SUPREME COURT OF QUEENSLAND

CITATION:	*Gibbs Holdings P/L v MMI & Anor* [2000] QCA 524
PARTIES:	**GIBBS HOLDINGS PTY LTD** ACN 009 941 735 (plaintiff/appellant) **v** **MERCANTILE MUTUAL INSURANCE (AUSTRALIA) LIMITED** ACN 000 456 799 (first defendant/first respondent) **INSURANCE AID GENERAL BROKERS SERVICES PTY LTD** ACN 010 587 685 (second defendant/second respondent)
FILE NOS:	Appeal No 10818 of 1999 SC No 1793 of 1995
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 December 2000
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2000
JUDGES:	Pincus and Thomas JJA, Mackenzie J Separate reasons for judgment of each member of the Court; Thomas JA and Mackenzie J concurring as to the orders made, Pincus JA dissenting in part
ORDER:	**1. Appeal against first respondent dismissed with costs to be assessed.** **2. Appeal against second respondent allowed with costs to be assessed.** **3. Judgment for second defendant set aside and replaced with judgment for plaintiff against second defendant in the sum of $380,188 with costs to be assessed.**
CATCHWORDS:	INSURANCE – FIRE INSURANCE - CONDITIONS – failure by insured to notify insurer of plastics manufacturer tenancy – finding that insurer would have declined insurance if aware of such tenancy - application of s 54 of the *Insurance Contracts Act* 1984 – identification of relevant "act of the insured" for the purpose of determining whether to apply regime in s 54(1) or regime in s 54(2), (3) and (4) – need for act or omission by reason of which insurer is entitled to refuse to pay the claim – whether "act" is a composite act which involves granting the tenancy and failing to notify and

obtain insurer's consent – insurer entitled to refuse to pay claim under s 54(1)

INSURANCE – INSURANCE AGENTS AND BROKERS – OBLIGATIONS TO CLIENT – GENERAL DUTY OF CARE – whether breach of duty by broker – failure by primary judge to determine issue – determination of issue afresh – sufficient notification to broker of possibility of plastics tenancy to give rise to duty to advise on the insurance consequences of plastics tenancies – breach of that duty by broker – assessment of damages

Insurance Contracts Act 1984 (Cth), s 54

Alexander Stenhouse Limited v Austcan Investments Pty Ltd (1993) 7 ANZ Ins Cases 61-166, considered
Antico v Heath Fielding Australia Pty Ltd (1997) 188 CLR 652, considered
Austcan Investments Pty Ltd v Sun Alliance Insurance Ltd (1992) 7 ANZ Ins Cases 61-116, considered
Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd (1992) 176 CLR 332, considered
Greentree v FAI General Insurance Co Ltd (1998) 44 NSWLR 706, considered
Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd (1991) 25 NSWLR 541, considered
Ray Teese Pty Ltd v Syntex Australia Ltd [1998] 1 Qd R 104, cited
Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd (1977) 16 ALR 23, cited

COUNSEL: J A Griffin QC with R F King-Scott for appellant
A I Philippides SC for first respondent
A B Crowe for second respondent

SOLICITORS: Hickey Lawyers for the appellant
O'Mara Patterson & Perrier for the first respondent
Phillips Fox for the second respondent

[1] **PINCUS JA:** The nature of this dispute is set out in the reasons of Mackenzie J. The appeal raises two questions: whether the appellant should have been held entitled to succeed against the insurer, the first respondent, and, failing that, whether it should have succeeded against the broker, the second respondent.

[2] The rejection of the appellant's claim by the insurer relied on a provision of the policy (cl 2) set out in par [50] of the reasons of Mackenzie J. In summary, it said that if a change in the nature of the occupation of the buildings insured occurred of such a kind as might increase the risk for the insurer, then –

> "... no benefits will be payable under these Policies unless You have advised Us in writing as to any such changes and We have agreed to them".

What happened was (1) that a plastics manufacturing business, being one of such a kind as mentioned in cl 2, was let into the premises and (2) there was no advice in writing given, so the question of the insurer's agreement to the change did not arise; the appellant was in breach of the clause. The essential point in the case is: in deciding whether these circumstances *could* have (they did not) caused the insured a loss against which it was covered, does one ignore circumstance (1)?

[3] Section 55 of the *Insurance Contracts Act* 1984, side-noted "*No other remedies*" reads as follows:

> "The provisions of this Division with respect to an act or omission are exclusive of any right that the insurer has otherwise than under this Act in respect of the act or omission".

The only relevant provision of the Division is s 54, which reads in part as follows:

> "(1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.
>
> (2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.
>
> (3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act.
>
> (4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.
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> ...
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> (6) A reference in this section to an act includes a reference to:
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> (a) an omission; and
>
> (b) an act or omission that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter.".

[4] The expression "are exclusive of" appears to mean simply "exclude" – i.e. render inoperative. So that the right given by cl 2, just referred to, to refuse to pay, is gone if the clause is accurately described as purporting to give to the insurer a "right ... otherwise than under this Act in respect of the act or omission". That this is the proper construction, with respect to cl 2, which says that in certain circumstances "no benefits will be payable under these Policies", is reinforced by the wording of s 54(1) which says that –

> "... where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay ... by reason of some act of the insured or some other person ... the insurer may not refuse to pay ... but the insurer's liability in respect of the claim is reduced ...".

Reading s 54(1) with s 55, their effect on cl 2 is to take away the right "that the insurer has otherwise than under this Act" – i.e. the right to refuse to pay under cl 2 – and replace it by the reduced right given by s 54(1). Similar reasoning applies to subss (2), (3) and (4) which, in respect of certain sorts of acts, set up a similar notion, one of giving the insurer, in lieu of whatever contractual rights it might otherwise have, a limited statutory right to refuse to pay.

[5] It is a question whether the decision of the High Court in *Ferrcom Pty Limited v Commercial Union Assurance Company of Australia Limited* (1993) 176 CLR 332 is consistent with the analysis just set out. There were two relevant clauses in the *Ferrcom* policy. Clause 1(a) made the insurer's liability conditional upon giving of a certain notification of a change in the risk by the insured; that was not given and the question was whether, and if so to what extent, s 54 altered the position which would have existed under the terms of the policy, namely that the insurer was not liable.

[6] The second relevant clause was cl 3(a)(2), (176 CLR at 337), which gave the insurer a right to cancel the policy at any time by giving the insured 30 days written notice. The factual issue in the case was set out as follows by Handley JA in the Court of Appeal (1991) 22 NSWLR 389:

> "In the present case the appellant had to prove what probably would have happened if the insured had notified it, as required by condition 1(a) of the change in risk which occurred when the crane was registered. This required the undertaker to prove what it probably would have done had it received such notice ...". (415C)

It was held in the High Court, affirming the majority's view in the Court of Appeal, that the loss of the insurer's opportunity to cancel the policy was the relevant prejudice, for the purposes of s 54(1). (342)

[7] In so holding, the High Court did not enforce against the insured the provision (cl 1(a)) requiring notification, so as directly to expunge the insurer's liability under that clause. As I understand the reasons given, the contractual right to deny liability under the clause was taken to have been destroyed by s 55; otherwise the effect of s 54 would have been of no consequence. A contentious legal point in *Ferrcom* was whether, although not directly enforceable, the notification provision in the policy was relevant in determining the effect of s 54(1), its alleged relevance being that if notification had been given the insurer would in fact have cancelled the policy, the insurer having under cl 3(a)(2) a right to do so on 30 days notice, breach or no breach. The insurer succeeded, both on the factual issue and the legal point.

[8] The appellant in the present case argued that s 54(1) has no operation here, because the act in question is one in respect of which subs (2) applies. No such point arose in the High Court's decision in *Ferrcom*. Each of subs (2), (3) and (4) of s 54 is based on the concept of a causal link, or possible causal link, between "the act" and the "loss". The expression "the act" must be a reference back to the use of the word "act" in subs 1. The relevant context is:

> "...where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person ...".

Here the act which has that character consists in a change in the nature of occupation of the relevant sort, and it must also be one in relation to which the *exception* requiring advice in writing and agreement by the insurer is inapplicable. *Because the "loss" in s 54(2) is the insured's loss, the "act" for the purpose of that provision will ordinarily be or include some act or omission having physical consequences for the insured property, one extrinsic to the contract*. Only such an act or omission could cause the loss sought to be recovered by the insured. The obiter observation, apparently to the contrary, in *Alexander Stenhouse Ltd v Austcan Investments Pty Ltd* (1993) 67 ALJR 421 at 424 DE (left-hand column) cannot, with respect, apply to s 54(2). A failure to notify a change in use under the policy will not be such an act as to possibly cause the insured indemnifiable loss; allowing the change in use may be an act of that sort.

[9] When considering whether causing or allowing the change could reasonably be regarded as being capable of causing or contributing to the insured's loss, it does not matter whether one considers it in isolation or as subject to the exception I have mentioned; in either case the change could "reasonably be regarded as being capable of causing or contributing to" the insured's loss. The exception only becomes relevant under s 54(3), where one must ask whether refusal to pay is "by reason *only* of the act". In that context, it matters that the act is not merely the change in the nature of occupation, but the change not excused by a notification and agreement; it is that combination which is the basis of the refusal to pay. But then s 54(3) saves the insured, because it is common ground that the change in the nature of occupation caused no part of the insured's loss.

[10] If the judgment in this case for the insurer is right, then the same result should follow if the clause in the policy says that if the insured does any act of the kind mentioned in s 54(2) of the *Insurance Contracts Act* 1984, without first obtaining the insurer's consent, the insurer is not liable. This would be a clear negation, in letter and substance, of ss 54 and 55. And it would make evasion of the intended effect of s 54(2), (3) and (4) child's play.

[11] It follows, in my opinion, that the insurer was not entitled to refuse to pay and the appellant should succeed, on the appeal, against the insurer.

[12] It is therefore unnecessary to consider the appellant's claim against the broker.

[13] I would allow the appeal and set aside pars 1 and 2 of the orders made by the learned primary judge. I would order in lieu that the appellant have judgment against the first respondent in the sum of $448,472.31 together with interest from 15 July 1999 until the date of judgment at 9.5 per cent and that the first respondent pay the costs of the other parties to the proceedings at first instance and on appeal.

[14] It is therefore unnecessary for me to consider the appellant's claim against the second respondent. But I should say that, if contrary to my view the appellant is not entitled to succeed against the first respondent, the reasons given by Mackenzie J

would in my opinion justify a judgment for the appellant against the second respondent, in the sum proposed by his Honour.

[15] **Summary**

1. The act by reason of which the insurer was entitled, under the policy, to refuse to pay was a composite. It consisted in letting the plastics manufacturer in and failing to advise the insurer of and secure the insurer's agreement to that. "Act" in s 54 includes "acts".

2. In deciding whether the composite act is one which could cause a loss insured against, it is wrong to consider only that part of the composite which is of such a kind that it could not possibly cause any loss to the insured and to ignore that part which could do so.

3. *Ferrcom* does not govern this case; there, arranging for the crane to be registered could not in itself have caused the insured any loss, so cl 54(2) was irrelevant.

4. The appeal by the insured against the insurer should in my view be allowed.

[16] **THOMAS JA:** I agree generally with the reasons of Mackenzie J for concluding that the appellant's claim against Mercantile Mutual Insurance ("the insurer") must fail, and that the insurer is entitled to refuse to pay notwithstanding s 54 of the *Insurance Contracts Act* 1984. I desire to add some comments on the application of that section.

[17] The following was one of the conditions in the policy:

> "If there is any change or alteration after the commencement of [this Policy] which will or might increase the risk of any claim being made, and in particular relating to
>
> 2.1 the nature of the Business carried on;
>
> 2.2 the nature of the occupation of or other circumstances affecting the buildings insured;
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> then no benefits will be payable under [this Policy] unless you have advised us in writing as to any such changes and we have agreed to them."

[18] At the relevant time the appellant had permitted a plastics manufacturer to go into occupation of part of the appellant's premises. The other part was occupied by a cosmetics manufacturer. Evidence was called on behalf of the insurer, and accepted by the learned trial judge, to the effect that it would not have accepted or continued the insurance if notified of occupation by a plastics manufacturer. In point of fact the fire had nothing to do with that part of the premises occupied by the plastics manufacturer. The fire would seem to have been lit by an unidentified third party in the premises of the cosmetics manufacturer. However the evidence suggested an aversion on the part of some insurers and of the respondent insurer in particular to granting cover of premises occupied by plastics manufacturers.

[19] There was no challenge to his Honour's finding that the entry into occupation by the plastics manufacturer constituted a change after the commencement of the policy so as to require notification in terms of the above clause. Therefore, apart from the possible effect of s 54 of the Act in favour of the appellant, the insurer was entitled to refuse to pay the claim in reliance upon the above condition.

[20] Section 54 of the Act provides:

"**Insurer may not refuse to pay claims in certain circumstances**

(1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.

(2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.

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

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

(5) Where:

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

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

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

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

(a) an omission; and

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

[21] Logically the first task of a court in applying s 54 is to ascertain whether the case is one to which s 54(2) applies. Different tests are to be applied according to whether the relevant act falls under s 54(2)[1] or s 54(1). It is the appellant's contention that the present case falls under the regime of s 54(2) and not s 54(1).

[22] There are two principal difficulties that commonly arise in the application of s 54. The first lies in identifying the "act of the insured" to which the relevant part of s 54 is to be applied, especially when different parties nominate different acts which would lead to different results; and the second lies in determining the "loss" referred

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[1] Section 54(2) is in turn subject to ss 54(3) and 54(4).

to in the section, and in particular whether it is the insured's loss or the insurer's loss.

[23] For the purposes of the present case, one may ask whether the "act of the insured" was the appellant's granting of possession to a tenant which manufactured plastics, or its failure to notify the insurer of the occupancy of such a tenant, or a composite of both. Different results follow according to which fact is selected. If the former is the relevant act and if the loss referred to in the section is that of the insured, then the appellant will win its case and substantiate its claim whether the applicable provision happens to be s 54(1) or s 54(2). It will do so because its loss was not caused by the acceptance of the plastics manufacturer as a tenant, and the insured has proved that no part of the loss was attributable to it. Accordingly, there would be no reduction of the appellant's claim under s 54(1) or s 54(4).

[24] Conversely, on the footing that the relevant act is the failure to notify the insurer and the relevant loss is that of the insurer, the evidence shows that the insurer would not have continued the policy, and its prejudice under s 54(1) through being deprived of the opportunity of discontinuing the policy is the full amount of the claim. If s 54(1) applies, the insured's claim is completely defeated. Similarly if s 54(2) applies, under s 54(3) and s 54(4) the insured would fail to prove that the insurer's loss was not caused by the act.

[25] The loss referred to in s 54(2) is "loss in respect of which insurance cover is provided by the contract". Is this the same as the "loss" that is referred to in ss 54(3) and 54(4)? At first glance one would think that it is. The reference in ss 54(3) and 54(4) to "the loss that gave rise to the claim" is anterior to the claim and is plainly a reference to the insured's loss. Sections 54(3) and 54(4) deal with the causation of that loss. An act (or omission) such as a failure to give notice to the insurer could not possibly qualify as an act that satisfies those subsections. Standing alone, the reference in s 54(2) to "a loss in respect of which insurance cover is provided by the contract" seems naturally to refer to the insured's loss, though arguably the insurer's loss is a loss "in respect of" the insured's loss.

[26] Subsections (2), (3) and (4) are closely inter-related and each deals with a loss caused by "the act". It is difficult to see why any different meaning should be given to the "loss" that is referred to in each of ss 54(2), 54(3) and 54(4). If this is correct, those subsections are all concerned with the act or omission of the insured that causes the loss that gives rise to the claim, which is of course anterior to any question of loss on the part of the insurer.

[27] In the present case the granting of possession to a plastics manufacturer could, in the words of s 54(2) "reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract". The insured has proved under s 54(3) that no part of the loss that gave rise to the claim was caused by that act. Therefore if the relevant act for the purposes of s 54 is the granting of possession to a plastics manufacturer, the appellant is entitled to full indemnity. Although I have not stated the argument precisely as presented by Mr Griffin QC, this is my understanding of the essential case that is advanced on behalf of the appellant for indemnity notwithstanding its breach of the stated condition in the insurance policy.

[28] Prima facie the word "act" should be given the same meaning throughout s 54. The term is inclusively defined in s 54(6). References to "some act of the insured or of some other person" under s 54(1), to "the act" in s 54(2), to "the act" in s 54(3) and to "the act" in s 54(4) should all bear the same meaning. If this is correct, it would be impossible to hold that an omission to notify an insurer of a fact relevant to the risk caused "the loss that gave rise to the claim" under s 54(3) or s 54(4). An omission to notify could never cause a loss that gives rise to the claim, and such an act or omission could never qualify as "an act" for the purposes of any part of the section, including s 54(1). If the matter were free of authority I would construe the section in this way and allow the appeal. I would also acknowledge the force of Pincus JA's reasons under which a composite act may be regarded and under which a similar result would follow. Such an approach seems in accord with the intention of the Law Reform Commission which suggested this particular section. However such views have not been taken by the courts in the decided cases. In my view only the High Court could now give such an interpretation of the section.

[29] It has been clearly held in more than one decision in the High Court[2] that omission by an insured to provide required information may be an "act" within the meaning of s 54(1). The dichotomy between s 54(1) on the one part and ss 54(2), 54(3) and 54(4) on the other has been recognised.[3] In applying subsection (1) to such an omission "it is necessary to adopt an hypothesis as to what [the insurance company] would have done if it had been notified …"[4] The material prejudice which the insurer thereby suffers is the loss of opportunity to cancel the policy[5]. If the company would have declined insurance, the value of that lost opportunity is the full amount of the liability that would otherwise have been avoided.

[30] The conundrum is that the insured has nominated an act that calls for the application of ss 54(2), 54(3) and 54(4) while the insurer has nominated a different act which calls for the application of s 54(1). If the act nominated by the insured is the applicable one the insurer must pay, and conversely if the act nominated by the insurer is the applicable one it is relieved of liability. The answer I think is that the "act" referred to in s 54(1) is *the act by reason of which the insurer is entitled to refuse to pay the claim*. That act was not the bare granting of tenancy by the insured or the occupancy of that tenant, but the failure of the insured to notify the insurer of that fact. In such a situation the insured cannot insist that some other fact be treated as the relevant act of the insured. These conclusions are supported firstly by the reference in s 54(1) to the insurer's refusal to pay "by reason of" some act of the insured. Secondly, the statement of Dawson, Toohey, Gaudron and Gummow JJ in *Antico v Heath Fielding Australia Pty Ltd*[6] expresses the same view:

> "Section 54 takes as its starting point the existence of a claim and a contract to the effect that the insurer may refuse to pay the claim. *The section directs attention to the reason founding the refusal*; namely a particular act or omission on the part 'of the insured or of some other person'." (my emphasis)

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2 *Antico v Heath Fielding Australia Pty Ltd* (1997) 188 CLR 652; *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd* (1993) 176 CLR 332.

3 *Ferrcom* above at p 340.

4 Ibid at 341.

5 Ibid at 343.

6 (1997) 188 CLR 652, 669.

[31] A similar view was taken by Mason P in *Greentree v FAI General Insurance Co Ltd*[7]:

> "Section 54(1) is directed to situations in which two elements are present. The first element is that 'the effect' of the particular contract of insurance would, but for s 54, entitle the insurer to refuse to pay a claim by reason of 'some act of the insured or of some other person' that occurred after the contract was entered into … The second element is that *the act which would*, but for s 54, *entitle the insurer to deny liability*, must not be one in respect of which s 54(2) applies; that is, it must not be an act which could reasonably be regarded as being capable of causing or contributing to any loss covered by the contract of insurance. It thus becomes critical for the purposes of s 54 to identify the relevant 'act' (including omission), and then to assess whether that act is of a kind inside subsection (1) and outside subsection (2)." (my emphasis)

[32] This view also permits the comfortable reconciliation of the decision in *Ferrcom*[8] and the decision of the Full Court of South Australia in *Austcan Investments Pty Ltd v Sun Alliance Insurance Ltd & Anor*[9]. In *Ferrcom* the condition relied on by the insurer was failure of the insured to give notification of a materially altered circumstance. The New South Wales Court of Appeal and the High Court held the failure to notify to have been the relevant act for the purposes of s 54, that such act was not capable of satisfying the requirements of s 54(2) and that it was an act to which the provisions of s 54(1) should be applied. By contrast, in *Austcan* the basis upon which the insurer was prima facie entitled to refuse indemnity was the fact that there was an alteration in the use of the premises. It was therefore appropriate, with respect, that the court considered s 54(2) to be applicable, because such a fact was reasonably capable of causing or contributing to a loss. On the facts of that case it did indeed cause or contribute to the loss, and accordingly the insured was unable to prove that any part of the loss was not caused by that alteration.

[33] Section 54(6)(b) contemplates an act of non-notification by an insured when it affects the rights of the parties to the insurance contract. For reasons which have been earlier mentioned, I am unable to conceive any case in which such an act could satisfy the requirements of ss 54(2), 54(3) or 54(4). In the present case, consistently with the reasoning of the High Court in *Ferrcom*[10] the relevant act is the insured's failure to notify, and it falls under s 54(1). In my view the case mounted for the appellant really comes down to an insistence that it had a right to nominate a different act which fell under s 54(2), namely the use of the premises for manufacture of plastics. This, for the reasons which have been given, it cannot do. Such an act was not the act "by reason of" which the insurer refused to pay the claim.[11]

[34] In summary, the answers to the questions posed in para [22] above are as follows:

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7 [1998] 44 NSWLR 706, 714.

8 above.

9 (1992) 7 ANZ Ins Cases 61-116.

10 above.

11 See s 54(1).

(a) An "act" for the purposes of s 54 must be one by reason of which the insurer is entitled to refuse to pay the claim. There may be more than one such act, but each must possess that quality. The insured, as the party who pleads the application of s 54, is entitled to seek judgment on the basis of the act that will give the insured the most favourable result;

(b) The decided cases have treated the "loss" referred to in s 54 as capable of being that of either the insured or the insurer. The distinctions between the various subsections to which I have adverted seem not to have dissuaded any court of authority from holding an insured's non-notification of a fact to be capable of amounting to an "act" for the purposes of s 54(1).

[35] The intention of the Law Reform Commission to introduce the principle of "proportionality" seems not to have been achieved by this legislation, although as noted in *Ferrcom*, considerable difficulty would lie in the way of defining how such a principle is to be applied.[12] As the section is now applied, s 54(1) has been held to be capable of covering a wide range of matters including failure of an insured to notify. When the insured's omission to notify is the basis of the rejection, the insured seemingly will obtain no benefit from this remedial measure unless it can be shown that the insurer would still have granted insurance cover if appropriately notified. The danger of self-serving retrospectant evidence from the insurer on such an issue presents real problems.

[36] Having said that, it must be noted that the learned trial judge in the present case accepted such evidence called by insurance company, to the effect that the Southport office of the insurer (with which the appellant normally dealt) would have declined continuation of the insurance had it been notified of the relevant fact. No attempt was made to challenge his Honour's findings on the critical hypothetical question of what the insurer would have done if properly notified.

[37] On the authorities I do not think that it is open to confine the "act of the insured" in the present case to its acceptance of a tenant that manufactured plastics, or to its permitting the use of its premises by a plastics manufacturer. Its failure to notify the insurer of that fact is the relevant act for the purposes of s 54. That act fails to satisfy the requirements of s 54(2) and qualifies as an act of the insured for the purposes of s 54(1). On the evidence that was given the insurer's interests were prejudiced to the extent of the amount of the claim that would otherwise not have been sustainable. The appeal against the insurer must therefore be dismissed.

Appeal against the broker

[38] I agree with what Mackenzie J has written concerning the failure of the learned trial judge to deal with some of the constituent elements of the claim against the broker for damages for negligence and breach of contract. I also agree, disregarding any evidence that the learned trial judge was apparently unwilling to accept, that the evidence justifies finding a breach of duty against the broker.

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12 Ibid p 341.

[39] The primary case for the appellant at trial was directed towards proving the broker's failure to advise the insurer of relevant information about the new tenant. Evidence was however led of brokers' duties on a wider level, including the existence of a duty to give further appropriate advice if alerted to the prospect that a plastics manufacturing tenant might eventuate.

[40] I also agree that this court should determine the matter on the evidence called rather than send it back to the learned trial judge for determination, notwithstanding that the available evidence is less than satisfactory. The parties had a full opportunity to litigate their claims, and it would not be appropriate to give either party the further opportunity of calling additional evidence or presenting a different case. The area of principal deficiency is the evidence concerning damages on the alternative basis upon which Mackenzie J has demonstrated the appellant was entitled to judgment. Even so, this court is in as good a position as the learned trial judge would be to make an assessment of damages on such evidence as is available. There was evidence to support inter alia the conclusion that the broker was under a duty to take steps to ensure that his client understood the insurance risks if he accepted or retained the plastics manufacturer as a tenant. It may be noted that the expert witness, Mr Bakker, was not contradicted, and no suggestion was made on the broker's part that an additional advice of the kind suggested was given. His case was that it was unnecessary to give advice because he expected the plaintiff to provide further information to him about such a tenant if the matter proceeded further. However in my view the broker's letter of 18 April 1995 shows enough awareness on his part to have activated duties of the kind referred to by Mr Bakker.

[41] A difficulty arises from the fact that no evidence was led of what the appellant would have done had he been advised of the risks of accepting such a tenant. A different assessment of damage would be made according to whether the appellant would have terminated that tenancy and presumably retained MMI Insurance or have persisted with the tenancy and attempted to obtain alternative insurance. The evidence strongly supports the availability of such insurance had it been sought.

[42] The appellant's basic loss by reason of the fire is well established, but its loss through being deprived of appropriate advice is not so clearly made out. The evidence shows clearly enough that the appellant's loss in this latter respect would be less than the face value of the loss of the building and consequential loss of rental. Some reduction in damages must be made because of the probability that there would have been either higher premiums or some loss through termination of the plastic manufacturer's tenancy. A party is required to prove its loss with as much certainty and particularity as is reasonable.[13] When it does not do so, it cannot complain if the court allows a substantial discount in respect of the uncertainty that exists. I agree with Mackenzie J's analysis of the evidence and with his Honour's conclusion that the prima facie loss in respect of the fire should be discounted by 15% to allow for the probable diminution of prima facie loss to which reference has been made.

[43] I agree with the orders proposed by Mackenzie J.

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[13] *Ray Teese Pty Ltd v Syntex Australia Ltd* [1998] 1 Qd R 104; *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23, 37.

[44] **MACKENZIE J**: The appellant owned a warehouse which was destroyed by fire on 15 August 1992. The first respondent was the insurer under a policy of insurance under which it agreed to indemnify the appellant against, inter alia, loss or damage by fire and consequential losses. The second respondent was an insurance broker who handled the insurance business of the appellant.

[45] The first respondent rejected the appellant's claim on the basis that it had not been advised of a material alteration of risk arising from a plastics manufacturer going into occupation of part of the premises.

[46] The appellant commenced proceedings against the first respondent to recover the costs of reconstruction of the building and lost rental. It was alleged that the second respondent was the first respondent's agent, that the appellant had informed the second respondent of the facts constituting the material alteration of risk and that the first respondent was liable despite the second respondent's failure to inform it of those facts. The claim against the second respondent was that, in breach of duty and breach of contract, to be implied from the long-standing relationship of broker and client, it failed to advise the appellant of the implications of letting into possession a tenant which carried on business as a plastics manufacturer.

[47] The insurance was current for 12 months from 23 May 1992. As at that date there were two occupants of the building. One was a cosmetics business. The other was a panel beater. However, the panel beater vacated the premises and on 18 July 1992 a company which manufactured plastic bottles and similar items entered into occupation of that part of the premises vacated by the panel beater.

[48] On 14 July 1992 a renewal advice which took into account the fact that the panel beater had vacated and which consequently required payment of a smaller premium, had been issued and paid.

[49] The facts accepted by the learned trial judge established that the fire which destroyed the warehouse had been deliberately lit in the premises of the cosmetics business, and that the fire had subsequently spread throughout the building. It was also accepted that the evidence established that the building would have been totally destroyed irrespective of whether the flammable material used in the plastics business had been there or not.

Claim against first respondent

[50] The first respondent rejected the appellant's claim in reliance on cl 2 of the "General Conditions and Exclusions Applying to all Policies". Materially it is as follows:

> "2. ALTERATION:
> If there is any change or alteration after the commencement of these Policies which will or might increase the risk of any claim being made, and in particular relating to:
> .....
> 2.2 the nature of the occupation of or other circumstances affecting the Buildings insured or containing any insured property;
> .....

> then no benefits will be payable under these Policies unless You have advised Us in writing as to any such changes and We have agreed to them."

[51] There was no evidence of any advice in writing of the plastics manufacturer's occupation. Mr Leishman, the manager of the appellant, and Mr Woods, an insurance broker who conducted the appellant's insurance accounts in his capacity as an employee of the second respondent, had different recollections of the nature and extent of conversations concerning the occupation of the premises by the plastics manufacturer. The learned trial judge resolved that issue in favour of the first respondent, saying that he was not prepared to conclude that what Mr Leishman told Mr Woods was such as to constitute notification of facts which would or might increase the risk in terms of the policy, as distinct from foreshadowing the prospect of a plastics manufacturer going into occupation. He also said that if Mr Woods' version prevailed the information was not yet such as to require the second respondent to refer the matter to the first respondent or to fix it with knowledge of the change in occupation.

[52] There was a statement in a letter by Mr Woods dated 18 April 1995 that Mr Leishman "did mention the type of business of a proposed tenant to [the second respondent's] office" at some time prior to the date of the tenancy. The letter further said that the information was not passed on to the first respondent, as detailed information was to be forthcoming about the proposed tenant's precise activities to allow an accurate assessment and rating of the risk to be made. The learned trial judge's findings must, in the circumstances, be taken to mean that he regarded the discussion of the subject as insufficiently precise to constitute notification but at least foreshadowing the prospect of such a tenant.

[53] There was also a finding that had the first respondent been given a notification under cl 2 that a plastics manufacturing business was to occupy the premises it would have gone off risk. There was evidence of the need for the broker to reserve the question of acceptance of such a risk for officers in the hierarchy of the first respondent. There was also evidence that such a risk would automatically be declined by the area manager, although that appears not to have been known to Mr Woods at material times.

[54] Section 54 of the *Insurance Contracts Act* 1984 provides, relevantly, as follows:

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

> (2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.
>
> (3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act.
>
> (4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.
>
> .....
>
> (6) A reference in this section to an act includes a reference to:
>
> (a) an omission;
>
> ....."

[55] Submissions focused on the relationship between s54(1) on the one hand and s54(2) and subsequent subsections on the other. The grounds of appeal were concerned with whether, as the trial judge found, the case was governed by *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd* (1992) 176 CLR 332, which fell within s54(1), or whether it fell within s54(2) and (3).

[56] Analysis of s54 as an exercise of construction without the assistance of authority would suggest that it is concerned with two categories of acts (or omissions). One, described in subsection (2), is where the act could reasonably regarded as being capable of causing or contributing to the loss in respect of which insurance is provided by the contract. The other, described in subsection (1), is a residual category of acts which are not acts to which subsection (2) applies.

[57] Characterisation of the act into one or other of those categories becomes critical. Where subsection (1) applies it provides that the insurer may not refuse to pay the claim by reason only of the act even though, but for section 54, it would have been entitled to refuse to pay that claim by reason of the act occurring. Instead, the insurer's liability is reduced by an amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of the act.

[58] Subsection (2) is concerned with the case where the act could reasonably be regarded as being capable of causing or contributing to the loss covered by the policy. Subsection (2) is subject to the succeeding provisions of section 54. Relevantly they are subsections (3) and (4).

[59] Subsection (3) is concerned with the case where the insured proves that no part of the loss was caused by the act despite its being of a kind which could reasonably be regarded as being capable of causing or contributing to the loss. In such a case the insurer may not refuse to pay the claim by reason only of the act.

[60] Subsection (4) is concerned with a case where the insured proves that some part of the loss was not caused by the act. In such a case the insurer may not refuse to pay the claim so far as it concerns that part of the loss by reason only of the act.

[61] In *Ferrcom* a mobile crane was insured against physical loss or destruction or damage under an "unregistered mobile machinery policy". Ferrcom had arranged for the crane to be registered so that it could be driven on public roads and while it remained registered it was damaged when it overturned while lifting structures.

[62] The relevant clause in the insurance contract was in the following terms:

> "The extent of the liability of the Company is conditional upon-
>
> (a) The notification as soon as possible by the Insured to the Company of any change materially varying any of the facts or circumstances existing at the commencement of this Policy."

No notification of registration of the crane had been given.

[63] In the High Court, it was common ground that Ferrcom had not satisfied the requirements of that clause and that the insurer would have been entitled to refuse to pay the claim unless the *Insurance Contracts Act* prescribed a different result. There was a finding of fact that if the insurer had been notified of the registration of the mobile crane, it would have gone off risk. The appeal proceeded on the basis that had alternative cover appropriate to a registered vehicle of the relevant kind been sought it would have been subject to an exclusion relating to the kind of loss and damage which occurred on the occasion in question.

[64] The joint judgment stated that s54 prescribed the effect to be attributed to two classes of acts. Firstly, s54(1) related to acts or omissions that could not reasonably be regarded as being capable of causing or contributing to the loss. Section 54(2) to (4) related to acts or omissions that could reasonably be regarded as being capable of causing or contributing to the loss. It was said that the dichotomy between the two classes of acts or omissions was not entirely clear. However, the effect of an act or omission that had not caused a loss or part of a loss depended on whether it could reasonably be regarded as being capable of causing or contributing to the loss.

[65] It was common ground that the omission by Ferrcom in failing to notify the registration of the mobile crane could not "reasonably be regarded as being capable of causing or contributing to the loss". In the circumstances, the case fell within s54(1). The failure would, but for s54, have entitled the insurer to refuse to pay the claim because its liability under the policy was conditioned upon compliance with the notification requirement. The conclusion was that the effect of s54(1) was to impose on the insurer a prima facie liability to pay the claim but did not purport to annihilate the effect of the relevant act in determining the extent to which the insurer's interests were prejudiced.

[66] The joint judgment continued that to give the latter part of s54(1) some operation in a case where the relevant act consisted of a mere failure to satisfy a condition precedent to the insurer's liability, it was necessary to treat the condition precedent as a term imposing on the insured an obligation to comply with it and to treat a failure to satisfy the condition precedent as a breach of a term obliging compliance. The position which the insurer would have been in if the insured had performed the obligation was to be compared with the position that the insurer was in as a result of the insured having failed to perform the obligation. The hypothesis as to what the

insurer would have done if the condition precedent had been complied with became critical in determining the prejudice to the insurer.

[67] In *Ferrcom* the loss of the opportunity to cancel the policy was held to be the material prejudice and the value of that lost opportunity, the value of the right to go off risk, was equivalent to the whole of the liability imposed on the insurer by s54(1) of the Act.

[68] It follows from the analysis in *Ferrcom* that if the present case is governed by s54(1) the judgment below in respect of the first respondent is correct, given the findings of fact as to the insurer's attitude to insuring where plastics manufacture was involved. However, it was contended that this case was governed by ss54(2) and 54(3) rather than s54(1). Reliance was placed on *Austcan Investments Pty Ltd v Sun Alliance Insurance Ltd* (1992) 7 ANZ Ins Cases 61-116. In that case the operative clause was in the following terms:

> "2. The policy shall be avoided with respect of any item thereof in regard to which there be any alteration after the commencement of this insurance-
>
> (b) in the trade or manufacture carried on ... in such a way as to increase the risk of destruction or damage; ...
>
> unless such alteration be admitted by memorandum hereon or attached hereto signed by or on behalf of the Company."

The South Australian Full Court held that what voided the policy under that clause was an alteration of the manufacture carried on in the premises.

[69] The factual basis upon which the matter was considered was that at the time of the issue of the policy, the business carried on did not include manufacture of water beds and that the change to manufacturing them introduced a manufacturing process involving inflammable materials. The insurer's case was that the act of changing what was manufactured could reasonably be regarded as being capable of causing or contributing to the fire and that the insurer was therefore justified in refusing to pay the claim by virtue of s54(2).

[70] When the matter went on appeal to the High Court (*Alexander Stenhouse Limited v Austcan Investments Pty Ltd* (1993) 7 Anz Ins Cases 61-166), the appeal was allowed for reasons irrelevant to the present case. It was unnecessary for the High Court to enter into a detailed analysis of the aspect of s54 with which the present appeal is concerned for the purpose of disposing of the appeal. The restricted discussion of the Full Court's decision, so far as the point relevant to these proceedings is concerned, is to the effect that the Full Court found that the insurer was justified in refusing to pay the claim by reason of the insured's failure to disclose the change in use of part of the premises. It was said that the judges in the Full Court took the view that s54 of the Act applied and that s54(2) avoided the contract because the change in use could reasonably be regarded as capable of causing or contributing to the fire.

[71] The relevant act for the purpose of s54 was also described as the omission to disclose the change in use. In *Ferrcom* liability of the insurer was conditional upon notification of any change materially varying any of the facts or circumstances existing as at the commencement of the policy. In *Austcan* the policy was to be

avoided with respect to any item in the contract of insurance in regard to which there was any alteration in the trade or manufacture carried on in such a way as to increase the risk of destruction or damage unless the alteration had been admitted and approved in writing by the company.

[72] In the former, if notification was not given of any change materially varying any of the facts and circumstances the extent of the liability of the company was affected. In the latter, it was the alteration in the trade or manufacture carried on in the premises in such a way as to increase the risk of destruction or damage without approval of the insurer which caused the policy to be avoided (subject to s54).

[73] In the former case it could not be sensibly said that the omission to notify the insurer of the change from unregistered to registered vehicle could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover was provided by the contract. In the latter, the commencement of a more hazardous business could reasonably be regarded as being capable of causing or contributing to such a loss.

[74] In the present case cl 2 provides that the payment of benefits is contingent upon advice in writing being given as to any relevant change or alteration. The relevant omission is the failure to notify of the change. The matter therefore falls within the principle in *Ferrcom* rather than that in *Austcan.* The learned trial judge was therefore correct in concluding that the outcome was analogous to that in *Ferrcom.* The appeal against the first respondent therefore fails.

Claim against second respondent

[75] The case against the second respondent was broadly that Mr Woods, on behalf of the second respondent, had been informed that a plastics manufacturer would be a tenant in the building. In reliance on the relationship of insurance broker and client over a number of years, the appellant alleged that, on advising the second respondent of the fact that the plastics manufacturing company was a new tenant, the second respondent had an obligation to advise the appellant in connection with the implications of allowing such a tenancy. The allegation was that Mr Woods was negligent or in breach of contract in failing to do so or alternatively in failing to ascertain the nature of the business of the new tenant, and then advising as to the implications with regard to the insurance.

[76] One of the difficulties about this aspect of the appeal is that there is no clear indication in the reasons for judgment of the learned trial judge that he has separately addressed it. If the conclusion to be drawn is that this aspect of the case has not been dealt with and a conclusion cannot be drawn from facts found as to the result that must flow from those findings, this aspect of the matter would have to be remitted to the Trial Division, inconvenient as that would be.

[77] There was evidence from an insurance broker on behalf of the appellant to the effect that it was the duty of an insurance broker who received information about a possible hazardous tenancy to advise the client as to the implications. The findings made with respect to the nature of the communications between Mr Leishman and Mr Woods have been referred to previously. It will be necessary to consider the evidence and the learned trial judge's findings in more detail. In the passages where

he discussed the state of the evidence concerning the possibility of a plastics manufacturer becoming a tenant, a finding was made in the following terms:

> "I am inclined to think that in all probability Trevor Leishman appreciated the potential significance to the insurer of a change in occupation or in the nature of the activities carried on in the building."

[78] He instanced inspections for assessing the risk when the panel beater had gone into possession and when a cabinet maker had gone into possession of premises in another of the plaintiff's warehouse in support of this view. He then discussed Mr Leishman's knowledge of the significance to an insurer of the nature of activities carried on and observed that the thrust of Mr Leishman's evidence was that he had told Mr Woods about the change in occupation rather than that Mr Woods had not advised him of the necessity to do so.

[79] He then set out the respective versions of the conversation concerning occupation by a plastics manufacturer in the following terms:

> "In all probability there was a conversation or conversations between Trevor Leishman and Woods bearing on Wood Form's occupation of the premises. The crucial difference between the versions of the content is that on Woods' version, the occupation was foreshadowed or contingent and to be confirmed if and when it became certain and then details would be provided. On Trevor Leishman's version, Woods was told of the proposed occupation, if not the occupation, as a matter of fact prior to the fire. There was nothing provisional or contingent. I am inclined to think there was such a conversation while the plaintiff and Wood Form were negotiating.
>
> The respective versions are as follows.
>
> On Woods' account, Trevor Leishman phoned him in early June about the possibility of the premises vacated by the panelbeater being occupied by a business that had something to do with the plastics. Woods asked what to do with the plastics and Trevor Leishman replied that he didn't know. Woods then went on to say that it was important to know more about it before the tenant went into occupation because a plastics manufacturer or processing place could require a survey by the insurance company. He says that the conversation terminated on the basis that Trevor Leishman would make further inquiries and get back to him, but never did.
>
> Trevor Leishman's evidence is that when he and his wife appreciated they had not received confirmation of insurance being affected after Mrs Leishman's query about the increased premium and her telling Woods the panelbeater had vacated the premise, he rang Woods. He rang because they had discussed the matter at breakfast but his wife was not working for the plaintiff on that day. In the course of the conversation he told Woods that he 'had got Wood Form Plastics' as a tenant. Woods asked whereabouts they were in town, Leishman told him and went on to say that they were making plastic caps and bottles and that sort of thing. I should say that Leishman did not

> consider Wood Form's particular operations to be hazardous. Woods is adamant that it was Mrs Leishman who phoned. The date of this conversation is fixed by the amended renewal advice dated 14 July which, on any version of it, must have been issued shortly after the conversation.
>
> If Woods' version prevails, in my view, the information was not yet such as to require the second defendant to refer the matter to the first or to fix the defendants with knowledge of the change in occupation. On this version those outcomes were contingent on a further contact by Leishman. On the other hand, on Leishman's version the occasion to refer arose and the defendants were fixed with knowledge of the change."

[80] It is apparent from the last paragraph quoted that the focus of the learned trial judge's discussion was not whether circumstances had arisen in which Mr Woods had a duty to advise Mr Leishman on behalf of the plaintiff of the implications of letting a plastics manufacturer into possession. This conclusion is reinforced particularly by the second last sentence of a later passage which is as follows:

> "For reasons I identified earlier I have considerable reservations about the reliability of the evidence of Trevor Leishman and of Woods in respect of conversations concerning Wood Form's occupation of the building. The reservations apply equally to the evidence of each and in my view it is not possible to reconstruct a reliable account of what in fact occurred. As I have indicated, I think it likely that Leishman mentioned the prospect of a plastics manufacturer going into occupation at some stage during the negotiations with Wood Form and before an agreement was concluded. That would in all probability put the conversation in June. There was a conversation between one of the Leishman's and Woods leading to the generation of the 14 July notice [re the amended premium advice]. In attributing the conversation to Mrs Leishman, Woods may well be mixing up that and the earlier call about the increased premium. I don't know whether the tenancy was discussed on this occasion. In saying this Leishman may be confusing it with an earlier conversation. Whatever occurred between Woods and Leishman however, I am not prepared to conclude that what Leishman told Woods was such as to constitute notification of facts which would or might increase the risk in terms of the policy, as distinct from foreshadowing the prospect of a plastics manufacturer going into occupation. I am simply not able to reach a conclusion as to what was said with the necessary degree of precision."

[81] The learned trial judge also referred to the letter of 18 April 1995 (referred to above in paragraph [9]) noting that "proposed" was a stronger word than "possible". However, he also observed that Mr Leishman with justification did not regard the plastics manufacturing business as particularly hazardous and that Mr Woods, as an experienced broker who appreciated the significance of a change in occupation and the need to take up with the first respondent about it, had not done so. These observations were made immediately prior to the last passage quoted above. While

the learned trial judge's conclusion must be taken to mean that the discussion concerned the prospect of such a tenant but was insufficient to constitute notification for the purposes of clause 2, the absence of any subsequent discussion of the evidence in the context of the plaintiff's claim against the second respondent is apparent.

[82] It is perhaps understandable that the separate considerations applicable to this claim were obscured at the trial, because the oral submissions to the learned trial judge focused on reliability of the respective accounts of the conversations between Mr Leishman and Mr Woods. The nature of the duty of a broker and whether circumstances that brought it into operation had come into existence were only marginally addressed. The second respondent's written submissions also placed a less than prominent emphasis on the separate claim against the second respondent because of the concentration on the evidence of the two men.

[83] There is one threshold matter which may be conveniently considered at this point. The second respondent claims that the case pleaded and the case conducted before the learned trial judge was that Mr Leishman had told Mr Woods that a plastics manufacturer "would be a tenant" (paragraph 12(a) of the amended statement of claim). Paragraph 15 of the amended statement of claim alleged that certain duties arose on the second respondent being advised that the plastics manufacturer "was a new tenant" in part of the premises.

[84] Paragraph 16 of the amended statement of claim alleges that on "being advised of the new tenant or proposed new tenant" the second respondent by its agent Mr Woods negligently and in breach of duty or of a term of the retainer failed in its obligations in various particularised respects. Paragraph 16(b) alleges, in the alternative, that, on being advised of a "proposed new tenant" it failed, negligently and in breach of duty and/or in breach of a term of its retainer, to do various things set out in that paragraph.

[85] The second respondent submitted that the case run by the plaintiff at trial was that Mr Leishman had advised Mr Woods that the plastics manufacturer "would be a tenant". Although there was reference in the statement of claim to a "proposed new tenant" that term must be referred back to the material fact pleaded in paragraph 12, that Mr Leishman had advised that a plastics manufacturer "would be" a tenant. It was submitted that that case run by the appellant had failed because of the findings of the learned trial judge.

[86] Three things may be noted. The first is that paragraph 16(a) uses both of the terms "new tenant" and "proposed new tenant", connected by "or". It is difficult to accept that as a matter of construction they were intended to bear an identical meaning. The second is that the term "proposed tenant" was used in the letter of 18 April 1995 written by Mr Woods to describe what had been conveyed by Mr Leishman. It therefore should not have been surprising to the second respondent to find that term also employed in the statement of claim.

[87] The third is that Mr Griffin says that no objection of the kind now raised was made at the trial or in addresses. This seems to be correct. It is also apparent that the second respondent's defence specifically denies the allegation and statements in paragraph 15, on the basis that it was not advised of the fact that a plastics

manufacturer "was a new tenant". With respect to paragraph 16 where the terms "new tenant" and "proposed new tenant" are both used, there is a general denial.

[88] The focus in addresses at trial was the reliability of recollection of Mr Leishman and Mr Woods. In the event, since there was no suggestion that either man was doing other than attempting to give honest evidence of his recollection of events seven years before, a possible finding, accommodated by paragraphs 16(a) and (b), that he had been told that a plastics manufacturer was a "proposed new tenant" became open and, subject to debate about the precise meaning of the findings seems to represent what was found. In my view the content of the pleadings and the conduct of the case below preclude reliance on the argument especially at this stage of proceedings.

[89] The issues with respect to the claim against the second respondent are whether the state of the second respondent's knowledge was such that duties arose from the lengthy relationship of broker and client, what the content of such duties were and whether they were breached. These questions are not conclusively answered in favour of the second respondent by reference to the finding as to whether notification was sufficient to bind the first respondent by reason of the second respondent's agency for it.

[90] The evidence in support of the existence of a duty to advise comes from an insurance consultant and former insurance broker Mr Bakker who was called on behalf of the appellant. The second respondent did not call a similar expert and Mr Bakker's evidence is uncontradicted. It was submitted that his evidence was consistent with the analysis by Kirby P of the content of such duty in *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541, 555-6.

[91] That case was concerned with engagement of a broker to effect insurance against damage if, in any circumstances, water entered the insured's premises. A policy with exclusions for particular kinds of damage which the Court of Appeal construed as excluding the insurer's liability was recommended by the broker. While it is apparent that the insured and the broker had had previous dealings that was not critical to the decision.

[92] Kirby P identified the applicable principles which included the following:

1. The duty in law of a broker who is engaged to secure insurance on behalf of a client is "having undertaken to obtain insurance, to exercise proper care and skill in carrying out to issue its instructions".

2. The foregoing duty does not extend to expounding the law to the insured. But it does extend to pointing out legal pitfalls which might arise in the course of effecting a valid insurance cover and in securing cover for the risk necessary to the insured's disclosed or ascertained needs.

3. To decide what a reasonably careful insurance broker would have done in particular circumstances, it is normally necessary that expert evidence be given upon the basis of which the court may reach its conclusion (except where the default is so rudimentary and obvious that it is not necessary).

[93] The present case is not one where there was a specific request to procure insurance. The conversations upon which the claim is based are said to have triggered a duty to advise because of the ongoing relationship between the broker and client. It is not directly covered by the principles stated by Kirby P, but is the subject of Mr Bakker's evidence.

[94] The hypothesis upon which Mr Bakker's evidence was based was that the insured premises had become vacant and that the insured told the broker that he was proposing to put a plastics manufacturer into occupation. Mr Bakker said that where a hazardous occupation, of which a plastics manufacturing business was one example, was proposed the broker should have told the insured to advise him of the full details of the kind of product manufactured and the process to be used. A prudent broker would have written to the insured to advise what it should be doing and after a week or so followed up to ensure that the insured understood the requirements and had taken appropriate steps. This was necessary to avoid misunderstanding of verbal advice.

[95] Under cross-examination, no doubt with a view to accommodating a possible finding that Mr Woods had only been told of the "mere possibility" of a plastics manufacturer going into occupation, Mr Bakker was asked about and agreed with the proposition that a reasonably competent broker would have informed the insured, if told that a plastics manufacturer was going to move into the premises. Mr Bakker was then asked if it would change his opinion if the broker had been told that "there was a mere possibility of a tenant involved in plastics moving in" and the insured had said that he would get back to the broker if it became more than a possibility that it would occur. He replied:

> "My view is that the insurance broker's task is to acquaint his clients with what the requirements are and when it comes to a hazardous occupation such as plastics, it is up to the insurance broker to advise his client what he should be doing -----
>
> So -----
>
> MR GRIFFIN: Let him finish.
>
> MR CROWE: Apparently you haven't finished?-- No, I haven't. The point is that in the insurance industry, as it's called, the practitioners become familiar with the particular types of risks that are being offered for insurance and that certain insurance companies accept certain risks and others don't. One can't expect the insured to know all of that. That is what the insurance broker is there for. It is also a fact that the general public – you and I – are not familiar with what a particular insurance company considers hazardous. I would imagine that if you were a stuntman you would think that your occupation was not hazardous, but I'm sure you and I wouldn't undertake the occupation of a stuntman.
>
> I can't even conceive of that?-- So as far as insurance is concerned, again, it is up to the insurance broker to clearly advise his client, not once but on an ongoing basis, what the requirements are and what the difficulties may be. When you are in commercial or industrial

> type buildings, of course occupations can change and it would then be even more important for the broker to advise his client that certain risks would be or may be unacceptable to the existing insurer."

[96] If accepted, this evidence supports the conclusion that even though the broker had not been told that a plastics manufacturer was definitely going into possession, the fact that he had been told that it was a prospect was sufficient to impose a duty on the broker to take certain steps to ensure that the client understood the risks. This issue is not the same as that involved in the case of the first respondent and is not disposed of by a finding as to whether or not what had been said constituted notification to the first respondent. If the reasons for judgment proceed on the basis that both cases are disposed of by the findings of fact made as to the sufficiency of what transpired between Mr Leishman and Mr Woods to constitute notification to the first respondent, such an assumption, in my view, pays insufficient regard to the different considerations applying to the case against the second respondent.

[97] The critical issue is whether the absence of reasons addressing the relevant issues in relation to the appellant's claim against the second respondent vitiates the learned trial judge's decision to dismiss the claim. For the reasons given, I have come to the conclusion that the trial of the appellant's claim against the second respondent has miscarried.

[98] The remaining question is whether the matter must be remitted to the Trial Division or whether the findings of fact are such that the matter can be resolved on the basis of them without the need for a further hearing. The finding of fact as to what was said about occupancy by a plastics manufacturer may have been intended to mean that it was more than a "mere possibility" that was discussed. To characterise it as a "mere possibility" would seem inconsistent with Mr Woods' letter of 18 April 1995 (referred to in paras [9] and [38] above). The uncontradicted evidence of Mr Bakker as to the duty of a broker seems dependent upon proof of no more than a proposal by the client to let a tenant in a hazardous industry into possession of the premises.

[99] If accepted, the evidence of Mr Bakker leads to the conclusion that Mr Woods' approach fell short of what was the second respondent's duty to the client required. The evidence establishes that the plastics manufacturing industry is regarded as one in respect of which insurers are wary about extending cover. However, cover was likely to be available, although not necessarily from the existing insurer.

[100] Mr Bakker and Mr Welsh, an expert underwriter, gave evidence that plastics risks were difficult to place but that cover could be obtained. They both said, as did Mr Mahaffey, Northern Region Underwriting Manager for the first respondent, that specialist insurers or underwriters would arrange cover. Mr Bakker and Mr Burke, Brisbane Underwriting Manager for the first respondent, also said that in cases where a valuable client was involved, general insurers who were otherwise reluctant to do so might extend cover. Mr Burke gave evidence that a higher premium might be required, depending on the nature of the process carried on.

[101] He, Mr Mahaffey and Mr Pobar, State Claims Manager for the first respondent, said that its Brisbane branch had insured some plastics operations. However, Mr Gardner, its Manager at Southport, and Mr Pobar gave evidence that it was the

practice at Southport not to accept plastics risks. Mr Lightfoot, then National Property and Liability Underwriter, gave evidence that if such a decision was taken locally it would not be overruled at a higher level.

[102] Mr Nissen, who conducted the plastics business in the warehouse of the plaintiff which burned down, gave evidence that he had no difficulty in obtaining insurance. At the time of the fire, it was provided by a specialist insurer who dealt with plastics risks. Mr Woods was apparently unaware of the specialist plastics market but said that, while he had never placed a plastics risk, he did not expect it to be difficult to place.

[103] The evidence supports the conclusion that Mr Woods did not specifically draw the potential difficulty about having a plastics business as a tenant to Mr Leishman's attention on the occasion they spoke of the possible tenancy, or later. The evidence establishes that, having had discussions about obtaining further information, Mr Woods did not follow the matter up with Mr Leishman. The evidence of Mr Bakker is to the effect that this falls short of the kind of advice and action which was appropriate (see paragraphs 51 and 52). These findings are compatible with breaches pleaded.

[104] The question then is whether the evidence and the findings of the learned trial judge provide a sufficient basis to find that the second respondent was in breach of its duty to the appellant and is liable for its loss. This depends on a judgment whether this court should reach that conclusion on the basis of his findings of fact without the need to remit it to the Trial Division for further consideration. In my opinion, such a conclusion may be safely reached on the evidence summarised above, including the uncontradicted evidence of Mr Bakker as to the content and extent of a broker's duty.

[105] Before proceeding to consider whether this court should proceed to assess damages and grant judgment against the second respondent, one particular matter concerning the pleadings requires to be mentioned. As against the second respondent, it was pleaded that it was retained by the plaintiff as insurance broker and acted in that capacity (para 14(d) amended statement of claim). It was pleaded (para 15) that there was a duty, based on an implied term, on being advised that the plastics manufacturer was a new tenant, to:

(a) advise the plaintiff generally of its obligation to disclose to the first defendant any alteration or change in the risk insured against;

(b) advise the plaintiff if the fact of the new tenancy might affect the validity of the insurance coverage it then had;

(c) ascertain precisely the nature of the business of the plastics manufacturer and whether it posed an increased risk for the first defendant;

(d) ...

(e) ...

(f) ...

(g) advise on alternative available insurance.

[106] It was then alleged (para 16) that negligently and in breach of the duty and/or a term of the retainer, the second respondent:

(a) On being advised of the new tenant or proposed new tenant:

(i) failed to advise the plaintiff that such a tenancy might amount to an alteration or change of the risk insured against which might affect the validity of the insurance coverage the plaintiff then had;

(ii) failed to advise the plaintiff that such matters should be communicated to the first defendant to ascertain whether it would affect its attitude to the risk and the insurance cover then existing;

(iii) ...

(iv) ...

(v) failed to warn the plaintiff that enquiries should be made of the first defendant as to whether the new tenant was acceptable.

(b) Alternatively, on being advised of the proposed new tenant:

(i) failed to ascertain the nature of the business of the proposed new tenant;

(ii) failed to advise the plaintiff that a new tenant and/or the nature of its business might amount to an alteration or change of the risk insured against and may affect the validity of the insurance coverage that the plaintiff then had;

(iii) ...

(iv) ...

(v) failed to warn the plaintiff that enquiries should be made of the first defendant as to whether the new tenant was acceptable.

[107] The reason why these passages have been set out in detail is that there was an objection when Mr Bakker referred to one of the steps required of a broker, if told the insured was proposing to put in a plastics manufacturer, as being to make sure that alternative cover would have been available if the existing insurance company would not extend cover. Mr Crowe objected if that evidence was to be relied on as evidence of a lost opportunity to obtain insurance from elsewhere, since that was not pleaded.

[108] After the learned trial judge expressed uncertainty as to what the purpose of the evidence was, Mr Griffin said that it was being led on causation, since it was necessary for him to prove that insurance might be obtained elsewhere to prove a causal connection between the negligence and the loss. Mr Crowe responded that if

it went to the issue of whether the first defendant would have insured for plastics risk and was limited to that issue he had no objection.

[109] After the learned trial judge tentatively expressed the view that Mr Griffin's submission concerning causation was correct, Mr Crowe said that he withdrew the objection "it being understood that it is not going to be asserted that the pleading can be amended to claim lost opportunity because of the way in which the evidence was led". After His Honour once again expressed agreement concerning the causal connection proposition, the evidence of Mr Bakker proceeded without further objection.

[110] The passages in which the objections were made and discussed are not without their obscurities and ambiguities. Mr Crowe's objections appear to have been premised on a need to amend the pleadings if loss of opportunity to seek other insurance if the existing insurer refused to cover the risk was to be relied on. An obligation to advise on alternative available insurance was pleaded as an element of a broker's duty in para 15(g), but breach of that obligation is not pleaded explicitly in para 16.

[111] However, if loss calculated by reference to loss of opportunity to seek other insurance is the measure of damages for a proven pleaded breach of duty, the point taken in the objection does not in my view affect resolution of the matter. Any implication sought to be drawn from it that damages could not be assessed on that basis because of the stance taken in the objection cannot in my view be sustained.

[112] The possible courses which the appellant might have taken had it been appropriately advised were not to proceed with the proposal to have the plastics manufacturer as tenant, or to proceed with the proposal and seek cover from the existing insurer or another, probably at a greater premium. If the latter option was adopted, the evidence established that there was a substantial probability that the existing insurance would not have been continued by the first respondent but that alternative insurance would have been obtainable from a specialist insurer or underwriter.

[113] Neither Mr Leishman nor Mr Gibbs, a director of the appellant, were asked directly what would have been done concerning putting a plastics manufacturer into possession as a tenant if they had been told of the possible complications with regard to insurance. However, on the basis of the evidence that insurance was taken out historically in respect of the appellant's buildings, it is safe to infer that one of the two courses above would have been taken. If it was the former, the existing insurance would have in all probability been retained. If it was the latter, the evidence supports the conclusion that alternative insurance, although not necessarily on as advantageous terms as before, would have been available and availed of.

[114] The consequence of the breach of duty to advise of the difficulty if a plastics manufacturer was let into possession and to follow it up is that the appellant suffered loss, the measure of which is calculated by reference to its loss of the chance to consider its position and to ensure that it had effective insurance against the risk which occurred. Damages should be assessed on that basis.

[115] With regard to damages, there is no dispute as to costs of rectification, which amount to $191,860. Interest on that sum from the date when rebuilding commenced until the hearing of the appeal at 9.5% was $91,620, rounded off. Loss of rental of $3,276.54 per month from the date of the fire to reletting was claimed. Without any deduction, that amounted to $132,268.39. Some allowance for commercial contingencies should be made with regard to that amount. Allowing loss of $100,000 seems not unreasonable in this regard. Interest on the lost income from 2 months after the fire (15 October 1992) to the time of reletting (5 January, 1995) at half the mean Treasury Bank Yield rate of 11.50% (ie 5.75%) was sought. That would, on the basis of the lost rental allowed, round off at $18,500. Finally, there was a claim for interest loss from 6 January 1996 to the date of hearing of the appeal on the lost rental, at 9.5%. That rounds off at $45,300. The total damages on the basis set out is $447,280.

[116] However, some allowance must be made for the contingencies that suitable insurance may not have been obtained and that, if it was, it would not be as advantageous as before. The degree of discount is a matter of impression and one upon which there is room for differing views, but in my view, it should be relatively slight on the evidence before us. I would reduce the assessed damages by 15% to allow for contingencies. This leaves a sum of $380,188 which may be recovered by the appellant.

[117] Orders:

1. The appeal against the first respondent be dismissed with costs to be assessed.

2. The appeal against the second respondent be allowed with costs to be assessed.

3. The judgment for the second defendant should be set aside and replaced with judgment for the plaintiff against the second defendant in the sum of $380,188 with costs to be assessed.