p 10, tab 13, exhibit 6

would not have seen fire within the Winnebago when she was searching for the keys. As has been mentioned, there are a number of windows on the Winnebago, including one on the door to the accommodation compartment which she approached. The evidence does not make clear whether the curtain separating the driving compartment from the accommodation compartment was drawn. However, if the fire had commenced within the accommodation compartment, Mr Nystrom expressed the view that it was likely the curtain would have ignited and collapsed. Even if that curtain was fully drawn, and had not collapsed, it seems to me unlikely that Mrs Fulcher would have seen no evidence of a substantial fire within the accommodation compartment on either of the two occasions when she searched for the keys in the driving compartment, or when she was close to the Winnebago, approaching the door to the accommodation compartment.

[51] Mrs Fulcher's evidence that the fire was initially on the roof of the Winnebago was supported by the evidence of Mr Fulcher, and to some extent the evidence of Mr Treseder. I accept their evidence.

[52] There has been no suggestion that, if the fire commenced on the roof of their Winnebago, it might have commenced in some other location than in the air conditioning unit. Nothing else was located on the roof of the Winnebago, and no mechanism by which a fire might otherwise have started on the roof was suggested. I also accepted the evidence of Mr Austin and Mr Nystrom. Both had the advantage of an early inspection of the fire scene, and the fire-damaged air conditioning unit. I therefore find that the fire commenced within that unit.

[53] I accept that arcing occurred within the relay enclosure as identified by Mr Denham and Mr Richardson. Mr Richardson in particular identified from his examination of the relay enclosure in March 2004 evidence that arcing occurred; and gave what seemed to me to be a convincing explanation of the difference between the effects of electrical arcing, and the effects of the melting of a wire conductor as a result of heat generated by a fire. It follows that I do not accept Dr Grantham's identification of the wire with which arcing is associated as an earth wire. While its location after the fire is similar to that where an earth wire was apparently located prior to the fire, it is apparent from a comparison of the post-fire photographs of the enclosure, with what was said to be a similar but undamaged enclosure, that there has been destruction and movement of many of the wires within the enclosure. In any event, if arcing occurred from this wire, it could not have been an earth wire. A further difficulty with Dr Grantham's view is that the undamaged enclosure to which he referred is not identical to the enclosure in the air conditioning unit on the Winnebago involved in the fire.

[54] I also accept the evidence of Mr Denham that arcing could have occurred in the relay enclosure, notwithstanding that there was an RCD attached to the electrical circuit. He gave evidence of fires having occurred where arcing had also occurred on circuits protected by an RCD. Once it is accepted that arcing occurred in the relay enclosure, it must also be accepted that that occurred, notwithstanding the fact that the circuit included the RCD.

[55] I also accept the evidence of Mr Richardson and Mr Denham, the effect of which was that arcing is an indicator of the place where the fire commenced. I accept Mr Richardson's evidence that, once arcing occurred, the circuit breaker made it unlikely that arcing occurred in another place. Although Dr Grantham expressed a

contrary view, he did not explain how arcing might occur in more places than one, in a circuit where there was both an RCD and a circuit breaker. The evidence of Mr Richardson and Mr Denham provides further support for my conclusion that the fire commenced within the air conditioning unit.

[56] Both Mr Austin and Mr Nystrom relied on their inspection of the air conditioning unit shortly after the fire, as indicating that the fire commenced within the air conditioning unit, and not below it. In addition, Mr Austin relied upon his inspection of the fire damage to the shed, as, to some extent, did Mr Nystrom. Dr Grantham's view as to another possible explanation for the damage to the air conditioning suffers from the fact that he did not have the opportunity to inspect it, and could only rely on photographs. His suggestion that other evidence of damage to the shed, which may have pointed to a different location as the place where the fire started, seems to me to be speculative. In any event, his alternative suggestions for the source of the fire relate to locations in lower parts of the Winnebago and do not seem to me to account for the presence of the evidence relied upon by Mr Austin and Mr Nystrom.

[57] Difficulties with the view that the fire commenced in the relay enclosure are that there were relatively small apertures in the walls of the enclosure through which a fire might escape, and that there was limited presence of materials which might provide fuel for the fire. However, Mr Denham gave evidence, which I accept, that if a fire commenced within the enclosure, the combustion would involve thermoplastic materials within the enclosure; and that protective materials in the apertures would quickly disintegrate or melt, permitting the passage of fire. He gave evidence that there had been other cases where fire had spread out of similar sheet-metal enclosures.

[58] In cross-examination, Dr Grantham conceded that if fire was seen on the top of the Winnebago, but not within it, then it was unlikely that the cause of the fire was the refrigerator or the battery charger. Similar reasoning makes it unlikely that the fire originated with the gas cylinders.

[59] Submissions were made on behalf of the plaintiffs to the effect that Dr Grantham's evidence was not objective. In my view, at times Dr Grantham displayed a lack of objectivity in his evidence. This is apparent from some of his reports. For example, at times he quoted selective passages from the reports of other experts, supporting his conclusions, when the quoted passages did not fully reflect the views of the person being quoted. A particular example of Dr Grantham's lack of objectivity appears in his report of 3 April 2008. That report was written as a consequence of a letter of instructions of 25 October 2007, which made clear that the issue to be addressed was the cause of the fire. One of the questions asked of Dr Grantham was whether the air conditioning unit complied with all relevant Australian Standards and Codes governing such devices. In dealing with that question, Dr Grantham referred to a certificate of suitability issued in 1981, based on testing against the 1979 Australian Standard then current, AS 3179-1979. He then referred to a standard current at the time when the air conditioning unit was supplied in 2003, namely AS/NZS CISPR 14.1:2003, in relation to which a Certificate of Compliance had issued. He then continued:

> "I am not aware of any relevant Australian Standards or Codes with which the air-conditioner in question does not comply. Based on my

> examination of the unit I am of the opinion that the unit has been designed and built to a high standard with respect to safety."

[60] A number of matters not mentioned in Dr Grantham's report subsequently emerged in the course of his cross-examination. The first was that the certificate of suitability had a limited life of either three or five years. The second was that AS 3179-1979 had been revised on a number of occasions; and in 1997 it had been replaced by a standard which was itself updated in 2001. Although Dr Grantham had available the current standard, he was unaware of the contents of the 1979 standard. Another matter is that the 2003 document, relevant to the Certificate of Compliance, had nothing to do with fire safety. The inclusion of reference to it in his report has no sensible explanation other than to create the impression of compliance with current standards relevant to the cause of the fire. Finally, the effect of the passage set out above was to create the impression, in the context of the earlier matters mentioned, of compliance with relevant Australian Standards. The passage disguises the fact that Dr Grantham had no satisfactory basis for expressing a view that the air conditioning unit complies with the Australian Standard current in 2003. I might add that Mr Denham has been for many years a member of the committee responsible for the production of the Australian Standard. He gave evidence, which I accept, that there have been major improvements to the fire hazard test requirements of the standard; which meant that it was erroneous to rely on compliance with the 1979 version as evidence of safety. If the views of Dr Grantham were, in the context of the evidence as a whole, as compelling as the views of the experts who gave evidence in the plaintiffs' case, I would prefer the views of the latter experts. However, I also consider their evidence to be more convincing.

[61] None of the witnesses attempted to identify definitively the precise mechanism by which the fire started. Mr Denham, in his report of 8 March 2010, identified four possible mechanisms. They were, an over-heated connection; a fracture in a conductor; the failure of a capacitor in the relay enclosure; and damage to the insulation of an electrical conductor. In his oral evidence, Mr Denham made it clear that he did not consider the fourth possibility as the explanation for this fire. He regarded the failure of a capacitor as the most likely explanation. In his report of 8 March 2010, he had said that the failure of a capacitor is a well known cause of fires in appliances, and is the result of faulty manufacture of the capacitor. I accept his evidence that this is the most likely explanation for the fire. His description of violent ignition, in my view, makes this explanation more likely, given the nature of the materials in the enclosure.

[62] Taken as a whole, the evidence includes the opinion of a number of experts to the effect that the fire resulted from an electrical fault within the air conditioning unit; as well as the evidence, particularly of Mrs Fulcher, that initially the fire was visible on the roof of the Winnebago, but not elsewhere. There is evidence that an electrical failure might have occurred within the air conditioning unit, which could have caused the fire. There is no sensible explanation for the presence of fire on the top of the Winnebago, other than a failure of an electrical component within the air conditioning unit. I find that to be the cause of the fire.

[63] For the defendants, it was submitted that the better view of the evidence was that the air conditioning unit had been turned off by Mrs Fulcher, after she cleaned out the Winnebago. That evidence was supported by the fact that neither of the Fulchers

heard the noise of the air conditioner operating, after the Winnebago had been cleaned on the afternoon of 8 February 2004. The expert evidence was to the effect that, unless the air conditioning unit was turned on, an electrical failure would not have occurred. However, Mr Denham gave evidence that there have been a number of occasions where persons have claimed to have turned off electricity prior to a fire, and it has subsequently been demonstrated that they were mistaken. The air conditioning unit was one that, when switched on, would operate intermittently. For that reason, a failure to hear it operating does not demonstrate that it was not switched on. Moreover, once it is accepted that arcing occurred in the air conditioning unit, the presence of electricity within the air conditioning unit must follow. Accordingly, I find that the switch connecting the air conditioning of the Winnebago to the electricity supply was left on after the Winnebago had been cleaned on 8 February 2004.

[64] The defendants submitted, relying on a passage from *Nguyen v Cosmopolitan Homes*[5], that this was a circumstantial case, where the evidence was not sufficient to enable a definite conclusion to be drawn as to the cause and point of origin of the fire, that being a matter of broad speculation. It will be apparent that I do not accept this submission. I have accepted the evidence of Mr and Mrs Fulcher, which in my view demonstrates the fire commenced on the roof of the Winnebago. There is no sensible explanation for the commencement of a fire there, other than an electrical fault in the Winnebago itself, something which, on the evidence, is by no means impossible. This is sufficient to give rise to an actual persuasion that the fire commenced there[6]. On the evidence, there is no explanation for the commencement of the fire within the air conditioning unit, and for the post-fire condition of the unit other than an electrical fault within it. The evidence shows that faults of that kind sometimes cause fires. Accordingly, the evidence is sufficient to give rise to an actual persuasion that the fire commenced as a consequence of an electrical fault within the air conditioning unit.

Liability issues relating to second defendant

[65] Under s 71(2) of the *TPA*, the condition that goods supplied under the contract are reasonably fit for a particular purpose is implied where the purpose is made known, expressly or by implication. The second plaintiff has alleged that, under s 71(2) of the *TPA*, a condition was implied that the Winnebago would be reasonably fit for the purpose of being used as a motor home. It seems clear that this purpose was made known to the second defendant, at least by implication, notwithstanding that some special requirements, relating to attendance at go-kart meets, were also communicated[7]. Accordingly, I am satisfied that the condition alleged by the second plaintiff as to fitness for purpose was implied in the contract for the sale of the Winnebago.

[66] The presence of a hidden defect or fault may have the effect that goods are not of merchantable quality[8]. The existence of an electrical fault in the air conditioning unit which would render the unit liable to catch fire within a short period after its purchase is, in my view, one that rendered the Winnebago not of merchantable

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5 [2008] NSWCA 246 at [54].

6 See *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361.

7 See exhibit 2, tab 3.

8 See *Grant v Australian Knitting Mills Ltd* (1935) 54 CLR 49, 60; and in the High Court (1933) 50 CLR 387, 418.

quality. Likewise, it had the consequence that it was not fit for the purpose pleaded on behalf of the second plaintiff. It follows that the second defendant is liable for any loss which results from the breach of these implied terms of its contract with the second plaintiff.

[67] It has not been suggested that the liability of the second defendant by reason of the provisions of s 17 of the *SGA* is affected by the provisions of the *TPA*. Accordingly the second defendant is similarly liable for breach of the terms implied by this provision.

[68] The written submissions on behalf of the plaintiffs proceed on the basis that the second defendant owed a duty to take reasonable care that the Winnebago was free from any defect likely to cause injury to the user. However, they made no submission that that duty was breached by the second defendant. In my view, the evidence does not demonstrate that the second defendant breached any duty of care it owed to the plaintiffs. The plaintiffs relied on the doctrine of *res ipsa loquitur*. I do not see how it could be said that a fire which occurred as a result of a hidden defect in a component of a vehicle, could not have occurred without negligence on the part of the seller of the vehicle. The action of the plaintiffs in negligence against the second defendant fails.

[69] In the result, therefore, the second defendant is liable to the second plaintiff for breach of the contractual terms imposed by statute.

Liability issues relating to first and third defendants

[70] The plaintiffs' submissions also proceed on the basis that the first and third defendants owed them a similar duty of care; and that it was breached. In my view, the plaintiffs face a significant difficulty in establishing negligence against each of these defendants. It has not been established that the electrical fault is one which could have been detected by the exercise of reasonable care by either defendant. The first defendant acquired the air conditioning unit as a fully assembled unit. The evidence established that the third defendant was a reputable supplier of such units. The units have been used for many years without any similar failure. The plaintiffs have not identified any precaution which these defendants, acting reasonably, should have taken, and which was likely to have rectified the defect and thus to have prevented the fire. The difficulty which the plaintiffs face in this regard is compounded by the fact that they do not identify the specific mechanism by which the fire commenced. Even if it be accepted that the most likely cause of the fire was a defective capacitor, nevertheless, this was not manufactured by either of these defendants; and it has not been shown that the existence of the defect would have been avoided by the taking of reasonable care. It should be observed that the position of the third defendant is not materially different to the position of the first defendant in this context. It was a re-seller of the air conditioning unit, supplied from the manufacturer in the United States.

[71] The plaintiffs' position was not assisted by their reference to the doctrine of *res ipsa loquitur*. The occurrence of a fire in a component of a vehicle manufactured by someone else does not, without more, demonstrate negligence in the re-supplier of the component, or in the manufacturer who installed the component, already fully assembled, in a vehicle ultimately supplied to the plaintiffs.

[72] In view of the position taken by the defendants, it is unnecessary to set out my reasons for finding that the second plaintiff is a consumer for the purposes of the claims made under s 74B and s 74D of the *TPA*. Those sections would make the first defendant liable, as the manufacturer of the Winnebago, if the second plaintiff suffered loss by reason of the fact that the Winnebago was not of merchantable quality, or that it was not reasonably fit for a purpose for which it was acquired, made known (expressly or by implication) to the first defendant. The first defendant, in my view, knew by implication from the nature of the Winnebago which it had manufactured, and the purpose for which such a vehicle is ordinarily used, that the Winnebago was being purchased for use as a motor home. As will be apparent, because of the presence of the electrical fault in the air conditioning unit, I consider that the Winnebago was not of merchantable quality, nor was it reasonably fit for such use. Accordingly, I find the first defendant liable for any loss that the second plaintiff suffered, by reason of the electrical fault.

[73] The third defendant is, by virtue of s 74A(4) of the *TPA*, deemed to be the manufacturer of the air conditioning unit. No arguments have been advanced to the effect that the air conditioning unit had ceased to exist by reason of its incorporation into the Winnebago, and accordingly was not the subject of a supply to the second plaintiff. By reason of the electrical fault, the air conditioning unit was not of merchantable quality. As against the third defendant, it was alleged that the air conditioning unit was acquired to be used as part of the mobile home, a purpose said to be made known by the first defendant. In my view, it is highly likely that the third defendant knew that the air conditioning unit was to be so used, at least by implication; and that accordingly any person acquiring a mobile home manufactured by the first defendant and equipped with an air conditioning unit supplied by the third defendant, would be acquiring the air conditioning unit for use as part of the mobile home. By reason of the defect, it was not fit for this purpose. Accordingly, I find the third defendant to be liable for any loss suffered by the second plaintiff, by virtue of the electrical fault in the air conditioning unit, under s 74B and s 74D of the *TPA*.

[74] The first defendant produced a brochure given to Mr and Mrs Fulcher by the second defendant which contained representations relating to the safety of the Winnebago. The submissions made on behalf of the first defendant accept that representations contained in the brochure constitute express warranties by virtue of s 74G of the *TPA*[9]. While the second plaintiff submitted there was a general warranty as to the safety of the Winnebago, the first defendant submitted that the warranty was limited to the terms of the representations found in the brochure, and that that warranty had not been breached. Nor was a causative link demonstrated between any breach of the warranty, and the second plaintiff's loss. It was also submitted that the remedy available by virtue of the warranty created by s 74G of the *TPA* was restricted by an express warranty given by the first defendant, being a warranty that the Winnebago would be free from defects in material and workmanship for a period of 24 months. However, on parts not manufactured by Winnebago but fitted to its products as original equipment, the first defendant undertook to transfer the benefit of warranties given by its suppliers, without undertaking further liability[10].

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9 See in particular s 74G (2) of the *TPA*; see also s 74A (1) of the *TPA*.

10 See exhibit 2, tab 10.

[75] To determine the scope of the representation, it is necessary to consider the words used in the brochure, in particular in the section headed "Safety & Warranty". They are as follows:

> "You would expect that Australia's largest manufacturer of motorhomes would have safety and quality as top priorities – spot on. At Winnebago, all of our motorhomes are 'built better and backed better'. The structure of our motorhomes have been engineered and rigorously tested for maximum safety, minimum noise, and maximum protection against the elements. We leave nothing to chance at Winnebago. All motorhomes come with an exclusive 24month and 40,000km Limited Warranty."

[76] In my view, the representation does not amount to an absolute representation of the safety of the Winnebago. Rather, it includes a representation that safety was a "top priority"; and that the structure of a motor home produced by the first defendant had been engineered and rigorously tested for maximum safety.

[77] The representation as to the engineering and testing of the structure of the Winnebago is of no present relevance. There may well be substantial debate about the scope of the representation that safety was a top priority for the first defendant. The evidence demonstrated that checks, some of which were relevant to safety, were carried out before the Winnebago left the control of the first defendant. Although the first defendant's Chief Executive Officer gave evidence, it was not suggested to him that the first defendant did not have the safety of its products as a "top priority" nor was other evidence led on the question. The second plaintiff has therefore failed to demonstrate that the warranty was breached. The warranty is, as I have indicated, not an absolute warranty of the safety of the Winnebago. To make safety a "top priority" does not inevitably mean that hidden defects in a component supplied by another manufacturer will be detected. Even if some breach were shown, therefore, the second plaintiff would face the difficulty of demonstrating that it caused loss to the second plaintiff.

[78] It therefore follows the second plaintiff's claim under s 74G fails.

[79] Sections 75AF and 75AG of the *TPA* imposed liability on a manufacturer respectively for damage to goods and buildings or fixtures, as a result of a defect. Compensation is limited, in the case of goods, to goods ordinarily acquired and in fact used or intended to be used for personal, domestic or household use; and in the case of buildings or fixtures, to those ordinarily acquired, and in fact used or intended to be used, for private use. It is a condition of each remedy that the goods supplied by the manufacturer have a defect, because of which other goods, or buildings or fixtures, of the kind described, are destroyed or damaged. Claims were made against the first and third defendants under these sections.

[80] For the first and third defendants, it was submitted that relief is not available unless the plaintiffs establish the existence of the defect, relying on *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd*[11] (*Carey-Hazell*). It was also submitted that in view of the checks undertaken, the latent nature of the defect, and the lack of any history of previous failure, the air conditioning unit and Winnebago were as safe as persons

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11 [2004] FCA 853 at [190].

generally are entitled to expect, and accordingly were not defective[12]. No submission was made that there was a material difference between the position of the first defendant and the position of the third defendant for the purpose of the claims under s 75AF and s 75AG.

[81] In *Carey-Hazell*, the issue was whether a plaintiff had to demonstrate that a defect, in existence at a time when damage was suffered, was in existence at the time when the goods were supplied. It was held that it was sufficient for a plaintiff to establish the existence of the defect at the time when the injury was suffered. The case was not concerned with determining what a plaintiff must show to demonstrate the existence of a defect at that time.

[82] The effect of s 75AC is that goods have a defect, if their safety is not such as persons generally are entitled to expect. The section goes on to state that regard is to be given to all relevant circumstances, and identifies some specific circumstances. Some helpful observations about the application of s 75AC, which specifies when goods have a defect for the purposes of these claims, are found in *Australian Competition and Consumer Commission v Glendale Chemical Products Pty Ltd*[13], referred to in the submissions of the defendants. From the observations of Emmett J, I take a number of relevant propositions for determining whether the Winnebago had a defect[14]. One is that the test is objective. The second is that it is concerned with what the public at large, rather than any particular individual, is entitled to expect. The third is that the legislation does not require goods to be absolutely free from risk, so that there may be some risk to safety associated with goods, without the goods having a defect. The fourth is that a plaintiff does not need to establish negligence on the part of the manufacturer, to establish that goods have a defect. Moreover, no doubt because s 75AC takes effect by reason of its application to provisions which impose liability, its scope can be determined by reference to defences found in s 75AK of the *TPA*.

[83] In my view, persons generally are entitled to expect that a motor home will not catch fire simply as a consequence of its having been used for a short time, and then being connected to an electricity supply for the purpose of charging batteries, with the switch for the air conditioning unit having been left on. There seems to me to be nothing which would differentiate that use from the use of the motor home for overnight occupation. I therefore find that the motor home was not as safe as persons generally are entitled to expect. The same may be said of the air conditioning unit[15].

[84] In my view, the conclusion reached as to the existence of the defect is supported by reference to s 75AC (2)(e) in particular. I also note the relatively brief period which had elapsed from the time of the original supply both of the air conditioning unit, and of the Winnebago by the first defendant: see s 75AC (2)(f). Further, it is plain that the Winnebago was marketed as a vehicle in respect to which safety was important, and one which could be left connected to an electricity supply, with the air conditioning unit in operation. There has been no suggestion of a warning or

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12 See s 75AC of the *TPA*.
13 (1998) 40 IPR 619.
14 *Glendale*, 629-630.
15 Compare the reasoning in *Thomas v Southcorp* [2004] VSC 34 at [76].

instruction in relation to the air conditioning unit which would be relevant in determining whether it or the Winnebago had a defect: see s 75AC (2)(d).

[85] In my view, therefore, the first defendant and the third defendant are liable for losses suffered by the plaintiffs, of the kind identified in s 75AF and s 75AG of the *TPA*.

[86] The first defendant and the third defendant submitted that the claims made under s 74B and s 74D are barred by s 74J of the *TPA*; and those made under s 75AF and s 75AG are barred by s 75AO of the *TPA*.

[87] Under s 74J, a claim may be commenced only within three years after the day on which the cause of action accrued. In the case of s 74B, the cause of action was deemed to have accrued on the day on which the plaintiffs first became aware, or ought reasonably to have become aware, that the goods were not fit for the purpose referred to in the section; and in the case of s 74D, the cause of action is deemed to have accrued on the day when the plaintiffs first became aware, or ought reasonably to have become aware, that the goods were not of merchantable quality.

[88] The relevant effect of s 75AO is that an action based on s 75AF or s 75AG may not be commenced more than three years after the time on which the plaintiff became aware, or ought reasonably to have become aware of the loss, the defect on which the claim was based, and the identify of the person who manufactured goods.

[89] The causes of action based on s 74D, s 74G, s 75AF, and s 75AG against the first defendant were added by amendments made on 5 March 2007. The third defendant was joined to the proceedings, and the claims under these sections were made against it, on the same day.

[90] The first defendant and the third defendant pleaded that the plaintiffs had, or ought to have had, the relevant awareness on about 9 February 2004. It was conceded that the evidence did not show that the plaintiffs knew the identity of the manufacturer of the air conditioning unit before 5 March 2004. Accordingly, on any view, the claims made against the third defendant under s 75AF and s 75AG are not statute barred.

[91] However, the question remains whether the plaintiffs were, or ought to have been, aware, by 5 March 2004 that the Winnebago, and the air conditioning, were not fit for the purpose previously referred to, and were not of merchantable quality; and both had the defect relevant for the claims under s 75AF and s 75AG.

[92] Mr Fulcher knew shortly after the fire that the air conditioning unit had been taken away for testing. He also conceded that in February 2004, Mr Austin "might have implied" that the fire started in the area of the air conditioning unit. In my view, that is not sufficient to establish that any of the plaintiffs was aware that the Winnebago, and the air conditioning unit, were not fit for the previously mentioned purpose, or of merchantable quality; or that either had a defect. The fact that the air conditioning unit was taken away meant that an investigation was ongoing. The air conditioning unit was not opened until 5 March 2004, and the results of an inspection of it were not recorded in writing until 11 March 2004 (by Mr Denham).

[93] Even at the trial, the cause of the fire was strongly contested, with the view of the experts called on behalf of the plaintiffs being contested by an expert called on behalf of the defendants; and it being submitted on their behalf that the cause of the fire could not be determined. The conclusion which I have reached is a result of the weighing up of all of the evidence which has been presented in the case relating to that issue. While Mr Austin may have communicated to Mr Fulcher a view that the fire originated in the air conditioning unit, that view was plainly only a preliminary view. It cannot be said that that communication meant that Mr Fulcher should have been aware either that the Winnebago or the air conditioning unit had a defect; or that either was not of merchantable quality, or was not fit for the relevant purpose. Nor can it be said that he should have been aware of any of these things by 5 March 2004. Accordingly, in my view, the defences based on s 75J and s 75AO of the *TPA* have not been made out.

[94] It was submitted that, because the plaintiffs have remedies under Part V and Part VA of the *TPA*, by virtue of sections which were intended to "cover the field with respect to liability for defective products in Australia", the doctrine of statutory pre-emption operates to exclude a common law claim for negligence. Since I have found the claims for negligence fail as against all three defendants, it is not necessary for me to reach a firm conclusion about this question. In my view, there are significant difficulties with the submission made by the defendants. So far as the second defendant is concerned, the *TPA* provisions relied upon are those which introduce statutory warranties into the contract between the second defendant and the second plaintiff. It is difficult to accept that the statutory provisions which have this effect are intended to affect the law of tort.

[95] Part V of the *TPA* deals with consumer protection. Its provisions, and in particular the remedies found in it, are of a kind likely to be intended to supplement remedies available at common law. In my view, the provisions of Part VA are of a similar character. Although I was not referred to them, my conclusions are confirmed by s 75 and s 75AR of the *TPA*.

[96] In the result, therefore, the first defendant and third defendant are liable under s 74B and s 74D of the *TPA*, for the second plaintiff's loss. They are also liable to the first defendants for loss of the kind described in s 75AF and s 75AG.

Economic loss

[97] As has been previously stated, the tomato growing operation ceased at the time of the fire. Some alternative cropping was carried out, with limited success. The second plaintiff has claimed economic loss.

[98] Evidence relating to the economic loss claims was given by a Mr Donald McDougall of Agricultural Risk Consulting Group. Mr McDougall considered scenarios identified by both sides. There was no issue as to his qualifications to give this evidence.

[99] Mr McDougall's report of 24 January 2012 identified the loss suffered since the fire as $9,444,539, though later evidence suggested that there might be some adjustment to this figure.

[100] The defendants submitted that there is no causative link between the breaches of duty or contravention alleged against them, on the one hand, and economic loss beyond the time the farming business operations might reasonably have been expected to be re-established after the fire, said to be a period of 12 months. In this context, reference was made to the agreement to sell the farms to Bundaberg Sugar, reached in September 2004. Alternatively, the defendants submitted that the plaintiffs had failed to mitigate their loss, effectively by rebuilding the shed, and replacing the tomato grading equipment and other plant lost in the fire, actions which should have occurred within a period of 12 months.

[101] To deal with these issues, it is necessary to say something about events which occurred shortly after the fire, and the circumstances which the plaintiffs then faced.

[102] Brief mention has already been made of the farming activities which were conducted after the fire. The submissions for the defendants do not criticise them.

[103] Mr Fulcher obtained a quotation for a packing plant, provided in a document dated 10 February 2004. The document contained a "budget price estimate" for a new line. It totalled $799,590, not including wiring for the shed, and transport costs. Although new, this machine did not have the same capacity as the machine destroyed in the fire. It had no facility for second or third grade fruit; with the result that the operation would take longer and involve double handling. Mr Fulcher also gave evidence, which was not challenged, that the area which could be planted with tomatoes would be reduced by an area which appears to have been about 20 per cent of the area planted in the season prior to the fire.

[104] Mr Fulcher properly sought the assistance of solicitors. The claim which issued on 19 July 2004 was accompanied by a statement of claim, claiming loss on the basis that the second plaintiff would suffer economic loss until farm equipment (being a reference to farm machinery and the shed destroyed by the fire) could be reinstated. No doubt the statement of claim reflected Mr Fulcher's instructions at some earlier time.

[105] By September 2004 a decision had been made not to recommence tomato production and to sell most of the farm to the Bundaberg Sugar Mill. When asked his reasons for that decision, Mr Fulcher referred to a number of things. He particularly referred to "the major expense in … rebuilding", which would involve significant debt. He said that it would involve incurring debt with associated financial stress. He also referred to Mrs Fulcher, who, he said, "really struggled to get over the fire"[16]. He also referred to the fact that losses had been incurred in attempts to grow other crops after the fire.

[106] The plaintiffs sought advice from their accountant, Mr Stewart, about this decision. His evidence was generally consistent with Mr Fulcher's, though he referred to the fact that it would take some time to re-establish; the effect of the loss of staff who were trained in the Fulchers' ways of operating; the amount which would need to be expended; and that some borrowing of funds would be necessary.

[107] There was evidence, which I accept, from Mr Kuhn, whose construction company had experience in constructing similar sheds in the Bundaberg area in 2004 that it

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16 See T2-46/20-47; 2-44/10.

would have taken 18 months to obtain the necessary approvals, to reconstruct the shed. Mr Fulcher had given a similar estimate. The parties agreed that the cost of reinstatement in 2004 would have been $2,008,651.91 including fire service expenses of $200,513.52[17], and new forklifts with a total cost of $50,000. If older forklifts were purchased, the costs would reduce by $28,000. Mr Kuhn's evidence was that fire services would be necessary. The agreed figure for the fire services was somewhat lower than the figure given in Mr Kuhn's evidence[18].

[108] The evidence does not show a precise time when a decision was made not to reinstate the tomato-producing operation. However, the evidence shows that, although Mr Fulcher gave consideration to reinstatement, he had not positively decided to do so in the first half of 2004. There is no suggestion that any step was taken by way of placing orders or commissioning work for reinstatement.

[109] The defendants submitted that the plaintiffs saw an opportunity, when the sugar mill expressed interest in purchasing the land, to free up capital, part of which could be applied to the rose-growing business and to KKP, giving them more free time and lifestyle advantages, and reducing their workloads; and that this is the explanation for the sale of the land.

[110] The fire having destroyed the shed and packing plant, the second plaintiff could not continue to conduct its business as it had before the fire. It could only do so if a considerable sum of money was expended to provide a shed and operating equipment. It seems to me, therefore, that loss was caused by the fire.

[111] The decision to sell the land was, on the evidence, associated with the decision not to recommence tomato production. On the evidence, it was plainly a result of the circumstances produced by the fire. There was no evidence to show, and it was not suggested to any of the plaintiffs' witnesses, that the land would or might have been sold had the fire not occurred. That seems to me to have been quite unlikely. Although it placed demands on the Fulchers, the tomato-producing operation had become, over the years, very profitable. It enabled the Fulchers to experience a lifestyle they appeared to enjoy very much. Although KKP and the rose growing business may have appeared to have some prospects of success (less so in the case of KKP), these operations did not have the established successful history of the tomato producing operation. In my view, the decision to sell the land was, like the associated decision not to recommence tomato production, a result of the fire. The second plaintiff's subsequent economic loss was caused by the fire, notwithstanding the sale of the land[19].

[112] It is then necessary to consider whether there has been a failure to mitigate the second plaintiff's economic loss. A plaintiff may not recover loss which could have been avoided by the taking of some reasonable action on the part of the plaintiff[20].

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17 Although one exercise asked Mr McDougall to assume no cost for fire services.

18 Mr McDougall had been earlier asked to consider an alternative view of the cost of reinstatement: See exhibit 9, Vol 2, appendix 6. The major difference was that the tomato grading equipment was assumed to cost some $740,000 less than the figure ultimately agreed. The lower cost for the tomato grader was not referred to in the submissions for the defendants, nor in the evidence, and I have ignored it.

19 *Medlin v The State Government Insurance Commission* (1995) 182 CLR 1, 6-7; see also 23.

20 NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract* (LexisNexis Butterworths, Australia: 9th Australian ed, 2008) at para 23.41.

The onus is on the defendant to establish that the plaintiff failed to take such action[21]. What measures a plaintiff should to take to mitigate its loss "ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty"[22]. It has been said that a plaintiff is not required to sacrifice or risk any of its property or rights in order to mitigate the loss[23]; though it seems more accurate to say that a plaintiff need not risk its money (and no doubt property) too far to mitigate its loss[24]. There is authority for the proposition that the personal circumstances of the plaintiff are relevant, including the plaintiff's abilities[25].

[113] The evidence does not clearly establish the financial position of the plaintiffs in the period after the fire. Bank statements for an account in the name of the first plaintiffs, but in fact an account of the second plaintiff (*company account*), were put in evidence. They were for the 2004 calendar year. They showed substantial sums of money coming into the account, particularly in the early months of the year, primarily reflecting payments for crops produced before the fire; and transfers of funds between the account and an account referred to as the sweep account. The sweep account was identified as an account in which larger sums of money were held; and from which the company account was provided with funds when required. The actual balances of the sweep account were not put in evidence. Nor was it apparent whether it was an account of the first plaintiffs or the second plaintiff, though the latter seems more likely.

[114] In January, the credit balance of the company account at one point exceeded $800,000; but by the end of the month the account was overdrawn by a little over $117,000.

[115] Substantial sums were both deposited to and withdrawn from the company account both in February and March of 2004, though the total volume of the transactions declined over that period. The closing balances at the end of February and March were respectively an overdrawn amount of $126,106.53 and a credit amount of $112,511.27.

[116] Not surprisingly, the volume of transactions declined somewhat further in the months of March, April, May and June.

[117] The second plaintiff's balance sheet at 30 June 2004 recorded current assets slightly over $1,500,000, the principal element of which was a sum of $915,255.23 held in a cash management account. On the other hand, total current liabilities were a little over $800,000.

[118] While it is possible from the evidence to infer that in the months after the fire, the plaintiffs had available to them a substantial amount of cash, it is not possible to come to a firm view about the amount. It is, however, clear that if the operation

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21 *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130, 138; *Metal Fabrications (Vic) Pty Ltd v Kelcey* [1986] VR 507; *AHR Constructions Pty Ltd v Maloney* [1994] 1 Qd R 460, 467.

22 *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, 506.

23 *Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd* [1976] 1 NSWLR 5, 9.

24 *Hoad v Scone Motors Pty Ltd* [1977] 1 NSWLR 88, 100; see also *Metal Fabrications (Vic) Pty Ltd v Kelcey* [1986] VR 507, 513.

25 See *Freemantle's Pastoral Pty Ltd v Hyett* [1999] VSC 129 at [69] and the authorities referred to at [72].

were to be re-established as it had been prior to the fire, it would involve borrowing a large sum of money. In addition, funds would be required to re-start the farming operation, including picking and packing, before any significant return could be expected. As has been mentioned, large numbers of people were employed. In addition, the cost of moneys borrowed would have to be met.

[119] In my view, at the time of the fire, it was reasonable to assume that the farm would not be fully operational for 18 months, the reason being the time taken to reconstruct the shed. On that basis, some crops would be missed. The evidence showed that a tomato crop was typically planted between February and April and picked from about June to August; and another crop planted between July and October, and picked from about October through to Christmas. It seems to me that a reasonable person in February 2004 making a decision about when operations might resume would act on the basis that it would be uncertain that the shed would be ready for production for a crop planted early the following year, with the result that no returns from tomato production might be expected for a period of two years. If the shed were constructed in accordance with the projected timeframe, it would only be ready at the very end of the picking season ending in August of the following year, and with some uncertainty about the reliability of the estimate, too late to justify planting in the early months of that year.

[120] Prior to the fire, the enterprise had enjoyed considerable success. Mr McDougall's calculations indicate that the net profit from tomatoes for the crop harvested in the latter part of 2003 (referred to as the Spring 2004 crop, by reference to the 2004 financial year) was $2,048,088. However, the same calculations show lesser, though still significant, profits for the 2002 and 2003 financial years; though there was a loss of $11,687 for the 2001 financial year. While the material indicates that the 2001 financial year was affected by the costs of setting up the rose growing operation, Mr McDougall identified it as having the largest planting and the lowest yields, which contributed to the result.

[121] Beyond that, the evidence demonstrates that there was some risk in the business. Mr Fulcher gave evidence that the industry was volatile, and that he was aware of people who had failed financially. This volatility is confirmed by the fact that in more recent times, some entities engaged in the industry that in the past had been successful have been placed in receivership or administration.

[122] In addition, it seems to me that a relevant consideration would have been that it may have taken some time to re-establish a suitable team of employees, as had been established at the time of the fire; and there may have been some difficulty in re-establishing the relationship with buyers which was available to the plaintiffs prior to the fire. These considerations may have had some effect on the return to pre-fire levels of profitability, even after the business became fully operational again.

[123] Given the fact that it would have been necessary to expend large sums of money, the likelihood that much of this would have to be borrowed, the length of time until the plaintiffs would receive income from the resumed operation, the likelihood that some at least of the former employees might not be re-engaged, market connexions may have been lost, and the fact that there was some risk associated with the industry, the defendants have failed to satisfy me that it was not reasonable for the plaintiffs not to reinstate the tomato producing operation. Accordingly, I am not

satisfied that the economic loss claimed by the plaintiff should be reduced by reason of a failure to mitigate the loss.

[124] If it is permissible to have regard to the abilities and personal circumstances of Mr and Mrs Fulcher, those would confirm that conclusion. Mrs Fulcher was, and plainly remains, significantly affected by the fire. She was deeply upset by it, and has had trouble sleeping. She has sought medical attention and counselling. Judging from her response to questions about re-establishing the business, her psychological or emotional state was such that she could not have been involved in the business in the period after the fire. Indeed her responses would suggest that even now she would have difficulty with this.

[125] It was suggested that it would have been possible to employ a manager to carry out the tasks which had previously been carried out by Mrs Fulcher. Plainly that would have involved some additional cost, though perhaps not particularly significant in the context of the total operation. However, it seems to me that there is a material difference between the operation of a business such as this where the responsibilities have been divided between a husband and wife; and the operation of a business where a manager replaces one of them. Mr Fulcher's areas of expertise were different from those of Mrs Fulcher, and it may be doubted whether an employed manager could adequately replace her.

[126] My conclusion would not be altered by a consideration of the previous borrowing practices of the plaintiffs. While they had, from time to time, borrowed money to purchase additional land, that was at times when they had available a substantial part of the purchase price; and they had an operating business, generating sufficient funds to enable the relatively speedy repayment of the debt. In my view, these borrowings were made under very different circumstances from those which faced the plaintiffs after the fire.

[127] As stated earlier, in his report dated 24 January 2012, Mr McDougall calculated the loss resulting from the cessation of the tomato growing operation at $9,444,539. That included the crop for Spring 2011, which I understand to refer to the crop to be picked late in 2010. Mr McDougall provided a further report dated 21 February 2012. That report included revised calculation on the basis of a different income from growing capsicum in 2004. In my view, the evidence justified adjustment for that reason. He also adjusted costs relating to the capsicum growing, based on information from a Mr Nigel Schmidt, a farm manager. Again, it seems to me that such an adjustment is appropriate. On that basis, he recalculated the loss at $9,601,950.

[128] Mr McDougall's calculations were said, on the evidence, to take account of weather conditions and pricing over the years to which they relate. No submission was made that any allowance should be made for contingencies.

[129] In my view, the second plaintiff's claim for economic loss succeeds against the second defendant, on the basis of the breach of implied terms found previously. It also succeeds against the first defendant and the third defendant, on the claims made under s 74B and s 74D of the *TPA***.**

Damage to property

[130] The shed was owned by the first plaintiffs. It was not replaced prior to the sale. The reason for its existence, and its primary use, was as a farm shed. That is to say, its primary use was as a packing shed, and a place to store farm equipment. Some use was also for private or domestic purposes. I would be prepared to act on the basis that it is not uncommon for a farm shed to be used in that way: that is to say, for those who live on a farm to store in such a shed vehicles not used for farm work, recreational equipment and personal items; though the primary use of the shed is for farm-related purposes.

[131] The expression "private use" in some contexts may be explained as the opposite of public use. However, in other contexts it is contrasted with business use. That was the sense in which the expression was used in s 4(3) of the *TPA* for the purpose of identifying whether goods were acquired by a person as a consumer, prior to its amendment by Act No 81 of 1977[26]. In my view that is the sense in which the expression is used in s 75AG. It gives the section an operation which corresponds to s 75AF (relating to goods). Moreover, if the expression were meant to operate by way of contrast to public use, it would have little scope; and seems to be an unlikely limitation on the remedy provided by s 75AG.

[132] It seems that a farm shed, notwithstanding that there may be some private use of it, is not a building or fixture ordinarily acquired for private use. It follows that damages may not be recovered for the loss of the shed under s 75AG.

[133] There is no real contest that Exhibit 11 correctly identified the property of the plaintiffs destroyed in the fire. To the extent that property belonged to the second plaintiff, there is, in my view, no difficulty about its recovery of damages for its loss. Some of the goods of the first plaintiffs are identified as personal effects, and accordingly, I would accept both that they are goods ordinarily acquired for personal use, and in fact either intended to be used or in fact used in that way. For the loss of such goods, the first plaintiffs are entitled to recover damages against the first defendant and the third defendant.

[134] There was a large quantity of tools destroyed in the fire which were owned by the first and second plaintiffs. It seems to me likely that, to a significant extent, these tools were tools owned by the second plaintiff for the farming operation. However, some are likely to have been owned by the first plaintiffs, and used in connection with their go-kart activities. In the absence of any justification in the evidence for a different approach, I propose to divide the loss between the first plaintiffs and the second plaintiff.

[135] There was also a large quantity of racing go-karts and equipment, owned by the first plaintiffs. At the time of the fire, KKP was operated by the second plaintiff. It had recently leased premises in Walla Street, Bundaberg. There is no reason for me to conclude that any of the go-karts and equipment owned by the first plaintiffs were used in the business operations of KKP. The first plaintiffs engaged in go-karting as a recreational pursuit, though in a way that might well be described as lavish. Nevertheless, it seems to me that the use of the karts and related equipment is correctly described as personal. It also seems to me that the karts and equipment are goods ordinarily acquired for personal use, by those enthusiasts who engage in

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[26] The early provision is set out in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216, 224.

go-karting as a recreational activity. Accordingly, it seems to me that the first plaintiffs are entitled to recover from the first defendant and the third defendant, damages for the loss of these goods under s 75AF of the *TPA*.

[136] There is office equipment described as jointly owned by the first and second plaintiffs. Much of the equipment was acquired after the second plaintiff took over the farming operation. There appear to be a few items of elderly equipment which may have been owned by the first plaintiffs before it was taken over by the second plaintiff, and used subsequently in the business. It seems to me that there should be some small discount of the amount which would otherwise have been allowed, on the basis that some of the items of office equipment were owned by the first plaintiffs, for which they are not entitled to recover damages.

[137] There was an item claimed for repairs, cleaning and insurance assessment fees. It was abandoned in supplementary submissions.

[138] Mr Madden gave oral evidence that the value of the grading plant destroyed in the fire was $470,000. He was one of the original owners of Colour Vision Systems, the manufacturer of the plant, and had some knowledge of it. Although his company did not stock second-hand equipment, it did get involved from time to time with the sale of such equipment. He considered that the principal components were "relatively highly saleable", though some months would be needed to effect a sale.

[139] Mr Hoffmans, an auctioneer with experience in valuing a range of chattels, also gave evidence of the value of the tomato grading equipment. He considered its replacement value to be $700,000, and its re-sale value to be $180,000. It should be noted that his replacement value is significantly less than that shown by Mr Madden's evidence of the cost of replacing the equipment (the evidence is of 2004 prices).

[140] I considered Mr Madden's evidence as to the re-sale value of the tomato grading equipment to provide a better guide as to its value at the time of the fire. Accordingly, I adopt $470,000 as its re-sale value at that time.

[141] Mr Hoffmans attributed a value of $209,000 to the Winnebago at the time of the fire. That was the price paid for it some 10 days earlier. I accept his evidence that that was its value at the time when it was destroyed by the fire.

[142] Mr Hoffmans valued the other items destroyed in the fire. The evidence does not suggest that they were replaced. In those circumstances, it seems to me the correct measure of damage is the re-sale value provided by Mr Hoffmans (save with respect to the tomato grading equipment). The total figure adopted by Mr Hoffmans is $1,061,736. Adjusting that for the tomato grading equipment, I would attribute a value of $1,351,736 to the equipment valued by Mr Hoffmans, and destroyed in the fire.

[143] It seems to me, in view of the fact that not all of the damages are recoverable, it is necessary to identify the amounts I would award in respect of the various classes of equipment, as property of the first plaintiffs or the second plaintiff. Those amounts are shown in the following tables:

First plaintiffs' equipment (recoverable)

Holden	$40,000.00
Tools	$17,400.00
Go-karts and equipment	$127,981.00
Personal effects	$4,000.00
TOTAL	$189,381.00

Second plaintiff's equipment

Winnebago	$209,000.00
Tomato grading equipment	$470,000.00
Tools	$17,400.00
Office equipment	$50,000.00
Farm machinery	$264,200.00
Cold rooms	$20,000.00
Repairs etc	$10,000.00
Miscellaneous	$127,750.00
TOTAL	$1,168,350.00

Supplementary submissions: Further quantum issues

[144] Subsequent to the initial delivery of reasons, the defendants made submissions about the assessment of the second plaintiff's economic loss, in the sum of $9,601,950. They submitted that the assessment was erroneous by reason of the fact that the amount was not appropriately reduced to allow for contingencies. The second plaintiff did not object to the making of further submissions on this issue.

[145] The parties engaged Mr Donald McDougall to provide evidence relating to the second plaintiff's economic loss. His report of 24 January 2012 identified the loss from the date of the fire to the date of the report as being $9,444,539. Some adjustments were made to this amount, which for present purposes are not contentious, which resulted in the loss being assessed at $9,601,950.

[146] The loss was determined by reference to assumptions identified in Mr McDougall's report as Scenario 7.

[147] Table 16 of Mr McDougall's report set out his calculation of loss to the date of his report, including the effect of the second plaintiff's growing capsicums and watermelons after the fire. Table 17 of the report related that loss (excluding reference to the growing of capsicums and watermelons) to historical information concerning the second plaintiff's operations prior to the fire[27]. Mr McDougall then expressed the view that the annual losses he calculated were in line with the historical performance of the second plaintiff. He then discussed "Potential Ongoing Losses" under Scenario 7 and identified some matters which he considered would justify a discount at between 20 and 25 per cent[28].

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[27] There are some discrepancies relating to the net profit from growing tomatoes about which no issue was taken by either party.

[28] See paras 7.76 and 7.77 of Mr McDougall's report.

[148] The defendants submitted that Mr McDougall's evidence as to discounting the award was unchallenged, and effect should be given to it. Mr McDougall had noted in this context that the award did not take into account the impact of taxation, and for that reason it was submitted that the upper level of discount identified by Mr McDougall should be adopted.

[149] For the plaintiff it was submitted that the defendants have failed to appreciate the true effect of Mr McDougall's evidence. The discount proposed by Mr McDougall is for loss subsequent to the period the subject of his report, i.e. after the spring 2011 crop.

[150] In my view, the plaintiff's submission should be accepted. Mr McDougall's report in relation to Scenario 7 was structured to deal with the losses determined by Mr McDougall, and the second plaintiff's potential ongoing losses, separately[29]. That reflected the matter raised in a letter dated 2 November 2009, from Ms Bundesen of PPB, a forensic accountant engaged on behalf of one of the defendants. The letter[30] discussed Mr McDougall's quantification of past losses (at that time up to 30 June 2009); and noted that he had not taken into account losses after 30 June 2009. The letter continued, "Mr McDougall has not attempted to determine a yearly loss of net profit into the future which is claimed by the Plaintiff"; and stated that he should do so, with his assumptions being explained clearly.

[151] In dealing with potential ongoing losses, Mr McDougall stated that he had calculated an average loss "over 6 seasons" of $1,252,108. As a matter of arithmetic, that figure is the yearly average for the six year period from 2005 to 2010 (both inclusive)[31]. Mr McDougall stated that in respect of that period, there had been no natural disasters that adversely impacted on tomato crops[32]. He continued by observing that if the second plaintiff had continued to grow crops, there may have been some losses, presumably attributable to natural disasters.

[152] Another matter identified by Mr McDougall as a justification for a discount was the possibility of "poor prices". However, for the period prior to his report, Mr McDougall has taken into account movements in prices[33].

[153] In identifying the level of discount which he proposed, Mr McDougall stated that it should apply to "any compensation for future losses" under Scenario 7[34].

[154] Further, Mr McDougall identified as a basis for his proposed discount, the "(early) receipt of money". Such a consideration is plainly irrelevant to an award of damages for economic loss for a period prior to the date of the award.

[155] These considerations lead me to conclude that the discount was proposed only in respect of any losses awarded for a period subsequent to that in respect of which Mr McDougall assessed a loss.

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29 See para 7.6 of Mr McDougall's report; and note the separate headings for the two sections, found immediately prior to para 7.71 and para 7.76.

30 At p 5.

31 The figure relates only to net profit from tomatoes, and accordingly is not identical with the loss calculated by Mr McDougall in table 16. However, no point was made by either party about this.

32 See para 7.76 of his report.

33 See para 7.40-7.43 and para 7.44, last bullet point, of this report.

34 See para 7.77 of his report.

[156] It follows that I do not accept the submission made on behalf of the defendants to the effect that there was unchallenged evidence from the only relevant expert witness that the damages for loss prior to trial should be discounted by between 20 and 25 per cent.

[157] Nor, on the evidence, do I consider that such a discount would be appropriate. As I have attempted to indicate, a discount for the early receipt of money would be entirely inappropriate. Mr McDougall's quantification of loss has taken into account actual prices, so that a discount to allow for movement in prices would be inappropriate. Mr McDougall has also considered the potential impact of natural disasters in the period which is the subject of his calculation.

[158] There is no evidence about whether either the effect of disease or spray drift has been taken into account. However, because the loss quantified by Mr McDougall related to past times, it would have been possible for the defendants to lead evidence to show that, in the period the subject of Mr McDougall's quantification, either had had an effect in the vicinity of the Fulcher property, and in a way which was different to the years prior to the fire which Mr McDougall had relied upon for his calculation. No such evidence was adduced.

[159] It therefore seems to me inappropriate to make a discount by reference to these considerations.

Interest

[160] The defendants submitted that interest should not be allowed for the full period from the fire, on the basis in the period 2006-2008, there had been periods of delay by the plaintiffs in prosecuting their claim, which in aggregate amounted to 13 months. They further submitted that interest should be calculated by reference to the rate applicable to default judgments which, from the date of the fire (9 February 2004) to 1 July 2007 would be 9 per cent; and thereafter 10 per cent. They further submitted that, conventionally, the interest should be allowed either at half the rate, or for half the period, the loss being progressive.

[161] The plaintiffs submitted that delay, of itself, did not justify a reduction of a period for which interest was to be awarded. They also submitted that it had not been shown that any delay by them was unreasonable. They submitted that interest should be calculated at the rate now current, which is 10 per cent per annum. They submitted that it was more accurate, more in line with principle, and reasonably practicable in the present case, to calculate interest on each year's loss, at the appropriate rate, from the end of that financial year; and then to total the interest; rather than simply to take the approach of halving the rate or the period.

[162] Finally, in the course of argument, a question arose as to whether the award for interest should be reduced, to reflect the fact that, had the second plaintiff's income been received progressively over the period since the fire, tax would also have been paid progressively, with the result that the second plaintiff would not have had the benefit of the use of all of its profit over that period.

[163] It is convenient to consider first whether the award of interest should be reduced by reason of delay by the plaintiffs. In *Interchase Corporation Limited (in liq) v*

Grosvenor Hill (Queensland) Pty Ltd (No 3)[35] it was held that delay by a plaintiff in the prosecution of a claim does not inevitably have the consequence that interest is not to be awarded for the whole of the period from the time when the cause of action arose. It was noted that an award of interest was intended to be compensatory for the plaintiff's loss of use of the money awarded by the judgment; and that during any period of delay, the defendant has had the benefit of the use of money, which it would otherwise have had to pay earlier. This decision drew on an earlier decision of the Full Court of this State, *Serisier Investments Pty Limited v English*[36]. No appellate decision of this State, to contrary effect, was identified. It might be observed that both of these cases recognise the "wide discretion" conferred on a Trial Judge to award interest.

[164] The defendants referred to *HK Frost Holdings Pty Ltd (in liq) v Darvall McCutcheon (a firm)*[37]. There, Finn J carried out an extensive review of the authorities. His Honour noted the diversity in judicial opinion as to the extent to which an interest award might be moulded adversely to a party that delays in the prosecution or defence of a claim, where no resultant detriment to the other parties is shown. His Honour was prepared to adjust the period for which interest is to be awarded, if to do otherwise "would work an injustice to the respondent in the circumstances".

[165] In my view, the facts that the award is compensatory, that the plaintiff has been held out of money, and that the defendant has had use of it, even in the period of delay, provides strong reasons for not reducing an award, simply because a plaintiff has delayed in the prosecution of its claim. However, the significance of these considerations would be greatly diminished in a case where it was shown that the delay had caused detriment to the defendant, particularly financial detriment. There has been no suggestion of such detriment in the present case.

[166] It seems to me that delay of the order of 13 months, even if established, is not, in the present case, sufficient to warrant a reduction in the interest to be awarded.

[167] In any event, the defendants' submissions do not go so far as to assert that the delay was unreasonable. The first period of delay, which appears to be between May 2006 and September 2006, was at a time when the plaintiffs had changed solicitors. I do not consider it unreasonable that there be some delay when that occurred.

[168] The second period of delay relied upon is said to be between 25 October 2006 and 1 March 2007. The period commenced with a letter from the solicitors for the plaintiffs enclosing a draft consent order for the joinder of Coast RV Pty Ltd as further defendant in the proceedings, and a supporting affidavit. Whether, and when, the solicitors for Coast RV Pty Ltd (the solicitors appear to be the same firm as the solicitors representing all defendants, though now with a different name) replied to this letter, or agreed to the order, is not clear. The material does not demonstrate that the delay is attributable to the plaintiffs; let alone that it was unreasonable.

[169] Reliance was also placed on delay between March and July 2008. On 11 March 2008, the solicitors for the plaintiffs proposed joint instructions to Mr McDougall.

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35 [2003] 1 Qd R 26 [59]-[63]; see also [5], [7]; and [93].

36 [1989] 1 Qd R 678, 679.

37 [1999] FCA 795 at [11].

Whether, and when, the defendants responded to that letter is not shown by the materials. It is difficult to see, on the material to which my attention has been drawn, why this delay should be attributed to the plaintiffs let alone why it should be found to be unreasonable.

[170] The material relied upon by the defendants also points out that by March 2007 almost a whole year had gone by "with nothing happening in relation to" the pending joinder of the third defendant. This was not expressly referred to in the defendants' submissions. In this period, on two occasions the plaintiff's solicitors provided expert's reports and other materials to the solicitors for the third defendant. A little later in the period, there was a change in the plaintiffs' solicitors. In October 2006 there were letters from the solicitors for the plaintiffs proposing orders, to which there appear to have been no responses.

[171] The final period relied upon is a period of about a month commencing on 9 July 2008. The solicitors for the third defendant wrote to the solicitors for the plaintiff, complaining about disclosure, and made a similar complaint on 8 August 2008. The apparent absence of a response is unsatisfactory, but it does not seem to me to demonstrate unreasonable delay; let alone to warrant a reduction in the period for which interest should be allowed.

[172] In overview, the material indicates that some of the delay the subject of the defendants' submissions is attributable to conduct of one or more of the defendants. Some delay seems to me to be explicable by reason of the fact that there was a change in the plaintiffs' legal representation. I do not consider that, taken as a whole, the plaintiffs' delay was unreasonable so as to warrant a reduction of the period for which interest is to be awarded.

[173] The rate identified in the practice direction is a simple interest rate, no doubt intended to reflect the value of the loss of use of money. It seems to me likely that the changes made to it from time to time are intended to reflect changes in available interest rates. I therefore take the view that it is appropriate to adopt the rate of 9 per cent for losses suffered by the plaintiffs, from the date of the fire until 1 July 2007; and for the loss of use of money thereafter, to award interest at 10 per cent.

[174] The plaintiff relied on the decision of *Cashmere Bay Pty Ltd v Hastings Deering (Australia) Ltd (No 2)*[38] where a rate of 10 per cent was applied. However, in that case, the plaintiff's loss was suffered after 1 July 2007.

[175] As has been mentioned, an award of interest is compensatory. Indeed, the award is, in substance, "in the nature of damages"[39].

[176] In *Jefford v Gee*[40] it was said that the plaintiff should be awarded interest on the sum representing the loss, as from the date it was incurred; and that, in principle, the loss was suffered weekly. It should be calculated on each week's loss from that week to the date of trial. However, it was recognised that practical considerations might result in the carrying out of a simpler calculation. In *Tate & Lyle Food and Distribution Ltd v Greater London Council*[41] Forbes J stated that the principle is

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38 [2011] QSC 134 at [23]-[24].

39 *Haines v Bendall* (1991) 172 CLR 60, 66; cited in *Interchase* at [59].

40 [1970] 2 QB 130, 146.

41 [1982] 1 WLR 149, 154.

that the award of interest is part of the attempt to achieve *restitutio in integrum*. It has been recognised that the approach of adopting half the period or half of the rate, in a case where loss is suffered gradually over time, is "a rough and ready method of compensating a plaintiff" for delay in the receipt of moneys[42]. That recognition does not dictate the adoption of the rough and ready approach, in all cases.

[177] In the present case, where annual losses have been identified, and the number of years is not great, it does not seem to me to be duly onerous to adopt the approach for which the plaintiffs contend, namely, to allow interest from the end of each year, for which the loss has been calculated, with a separate calculation of the interest from that year to judgment.

[178] It might be noted that there is a sense in which this is somewhat favourable to the defendant. The economic loss of the second plaintiff was suffered gradually over each of the relevant years. An examination of such bank statements as were in evidence shows the progressive receipts of payment for tomatoes in each year. The calculated profit for a year (and accordingly the second plaintiff's loss after the fire) when dealt with yearly, reflects the net effect of the payments and the outgoings associated with the operation of the second's plaintiff's business; so there are likely to be periods for which the approach proposed by the second plaintiff does not provide compensation.

[179] However, the approach contended for by the second plaintiff does not reflect the fact that it would have paid tax progressively in each year. Accordingly, it is necessary to reduce the amount claimed by it.

[180] The parties have provided calculations of interest consistent with this approach (which have become exhibits in the proceedings). Interest on economic loss is calculated to be $3,033,991.90, which I propose to award. Interest has also been calculated on the property loss of the plaintiffs. In the case of the first plaintiffs, it is $154,506.54; and in the case of the second plaintiff it is $953,309.44. I propose to award these amounts.

Conclusion.

[181] There is no debate about the order for costs sought by the plaintiffs.

[182] There shall be judgment for the first plaintiffs on their successful claims under the *Trade Practices Act 1974* in the sum of $189,381, together with interest in the sum of $154,506.54.

[183] There shall be judgment for the second plaintiff on its successful claims in the sum of $1,168,350 for damage to property, together with interest in the sum of $953,309.44; and in the sum of $9,601,950 for economic loss, together with interest in the sum of $3,033,991.90.

[184] The plaintiffs' claims are otherwise dismissed.

[185] The defendants are to pay the plaintiffs' costs of the proceedings, to be assessed on the indemnity basis.

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42 *Cullen v Trappell* (1980) 146 CLR 1, 19.

SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane
NUMBER: S325 of 2004

First Plaintiff:	**RAYMOND FULCHER AND KERYN EILEEN FULCHER (A PARTNERSHIP TRADING UNDER THE FIRM STYLE OR NAME OF RAYMOND FULCHER AND KERYN EILEEN FULCHER)**
	AND
Second Plaintiff:	**R & KE FULCHER PTY LTD (ACN 011 059 644)**
	AND
First Defendant:	**KNOTT INVESTMENTS PTY LTD (ACN 000 596 798)**
	AND
Second Defendant:	**AROUND AUSTRALIA MOTOR HOMES PTY LTD (ACN 096 161 161) TRADING AS BRISBANE MOTOR CAMPER CENTRE**
	AND
Third Defendant:	**COAST RV PTY LTD (ACN 101 461 330) TRADING AS COAST TO COAST RV SERVICES**

JUDGMENT

Before:	Peter Lyons J
Date:	28 August 2012
Basis of judgment:	Judgment after trial of the claim filed on 19 July 2004

THE JUDGMENT OF THE COURT IS THAT:

1. On the first plaintiff's claim for damages against the first defendant and the third defendant under ss. 75AF and 75AG of the *Trade Practices Act 1974*, the first defendant and the third defendant pay the first plaintiff $343,887.54 that sum comprising:

(a) $189,381, for damage to property;

(b) $154,506.54, being interest thereon at the rate of 10% from 9 February 2004 to the date of this judgment.

2. On the second plaintiff's claim for damages against the first defendant and the third defendant under ss. 74B and 74D of the *Trade Practices Act 1974* and against the second defendant for breach of contract (implied warranty under section 71 of the *Trade Practices Act 1974* and s. 17 of the *Sale of Goods Act 1896*), the defendants pay the second plaintiff $14,757,601.34 that sum comprising:

(a) $1,168,350 for damage to property;

(b) $953,309.44, being interest thereon calculated at the rate of 10% from 9 February 2004 to the date of this judgment;

(c) $9,601,950 for economic loss;

(d) $3,033,991.90, being interest thereon from 9 February 2004 to the date of this judgment.

3. The first plaintiff's claim for damages against the defendants for negligence is dismissed.

4. The second plaintiff's claim for damages against the defendants for negligence is dismissed.

5. The second plaintiff's claim for damages against the first defendant for breach of warranty under section 74G of the *Trade Practices Act 1974* is dismissed.

6. The defendants pay the plaintiffs' costs of the proceeding, to be assessed on the indemnity basis.

Signed: ……..
Registrar