SUPREME COURT OF QUEENSLAND

CITATION:	*Johnson v Triple C Furniture & Electrical P/L* [2010] QCA 282
PARTIES:	**RAE JOHNSON** (plaintiff/not a party to the appeal) **v** **TRIPLE C FURNITURE & ELECTRICAL PTY LTD** ACN 071 286 256 (first defendant/respondent) **RURAL & GENERAL INSURANCE LTD** ACN 000 007 492 (third party/appellant)
FILE NO/S:	Appeal No 3859 of 2010 SC No 147 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	15 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	3 September 2010
JUDGES:	Holmes, Chesterman and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. The judgment given on 18 March 2010 whereby the appellant was ordered to indemnify the respondent against the plaintiff's claim is set aside.** **3. The further orders made on 19 March 2010 by which the appellant was ordered to pay the respondent's costs of and incidental to the third party proceeding and the respondent's costs of and incidental to defending the plaintiff's claim to be assessed on the indemnity basis are set aside.** **4. The respondent is to pay the appellant's costs of the trial and of the appeal**.
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE INFERENCES OF FACT INVOLVED – WHERE FACTS NOT IN DISPUTE – where pilot's negligence resulted in his death and the serious injury of his

wife in a plane crash on 20 October 1999 – where plaintiff commenced proceedings against respondent for vicarious liability – where respondent claimed indemnity from appellant insurer – where appellant declined to indemnify respondent on the basis that there was no evidence pilot had satisfactorily undertaken a flight review within two years of the crash as required by the *Civil Aviation Regulations* 1988 (Cth) and by the insurance policy – where a log book was found in the wreck but only covered the period December 1997 to November 1998 – where that log book contained no record of a flight review – where there was a suggestion the pilot had lost a log book – where appellant bore onus of proof and had made enquiries but did not know whether pilot had completed the flight review – where plaintiff and respondent were in the best position to adduce evidence on the point – where trial judge concluded a lost, more recent logbook may have contained a flight review entry so that the insurance policy responded to the claim – whether the evidence supported the trial judge's conclusion

INSURANCE – CLAIMS GENERALLY – REFUSAL – STATUTORY RESTRICTIONS ON – where s 54 *Insurance Contracts Act* 1988 (Cth) prevents an insurer from refusing to pay a claim by reason only of an act or omission by the insured or some other person that did not cause or contribute to the loss – where respondent insured argued s 54 applied so that appellant insurer could not refuse to pay the claim – whether pilot's failure to satisfactorily complete a flight review could properly be described as an "omission" – whether the claim was in respect of a loss which the policy did not cover such that s 54 did not apply – whether the failure to satisfactorily complete a biennial flight review could reasonably have caused or contributed to the loss such that s 54 would allow the appellant to refuse to pay the claim

Civil Aviation Regulations 1988 (Cth), reg 5.51, reg 5.81
Insurance Contracts Act 1984 (Cth), s 54

Antico v Heath Fielding Australia Pty Limited (1997) 188 CLR 652; [1997] HCA 35, applied
Apollo Shower Screens Pty Ltd v Building & Construction Industry Long Service Payments Corporation (1985) 1 NSWLR 561, considered
Blatch v Archer [1774] 98 ER 969, considered
Director of Public Prosecutions v Brauer [1991] 2 Qd R 261, considered
FAI General Insurance Co Limited v Australian Hospital Care Pty Limited (2001) 204 CLR 641; [2001] HCA 38, applied
Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd (1993) 176 CLR 332; [1993] HCA 5, applied
Greentree v FAI General Insurance Co Ltd (1998) 44 NSWLR 706, applied

Moltoni Corporation Pty Limited v QBE Insurance Limited (2001) 205 CLR 149; [2001] HCA 73, cited
Permanent Trustee Australia v FAI General Insurance Co Ltd (1998) 44 NSWLR 186, cited
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, cited

COUNSEL: G C Newton SC, with M T Hickey, for the appellant
M Grant-Taylor SC, with A S Kitchin, for the respondent

SOLICITORS: CLS Lawyers for the appellant
Eardley Motteram for the respondent

[1] **HOLMES JA**: I agree with the reasons of Chesterman JA and with the orders he proposes.

[2] **CHESTERMAN JA**: Just before 6.00 am on 20 October 1999 a Cessna 206 aircraft, carrying a pilot and two passengers, crashed on takeoff from Wrotham Park, a grazing property 45 miles northwest of Chillagoe and about 100 miles west of Cairns. The pilot, Peter Johnson, was killed instantly. The two passengers, one of whom was the pilot's wife, were seriously injured.

[3] The aircraft was owned by a company, Triple C Furniture & Electrical Pty Ltd ("the respondent"), whose only directors and shareholders were Mr and Mrs Johnson, both of whom were employed by the company.

[4] In 2001 Mrs Johnson commenced proceedings against the respondent claiming damages for personal injury and alleging it was vicariously liable for the actions of its employee, the pilot, whose negligent handling of the aircraft on takeoff was alleged to have been the cause of her injuries. The action did not come on for trial until November 2009, 10 years after the fatal crash.

[5] The action succeeded. There was overwhelming evidence that the pilot was grossly careless in his control of the aircraft. The respondent did not dispute its liability to Mrs Johnson who was awarded $846,030 against it.

[6] The respondent had effected a policy of aviation insurance ("the policy") with the appellant to protect it against claims such as Mrs Johnson's. The appellant declined to indemnify the respondent under the policy claiming that the circumstances of the crash fell within one of its exclusions.

[7] The respondent joined the appellant as a third party in the action. (Mrs Johnson had also joined the appellant as second defendant but her claim against it was misconceived and was not pursued). The respondent disputed the applicability of the policy exclusion and contended that the loss of the aircraft and Mrs Johnson's injuries did come within the policy. It also argued that s 54 of the *Insurance Contracts Act* 1984 (Cth) ("the Act") operated to overcome the exclusion, if it would otherwise apply, so as to bring the respondent's loss within the ambit of the policy.

[8] The only issues at the trial were the *quantum* of Mrs Johnson's damages and the respondent's right to indemnity under the policy.

[9] The primary judge gave judgment for the respondent against the appellant for the whole of the Mrs Johnson's judgment against it, together with costs. The appellant challenges the judgment. It submits that the respondent's claim for indemnity against Mrs Johnson's claim was excluded from the policy and that s 54 of the Act had no application.

[10] The appellant initially joined both Mrs Johnson and the respondent to the appeal. The appeal as against Mrs Johnson was abandoned and only the appeal from the respondent's judgment against the appellant, indemnifying it from its liability to Mrs Johnson, was pursued.

[11] Although the respondent did not dispute the evidence, or the conclusion to which it led, that Mr Johnson was negligent, the evidence nevertheless has some relevance to the application of s 54, and should be recited.

[12] Mr and Mrs Johnson and an employed store manager flew from Weipa to Rockhampton in the Cessna aircraft on 18 October 1999. Weipa was the defendant's principal place of business. The flight, Weipa to Rockhampton and back, was undertaken for business purposes. The party left Rockhampton at about 11.30 am on 19 October 1999. They then broke the journey at Charters Towers, landing to refuel. Mr Johnson was keen to return to Weipa before nightfall but the flying time from Charters Towers to Weipa was about four and a half hours in the Cessna. Refuelling was not complete until about 4.00 pm.

[13] The refueller, Mr McMurray noticed that Mr Johnson appeared agitated by the prospect of not making Weipa by nightfall. When the aircraft had been refuelled Mr McMurray asked Mr Johnson to check that the fuel caps had been securely fastened. It is customary, as a matter of making an aircraft safe, for the pilot personally to check the fuel caps are secure. Mr Johnson checked one but not the other.

[14] They then attempted a departure but the Cessna's battery failed and the engine would not turn over. Mr Johnson attempted to start it by turning the propeller, a practice Mr McMurray thought dangerous, had the engine fired and the propeller rotated at speed. Mr Johnson remarked to Mr McMurray that "he did not know how to start the aircraft when it was hot". Eventually an engineer brought a battery which was connected to the Cessna's battery and the engine started.

[15] Because he could not reach Weipa by nightfall Mr Johnson intended to land at Chillagoe where he and his passengers would spend the night. However they encountered a heavy smoke haze during the flight and could not see Chillagoe or its airport. Mr Johnson flew on searching for an airstrip. Just before dark he observed Wrotham Park where he landed. He thought he was at another grazing property, "Bellvue". The manager of Wrotham Park provided accommodation and hospitality.

[16] What happened the next day when Mr Johnson attempted the return flight to Weipa is explained in the Australian Transport Safety Bureau's ("ATSB") Occurrence Brief:

> "At first light the following morning, the pilot taxied the aircraft for takeoff from runway 24. While the aircraft was taxiing, the station manager noticed that a bag belonging to one of the aircraft occupants had been left behind. He drove out to the aircraft and handed the bag

> to the pilot, who had left the aircraft to collect it. Soon after, the pilot began the takeoff.
>
> The aircraft was heard to take-off, followed by the sound of impact.
>
> Examination of the wreckage and assessment of the flight path and impact sequence determined that shortly after lift-off the aircraft yawed and rolled to the left, and began to descend. The leading edge of the left wing struck a powerline 8 m above the ground and about 100 m south-east of the runway centreline. The aircraft then cartwheeled through the top of a building, and its right side struck the ground while travelling slowly rearwards. It came to rest on its right side, about 5 m from the building and about 130 m south-east of the runway centreline. The passengers, who occupied the right seats of rows one and two, were seriously injured. The pilot was fatally injured.
>
> One of the passengers later recalled hearing the stall warning activate shortly after lift-off.
>
> … The wreckage examination did not reveal any pre-impact technical defect that may have contributed to the accident. …
>
> Rescuers reported that the pilot was not restrained by a seat belt when they arrived at the accident site.
>
> Civil Aviation Safety Authority records indicated the pilot's medical certificate was current. The autopsy and toxicology analysis on the pilot did not reveal any pre-existing medical condition that may have contributed to the accident.
>
> The airfield at Wrotham Park was unlicensed. The field was 500 ft above mean sea level, and consisted of a single runway, 915 m in length … . The surface was gravel and was in good condition … . There were no obstructions affecting the approach or departure flight paths in either direction.
>
> The Bureau of Meteorology assessed the weather conditions at the time of the accident as fine with a light breeze of less than 5 kts from the north-north-east. Visibility was assessed as good … .
>
> The pilot had flown about 22 hours in the aircraft, having purchased it 6 weeks before the accident. He had no prior experience on the aircraft type. The runway at Wrotham Park was both the shortest, and the first gravel runway the pilot had used in this aircraft. The pilot apparently did not fasten his seatbelt after collecting the bag, indicating that he may have been under some stress, possibly because he was concerned about the delay in his return to Weipa.
>
> Why the pilot lost control of the aircraft during the takeoff could not be determined."

[17] The appellant called evidence from an aviation insurance surveyor and adjustor, Mr Ellis, who was himself an experienced pilot and flight instructor, and Mr Crocker, another experienced pilot. Working from the findings of the ATSB and the inquiries he made of the manager at Wrotham Park Mr Ellis concluded:

"… shortly after the aircraft became airborne it drifted to the left of the airstrip when still at a low height. The left wing then collided with a steel pole 8.2 meters tall … . … The pole … is situated well outside the airstrip boundary and under normal circumstances would pose no hazard to departing aircraft. …

…

The tyre marks remaining on the eastern end of the airstrip together with the information supplied by Manager Burke confirms the take off run was commenced approximately one third along the strip. This is believed to be instrumental in that had the take off run been started at the threshold then the aircraft would have gained sufficient height … so as to have passed above (the buildings).

…

The Cessna 206 develops a considerable degree of propeller torque … during initial lift off. The effect is for the aircraft to yaw to the left, which needs to be counteracted with considerable right rudder input by the pilot."

[18] Mr Crocker said in his report:

"… the runway was both the shortest and the first gravel strip that the pilot … had used in the aircraft.

…

… The runway was 915m in length … but the pilot elected only to use about 700m of the available runway.

…

During the takeoff there are two factors which played a part in the accident. … the most significant factor was the gravel surface. The pilot was not used to the greater retardation force caused by gravel.

… The runway length seemed to be adequate, however, only using two thirds of it was also a contributing factor. I believe the pilot … was concerned by the slow acceleration of the aircraft and realised the end of the runway was coming up fast, so he decided to pull the aircraft into the air earlier than he should have. This … caused the aircraft to drift left of the runway centre line after takeoff.

…

… The aircraft seems to have been serviceable, as confirmed by ATSB. The aircraft was not overloaded and should have easily taken off with the available runway length under normal circumstances.

…

… the pilot either elected to pull the aircraft into the air early to get away from this retardation or he thought he was getting close too (sic) the end of the strip. This is confirmed in the ATSB report 'one of the passengers later recalled hearing the stall warning activating

> shortly after takeoff'. This indicates the aircraft was being flown well below its normal takeoff speed.
>
> Another effect of pulling the aircraft off too early is that greater force will be required by the rudder to offset the yaw caused by the rotation of the propeller … (which) … will cause the aircraft to … drift to the left. …
>
> The force of the rudder was not sufficient to counter the slipstream because of the low forward air speed of the aircraft."

[19] By Section (III) of the policy the appellant promised to:

> "Indemnify (the respondent) for all sums for which (it) become(s) legally liable to pay, including costs awarded against (it), in respect of;
>
> (a) accidental bodily injury … to passengers whilst … on board … the aircraft … ."

[20] Section (V), Part 2 of the policy contained the relevant exclusion. It provided:

> "… this policy does NOT apply whilst the aircraft, with the knowledge of the insured or the insured's agent … is;
>
> (a) used for any illegal purpose … or if the aircraft is operated in breach of;
>
> …
>
> (ii) an Appropriate Authority's, (defined herein) **'communications',** … issued from time to time;
>
> … ."

[21] The policy defined the Civil Aviation Safety Authority as an "Appropriate Authority". Communications were defined as:

> "recommendations, regulations, orders or bylaws, which would be regarded as an appropriate authority by aviators … in relation to airworthiness, air navigation and the legal operation of the aircraft … ."

[22] Regulation 5.81 of the *Civil Aviation Regulations* 1988 ("Regulations") made under the *Civil Aviation Act* 1988 (Cth) provided:

> "**Private (aeroplane) pilot: regular flight reviews required**
>
> (1) A private (aeroplane) pilot must not fly an aeroplane as pilot in command if the pilot has not, within the period of 2 years immediately before the day of the proposed flight, satisfactorily completed an aeroplane flight review.
>
> Penalty: 50 penalty units
>
> (2) …
>
> (3) …
>
> (4) If a private (aeroplane) pilot satisfactorily completes an aeroplane flight review, the person conducting the review must make an entry in the pilot's personal log book to the

effect that the pilot has satisfactorily completed the aeroplane flight review.

Penalty: 10 penalty units.

(4A) …

(5) A private (aeroplane) pilot who, within the period of 2 years immediately before the day of the proposed flight, has:

…

(c) satisfactorily completed aeroplane conversion training given by the holder of a grade of flight instructor … rating that authorises him … to conduct aeroplane flight reviews;

is taken to have satisfactorily completed an aeroplane flight review."

[23] The Regulations also provided for the keeping of log books by those licensed to fly aeroplanes. Regulation 5.51 provides:

"**Personal log books**

(1) The holder of a flight crew licence, a special pilot licence or a certificate of validation must have a personal log book that is suitable:

(a) for the entry of flight crew ratings, aircraft endorsements, flight procedure authorisations and other kinds of privileges; and

(b) for recording the matters required by regulation 5.52 … ;

(c) for recording any other matter that CASA directs must be recorded in a personal log book.

Penalty: 10 penalty units."

[24] The appellant contended at trial that Mr Johnson had not satisfactorily completed a flight review in the two years preceding the flight on 20 October 1999. If that negative proposition were established by appropriate means of proof Mr Johnson was prohibited from flying by regulation 5.81(1). The aircraft would have been operated in breach of a "communication" and the policy's cover would have been excluded.

[25] It seemed to be common ground that if Mr Johnson had not successfully undertaken the flight review in the two years preceding the crash the effect of regulation 5.81(1) was that he could not lawfully fly the Cessna. The expert aviator, Mr Appleton, called by the respondent, expressed the result in pilot's vernacular: Mr Johnson would have been "grounded".

[26] Regulation 5.81(5)(c) may have permitted Mr Johnson to fly had he satisfactorily completed aeroplane conversion training for the Cessna in the same two year period. In that event he would have satisfied regulation 5.81(1). The possibility arises because the respondent acquired the Cessna 206 about six weeks prior to the crash. However his licence was endorsed for that type of aircraft so he was appropriately qualified to fly it. There was no requirement or obligation that he undertake aeroplane conversion training with respect to it.

[27] Senior counsel who appeared for the respondent on the appeal accepted in submissions that it was unlikely that Mr Johnson had undergone conversion training. The issue at the trial was whether Mr Johnson had undertaken the compulsory biennial flight review, not whether he had undergone conversion training which was, in his case, unnecessary. The primary judge rightly ignored the possibility and considered only the evidence with respect to the flight review.

[28] The only evidence with respect to the question whether Mr Johnson had satisfactorily completed an aeroplane flight review between 19 October 1997 and 19 October 1999 came in the appellant's case. The onus was, of course, on the appellant to establish that the loss fell within the terms of the exclusion if it wished to avoid indemnifying the respondent against Mrs Johnson's claim.

[29] There was a reason for the respondent's lack of evidence on the point. At the trial counsel for the respondent frankly conceded its position. He told the primary judge that the respondent did not "know if (Mr Johnson) did the flight review within two years …". The appellant was put to proof on the issue.

[30] Had Mr Johnson satisfactorily completed a flight review a record of that fact, signed by the person conducting the review, should have been made in Mr Johnson's log book. The appellant's principal proof that there had not been a review was that there was no record of Mr Johnson having undertaken a flight review, in the relevant period, in his personal log book found in the Cessna by the ATSB investigators. That there was no such record was not contested, but it must be said that the parties' representatives at trial were alarmingly casual in their treatment of the rules of evidence and, in particular, the best evidence rule. Mr Johnson's log book was in his "flight bag" found in the wreck. The log book was, obviously, the best evidence of the entries it contained. It was not produced at trial. The ATSB investigators initially took possession of the book but by the time the trial came around no longer had it. There was hearsay evidence, not objected to, that the ATSB's usual practice was to return items such as log books to their owners at the conclusion of an investigation. In accordance with that practice the log book should have been in the possession of Mr Johnson's executors. No attempt seems to have been made to have it produced under subpoena.

[31] The ATSB had made, and retained, photocopies of what were described as the "relevant entries". They could have been produced if the log book could not be found, but a desultory attempt to procure the photocopies was not persisted in.

[32] The plaintiffs were content to let Mr Ellis, who examined the log book at the crash site, give secondary evidence of the document's contents. He had, it seems, made notes during his perusal and the effect of what he read appeared in his report.

[33] No point was taken about this objectionable and wholly unsatisfactory manner of proving what was critical to the third party proceedings. The parties accept the correctness of the primary facts found by the trial judge by reference to the evidence led. There is a challenge to the inferences drawn by his Honour from the facts.

[34] The log book found in the aircraft contained records of flights flown by Mr Johnson between 12 December 1997 and 13 November 1998. There was a record of a satisfactory flight review on 14 December 1996, but none after that date. Mr Ellis' inquiries established that the 1996 review had taken place at the Air Training Centre at Archerfield and that Mr Johnson had not subsequently been reviewed at that centre.

[35] Given the terms of regulation 5.81(4), that proof of a successful review be noted in the pilot's personal log book and signed by the person conducting the review, the absence from the log book of such a notation was cogent evidence there had been no such review. To comply with regulation 5.81(1) Mr Johnson had to have undertaken the review in the period apparently covered by the log book.

[36] There was some evidence of the existence of another log book. There is no requirement that a pilot keep only one log book at a time. The evidence came from Mrs Johnson. She said:

> "Oh, I'd seen (the log book) around the office. I know that he lost one at one stage and that my recollection is he had another one and there wasn't very much in it, but I never really took any notice of it.
>
> …
>
> It's something I remember because I was asked if I knew where the logbook was and … I felt that he had lost one and got a new one."

[37] The primary judge rejected the appellant's proof as inadequate to discharge the onus on it. His Honour was not satisfied that the late Mr Johnson had not undergone an aeroplane flight review in the relevant period. His Honour said:

> "[9] The third party asserts that Peter Johnson (deceased) had not carried out a flight review in accordance with that regulation in the two years prior to the crash. The basis for this assertion appears to be that there was no entry of his having done so in his log book which was in the plane at the time of the crash. His last flight review for which there is any evidence was successfully undertaken on 14 December 1996 at the Air Training Centre Pty Ltd at Archerfield.
>
> [10] The plaintiff and first defendant do not accept this assertion. They argue that the log book located in the crashed aircraft was not necessarily the only log book maintained by the deceased. It contained no record of his more recent flights. … .
>
> …
>
> [12] The third party bears the onus of proving that the circumstances show that the deceased did not undertake a biennial flight review and that this fact should exempt it from providing indemnity to the first defendant under the policy.
>
> …
>
> [19] I accept the evidence of the plaintiff about the logbooks and find on balance of probabilities that there was in fact a second logbook. The third party's reliance upon the absence of any notation of a biennial flight review in the discovered, and out of date logbook, is not at all conclusive of the fact that no review had been undertaken. On the whole of the evidence I am not satisfied on the balance of probabilities that the plaintiff had not undertaken a biennial flight review in the two years prior to the crash.

> Consequently, the third party has not established the circumstances which would give rise to the policy exclusions upon which it seeks to rely."

[38] The appellant challenges this finding of fact. Although the appeal is against such a finding it is not one which depended upon the resolution of conflicting evidence or the assessment of credibility. The finding in question was a conclusion from facts uncontroversially established. In such a case an appellate court:

> "… is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed … . In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it." *Warren v Coombes* (1979) 142 CLR 531 at 551.

[39] The primary judge's reasons show that critical to his finding was his assessment that the log book found in the Cessna was "out of date" and did not record the pilot's "more recent flights". The implication is that the "lost" log book was a more recent one covering the period in which Mr Johnson was required to have satisfactorily completed a flight review.

[40] The primary judge's conclusion is justified only if the evidence in relation to the second log book did in fact allow a finding that it was "more recent" than the one found in the wreckage.

[41] The evidence does not support the conclusion. Mrs Johnson's evidence was vague and while it may be accepted, as the trial judge did, as proving that Mr Johnson lost a log book and took to using another, there is no evidence which would allow any opinion to be formed as to the time at which that happened. There is no basis on the evidence for finding that the lost log book covered the period 14 November 1998 to October 1999.

[42] The inferences are against such a finding.

[43] What is significant is that Mr Johnson had in the plane with him, in his flight bag, a log book. In the absence of some explanation to the contrary the obvious inference is that that was the log book he was currently using, and that he had used it from the date of the earliest entry recorded in it. (The log book cannot have related only to the Cessna 206. That had been bought only six weeks before the crash). Mr Johnson had had that log book since at least 14 December 1996 when there is a record of a flight review. There may have been earlier entries but in the absence of the log book one cannot know. The latest entry was 13 November 1998 which means that Mr Johnson had not recorded any of his flights for about a year.

[44] The trial judge appears to have thought that the lost log book covered the period subsequent to November 1998 and would have recorded flights and flight reviews in that period. But this assumption does not explain the fact that on 20 October 1999 Mr Johnson had in his possession a log book which recorded events from three years earlier. If he had lost a log book after November 1998 and commenced a new one, then, to make sense of the book found in the wreck, Mr Johnson must have found the old book after starting to use the new one. He must have decided to reuse the old one and then lost the new one. There is no evidence in support of such an odd supposition.

[45] Mrs Johnson's evidence was that her husband had, at some time, lost a log book and started another. There was, in the wreck, a log book which covered the period December 1996 to October 1999. (The latest entry was November 1998 but the book could have been used up to the date of the crash.) The lost log book must therefore have been for an earlier period. Moreover there was no need for Mr Johnson to start a new log book after November 1998. He still had possession of the one found with the plane.

[46] If there did exist a lost log book that covered the period from November 1998 to October 1999, then, logically, Mr Johnson lost two log books: that later log book as well as one that was replaced by the log book found in the wreck. However, Mrs Johnson spoke only of one lost log book.

[47] Mrs Johnson said her husband started a new book after losing another. The log book found in the wreck was, evidently, not lost. The obvious inference is that it was the "new one" described by Mrs Johnson as having "not much in it". The recovered log book was the book in Mr Johnson's possession and was therefore, presumably, his current log book. It contained an entry for December 1996. The entries in any lost log book must therefore have preceded the earlier of those contained in the recovered log book. Any lost, earlier log book would not have recorded a flight review having been successfully undertaken between 18 November and 14 December 1998.

[48] The supposition that Mr Johnson lost a log book that covered the period November 1998 to October 1999 founders on the fact that Mrs Johnson said that after the log book was lost Mr Johnson got another which he used, and that he had a log book in October 1999 which he had used in 1996, 1997 and 1998.

[49] Logic, and such evidence as there is, favours a finding of continuous possession of the log book from December 1996 to October 1999.

[50] There is another point. To remain entitled to fly Mr Johnson had to successfully complete a flight review within two years of 14 December 1996 when it is known he did undertake a review. Common experience suggests that he would have undertaken the next review towards the end of the two year period. All but four weeks of the second year of that period is covered by entries in the log book. Mr Ellis noted an entry on 13 November 1998. Only a month remained of the two year period. In the twenty-three month period in which Mr Johnson did record flight activity there was no record of a review subsequent to that undertaken in December 1996.

[51] Mr Ellis made other inquiries. He spoke to Mr Onley, the respondent's chief pilot, to ask if "he had any information … whether or not the deceased pilot had … conducted a flight review …". Mr Onley's reply was that "they had no records of the deceased pilot's flying activities or experience, or any checks that he may or may not have done." He gave as the explanation for his ignorance that Mr Johnson "did not work within (the respondent's) framework as an aviation organisation." This appears quite wrong. There were in evidence several cover notes issued by the appellant to the respondent effecting insurance cover under the policy over the Cessna. They record Mr Johnson as one of the pilots who might fly it. Mr Johnson himself signed cheques on behalf of the respondent to pay insurance premiums. Mr Johnson was clearly one of the respondent's pilots. Nevertheless the fact remains that Mr Onley said he could provide no information relevant to a flight review undertaken by Mr Johnson.

[52] The burden on the appellant was to prove a negative: that Mr Johnson had not satisfactorily undertaken a flight review in the two years preceding 20 October 1999. The difficulty of discharging such a burden was discussed by Mr Gulson in his work *The Philosophy of Proof* (2nd Edition). The author remarked (152):

> "But, as a general rule, a negative fact is not perceptible, and therefore, since all evidence is ultimately referable to perception, not capable of direct proof.
>
> …
>
> Negative evidence, therefore, is always in some sort circumstantial or indirect, and the difficulty of proving the negative lies in discovering a fact or series of facts inconsistent with the fact which we are seeking to disprove, from which it may be possible to infer its absence with anything like an approach to certainty. This may be feasible … where … we comprehend within the range of our senses the whole situation, - the whole time and place to which the negative fact is limited. But when this is not the case, when the negative expression of fact, which we are seeking to prove, outreaches … the compass of our perceptive faculties, the task of finding incompatible facts sufficient to serve our purpose may become extremely difficult, or even hopeless from its infinity."

[53] The law accommodates the difficulty. As long ago as 1774 Lord Mansfield noted that:

> "… all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."

Blatch v Archer [1774] 98 ER 969 at 970. More recently in *Apollo Shower Screens Pty Ltd v Building & Construction Industry Long Service Payments Corporation* (1985) 1 NSWLR 561 Hunt J said (565):

> "… the defendant in the present case has the greater means to produce evidence which contradicts the negative proposition for which the plaintiffs contend. In other words, provided that the plaintiffs have established sufficient evidence from which the negative proposition may be inferred, the defendant carries what has been called an evidential burden to advance in evidence any particular matters with which (if relevant) the plaintiffs would have to deal in the discharge of their overall burden of proof: cf *Purkess v Crittenden* (1965) 114 CLR 164 at 167-168, 171. …
>
> I do not, however, intend to suggest that only comparatively slight evidence is required for the plaintiffs to discharge their onus in this case as in the case where the facts are peculiarly within the knowledge of the defendant … . That is the so-called 'scintilla' doctrine. Obviously, it does not apply to the position here. What I do intend to suggest is that the plaintiffs' burden of proof of the negative proposition … is not as difficult in this case as it might otherwise have been because of the defendant's greater means to produce evidence which contradicts that proposition. That is a pale reflection of the 'scintilla' doctrine. It is but an application of the more general maxim, not restricted to cases where the facts are

> peculiarly within the knowledge of one party, that all evidence is to be weighed according to the proof which it was in the power of one side to produce, and in the power of the other to have contradicted … ."

[54] The appellant relied also on the judgment of Thomas J in *Director of Public Prosecutions v Brauer* [1991] 2 Qd R 261 at 268-9:

> "The starting point here depends upon which party has the evidential burden. The amount and quality of evidence required to discharge it may be lessened when it may reasonably be supposed that the adversary is in a better position to know and prove the essential facts … . ... this does not mean that the peculiar means of knowledge of one party spares the other of the burden of adducing evidence on the issue, although very slight evidence will often suffice. …
>
> …
>
> The suggestion has been made that where one party bears the burden of proving a negative proposition, and where the other party has the greater means to produce evidence contradicting it, it is enough for the plaintiff to establish 'sufficient evidence' (which must be more than a mere scintilla), upon which there is cast upon the other party an evidential burden to advance evidence as to particular matters that could defeat the discharge of that proof … . Such a proposition is hardly novel, and is an application of *Purkess v Crittenden* … ."

[55] The appellant submitted that it had adduced sufficient evidence to discharge the evidentiary onus upon it of establishing the negative proposition and that the evidentiary burden passed to the respondent to prove the contrary positive proposition. The appellant submitted that the absence of any evidence from the respondent had the consequence that it had discharged the legal onus. It relied in particular, on:-

(i) its counsel's admission that the respondent did not know whether or not its employed pilot had undertaken the required flight review;

(ii) no witness being called, whether the respondent's chief pilot, or some other person involved in its aviation business, to speak to the proposition;

(iii) the lack of evidence of any system operated by the respondent to ensure that employed pilots maintained the currency of their entitlement to fly by undergoing the biennial flight reviews;

(iv) the absence of testimony from an instructor who conducted the relevant flight review which Mr Johnson completed satisfactorily;

(v) the absence of any documentary evidence, receipts, payment vouchers or credit card notations, evidencing making arrangements for the review, or payment for it.

[56] The principle on which the appellant relies depends upon the respondent being in a better position to know the facts and adduce evidence to establish their proof. Save for two of the points enumerated in the preceding paragraph it is not clear that the respondent was in any better position to prove that Mr Johnson underwent the

required review. A pilot's licence is a personal qualification. The requirement that a pilot undergo the biennial reviews is personal to the pilot. Mr Johnson may have undertaken his review independently of the respondent which did not pay for the review, or make arrangements for it.

[57] The exceptions are (i) and (iii). Mrs Johnson might have been expected to know whether her husband had been to a flight testing centre for a review, or where to make enquiries. The maintenance of a system, if there were one by which the respondent ensured that its pilots did complete reviews within the time fixed by the Regulations, should have been known to the chief pilot who could testify to it.

[58] Notwithstanding that observation, this is not a case in which it is helpful to analyse the issue in terms of a shifting burden of proof, for the reason just given. Nor is it one in which much emphasis can be given to the principle relied on by the appellant. The appeal should, I think, be approached on the basis that the parties put before the court all the evidence available to them on the question whether Mr Johnson satisfactorily completed a flight review within two years of the crash.

[59] Few, if any, civil cases where both parties go into evidence will be determined by the application of the rules as to onus of proof. The totality of evidence, such as it is, will prove or disprove facts which one party or the other must establish to make out its case or defence.

[60] It was in the respondent's and Mrs Johnson's interest to adduce evidence that there had been such a review. The issue was identified on the pleadings and litigated. Its importance was obvious. Regardless of where any burden of proof lay there was a compelling motive on Mrs Johnson and the respondent to prove, if it were the fact, that the policy exclusion did not apply and the company she sued for substantial damages would be indemnified by the appellant.

[61] The situation was well described by Thayer in *A Preliminary Treatise on Evidence at the Common Law* (370):

> "This duty (burden of proof), in the nature of things, here as well as at Rome, cannot shift; it is always the duty of one party, and never of the other. But as the *actor*, if he would win, must begin by making out a case, and must end by keeping it good, so the *reus*, if he would not lose, must bestir himself when his adversary has once made out his case, and must repel it. … This shifting of the duty of going forward with argument or evidence may go on through the trial. … It is the common and interchangeable duty of going forward with argument or evidence, whenever your case requires it."

[62] For the reasons I endeavoured to express earlier the only sensible inference from the available facts is that the log book found in Mr Johnson's possession on the day of the crash was his current log book which he had had since December 1996. It covered the period during which he ought to have undergone the review and contained no record of it. Had there been a review the instructor who conducted it was required by law to note its satisfactory completion by signing an entry to that effect. The lack of such an entry is a circumstance strongly inconsistent with the successful completion of a flight review in the period October 1997 and October 1999. The only contradiction to the proposition is that there was another log book, lost by Mr Johnson, which covered the period. The facts do not permit the drawing of such an inference.

[63] If Mr Johnson had undergone another review those in the best position to know that he had done so were the respondent's chief pilot or some other employee, or Mrs Johnson. They had, as Thayer points out, a strong motive to make enquiries. No witness offered any basis for thinking Mr Johnson might have undertaken the review. The absence of any evidence suggestive that there was a review is significant. It leaves unanswered the circumstantial case in favour of the negative proposition arising from the absence of a notation in the log book. That case, I think, is a strong one given the (also strong) inference that the log book covered the relevant period.

[64] I would respectfully disagree with the primary judge and hold that the appellant had shown on 20 October 1999 Mr Johnson flew the aircraft without having in the two years immediately beforehand satisfactorily completed an aeroplane flight review.

[65] The appellant was therefore entitled to have the respondent's action against it dismissed unless s 54 of the Act operated to prevent that result. The section provides:

> "**54 Insurer may not refuse to pay claims in certain circumstances**
>
> (1) Subject to this section, where the effect of a contract of insurance, would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.
>
> (2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.
>
> (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) …
>
> (5) …
>
> (6) A reference in this section to an act includes a reference to:
>
> (a) an omission; and … ."

[66] The respondent submits that the appellant, as insurer, refused to pay a claim by reason of some omission of Mr Johnson ("some other person") which occurred after the policy was entered into so that s 54(1) applies to prevent the insurer refusing to pay the claim by reason of that omission.

[67] It was not necessary for the primary judge to deal with this issue, and his Honour did not do so, saying only:-

> "[20] It is therefore not necessary for me to consider, in the event there had been a breach of regulation 5.81(1), whether s 54 of the *Insurance Contracts Act,* would relieve the first defendant of that breach. I would mention however in passing that the opinions of the respective expert flight examiners called by the defendants did not convince me that the conduct of the kind which led to the crash in this instance would be likely to be detected at a biennial flight review. Rather, I preferred the evidence of Mr Appleton quoted above which suggested to me that pilots being reviewed could easily suppress bad habits and would be certainly unlikely to make such a fundamental error as attempting a takeoff with insufficient runway length. Were it necessary for me to do so I would regard s 54 as applying in the circumstances of this case."

[68] His Honour's opinion, given "in passing", dealt only with s 54(2), was not a considered one and did not give any reason for accepting part of the testimony of one expert witness over other parts of his evidence, or over the evidence of the other expert. The points to which s 54 give rise must be addressed by this Court.

[69] As the High Court noted in *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd* (1993) 176 CLR 332 at 339, the construction of the section "is not without difficulty", but the section has now been considered on several occasions which have served to elucidate the scope and operation of the section. For the section to apply there must be some act or omission of the insured, or some other person, by reason of which the insurer may refuse to pay a claim upon it. One must therefore identify an act which would allow the appellant to refuse the respondent's claim on it. The act identified here was an omission: Mr Johnson's not having satisfactorily completed an aeroplane flight review within two years of the flight the subject of the claim. But for that omission, so that argument ran, the pilot would not have been in breach of regulation 5.81(1), the aircraft would not have been operated in breach of the Regulation, and the policy exclusion would not apply.

[70] There is an immediate problem in characterising the prohibition on Mr Johnson's flying as an omission. The word carries with it an implication or connotation that the thing omitted, the thing not done, was something which was within the power of the omitter to have done. An omission may be deliberate or inadvertent, but whatever its cause one cannot, I think, be said to omit to do something which is beyond one's capacity to do. A candidate for an examination who fails is not ordinarily described as having omitted to pass. An athlete beaten in a contest does not omit to win.

[71] Regulation 5.81(1) requires a pilot to have satisfactorily completed an aeroplane flight review. The review is, obviously, not a formality. It requires a thorough investigation of a pilot's theoretical knowledge and practical skills by a duly qualified and experienced examiner. Whether the pilot satisfactorily completes the review depends upon the instructor's assessment of the pilot's performance.

[72] Mr Johnson did not omit to comply with regulation 5.81(1). The circumstance that he had not satisfactorily completed a flight review was not an omission as the word

is ordinarily understood and as it is, in my opinion, used in s 54. He may have omitted to undergo the review but what was required was that he complete the review to someone else's satisfaction. Obtaining that satisfaction was something Mr Johnson might achieve, or fail to achieve, but it was not something he could omit.

[73] For that reason s 54 does not assist the respondent's case. The section does not apply to the particular facts of this appeal. If this analysis is wrong the section is not applicable for another reason.

[74] In *Ferrcom* Brennan, Deane, Dawson, Gaudron and McHugh JJ said (339-340):

> "Section 54 prescribes the effect to be attributed to two classes of 'act': an act that 'could reasonably be regarded as being capable of causing or contributing to [the] loss' and an act that could not reasonably be so regarded. Sub-section (1) relates to acts or omissions occurring after the contract of insurance is entered into that could not reasonably be regarded as being capable of causing or contributing to the loss; sub-ss (2)-(4) relate to acts or omissions that could reasonably be regarded as being capable of causing or contributing to the loss."

[75] The distinction was repeated with evident approval in the joint judgment of Dawson, Toohey, Gaudron and Gummow JJ in *Antico v Heath Fielding Australia Pty Ltd* (1997) 188 CLR 652 at 670. Their Honours made two other points, saying (669-70):

> "Section 54 does not postulate a liability of the insurer to pay a claim which has been made. Rather, it takes as its starting point the existence of a claim and a contract the effect of which is 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'. …
>
> Section 54(1) … does not specify the act or omission of the insured as being a failure to discharge an obligation owed by the insured to the insurer. The legislation is expressed in broad terms and, on its face, there is no reason why the omission of the insured may not be a failure to exercise a right, choice or liberty which the insured enjoys under the contract of insurance. In any event, the act or omission may be that of a third party … who is unlikely to be a party to the contract of insurance … ."

[76] The dichotomy between acts which are, and those which are not, reasonably capable of contributing to the loss was not referred to in the judgments in *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641. McHugh Gummow and Hayne JJ analysed s 54 in terms which may make it unnecessary to consider the distinction. Their Honours said (658-9):

> "Close attention must be given to the elements with which s 54 deals: the effect of the contract of insurance between the parties; the 'claim' which the insured has made; and the reason for the insurer's refusal to pay that claim.
>
> Section 54 directs attention to the effect of the contract of insurance on the claim on the insurer which the insured has *in fact* made. It is

> not concerned with some other claim which the insured might have made at some other time or in respect of some other event or circumstance. It requires the precise identification of the event or circumstance in respect of which the insured claims payment or indemnity from the insurer. …
>
> … Section 54 does not permit, let alone require, the reformulation of the claim which the insured has made. It operates to prevent an insurer relying on certain acts or omissions to refuse to pay that particular claim. In other words, the actual claim made by the insured is one of the premises from which consideration of the application of s 54 must proceed. The section does not operate to relieve the insured of restrictions or limitations that are inherent in that claim."

[77] The claim made by the respondent on the appellant pursuant to the policy was for indemnity against its liability for damages payable to Mrs Johnson as compensation for her personal injuries. The policy did not offer indemnity in circumstances where the aircraft was flown by a pilot who had not satisfactorily completed a flight review within two years previous to the loss.

[78] As I understand the exegesis in *FAI Insurance*, for the purposes of applying s 54 one looks to see whether some act or omission entitles an insurer to refuse the claim actually made on it. If the claim was for indemnity in respect of a loss which the policy did not cover s 54 will not apply. The act or omission, assuming one is identified, cannot operate to reformulate the claim or, in this case, convert the claim from one in respect of the loss caused by a pilot who had not completed the flight review into a loss caused by a pilot who had completed a flight review.

[79] The section operates where there is a claim made on the insurer to which the policy responds but with respect to which an act or omission by the insured or some other person has the effect that the insurer may refuse to pay the claim. In that circumstance the section provides that the insurer may not refuse to pay the claim, subject to the conditions contained in the section itself. The section "directs attention to the reason founding the refusal" by the insurer to pay. The act or omission which "founds" the refusal cannot change the "event or circumstance in respect of which the insured claims … indemnity from the insurer". That is what, as I understand the argument, the appellant seeks to do here.

[80] From the description essayed in *Antico*, and endorsed in *FAI Insurance* (652), for the purposes of s 54 an act or omission is the performance, or non-performance, of some activity which the contract of insurance requires, allows or contemplates and which may affect its operation. The act or omission is not something which can bring about or alter the circumstances which give rise to a claim for payment or indemnity under a policy of insurance. This understanding of "act or omission" seems to follow from its designation as something which is not necessarily an obligation contained in the contract of insurance but may be the "exercise (of) a right, choice or liberty which the insured enjoys under the contract of insurance." The acts or omissions by reason of which the insurer may refuse to pay a claim are not acts or omissions which change the facts on which a claim is based.

[81] The cases illustrate the distinction. A number of them were concerned with an insured's failure to notify a change of circumstance to the insured's property, or an

occurrence which might give rise to a claim, or of a claim itself; or a failure to obtain the insurer's consent before undertaking a course of action. In those cases, *Ferrcom*, *Antico*, *FAI Insurance*, *Moltoni Corporation Pty Ltd v QBE Insurance Ltd* (2001) 205 CLR 149, the failures were held to be omissions by reason of which the insurer could, by the terms of the policy, have refused indemnity. Section 54 applied.

[82] By contrast where the act or omission was not something which the contract provided for but, on the hypothesis that the act or omission had not occurred, was something which would make the policy answer the claim, the section was held not to apply. In *Greentree v FAI General Insurance Co Ltd* (1998) 44 NSWLR 706 an insured made a claim on its insurer for indemnity against a liability to which the insured had become exposed. The policy promised indemnity for claims made against the insurer in a defined period. The claim was made on the insured outside that period. An argument that "some other person" had omitted to make a claim on the insured in the period of insurance was rejected. *Permanent Trustee Australia v FAI General Insurance Co Ltd* (1998) 44 NSWLR 186 was to the same effect.

[83] The appeal, in my opinion, is of the second type. It is not a case in which the omission gives rise to a right in the insurer, the appellant, to refuse the claim by reason of something in the policy. It is an omission which is relied on to give rise to a claim which the insured could not otherwise make. Because Mr Johnson had not satisfactorily completed the flight review, the respondent's claim for indemnity under the policy was excluded. The omission cannot change that, and is not of the kind with which s 54 is concerned.

[84] If I have misunderstood the authorities and it is necessary to consider whether the omission (assuming there was one) in question could reasonably be regarded as being capable of causing or contributing to the loss so as to determine whether the case is within s 54(1) or s 54(2) I would conclude it was of the latter kind.

[85] The parties appeared to agree. The principal focus of the evidence and argument centred on s 54(2), pursuant to which an insurer may refuse to pay a claim where the omission in question "could reasonably" be regarded as "being capable of causing or contributing to a loss in respect of which insurance cover is provided by the (policy)."

[86] There was, in this case, ample evidence that a successfully completed aeroplane flight review could have addressed Mr Johnson's demonstrated shortcomings as a pilot and improved his skills. The omission, the failure to undergo the review, could reasonably be regarded as causing or contributing to the crash on 20 October 1999.

[87] The Civil Aviation Authority issued an advisory publication in November 2007:

> "to explain the philosophy and intent of a flight review and to provide guidance to the pilots undertaking a flight review … ."

[88] The publication contained the following:

> "4.2 … With the passage of time and lack of practice some skills and knowledge can degrade. A flight review affords the opportunity to restore these degraded skills and gain new knowledge.

4.3 … The flight review, although important … is one process that contributes to the safety of a flight. …

…

5.1 … the process of undertaking a biennial assessment of a pilot's skills and knowledge is referred to as a flight review. …

…

8.1 … the purpose of a flight review (is) to ensure that the pilot is safe to operate an aircraft. … 'safe' means that a manoeuvre or flight is completed without injury to persons, damage to aircraft or breach of aviation safety regulations … . …

8.2 In the time available to conduct a flight review, it would be unrealistic to attempt to assess all of a pilot's skills and knowledge. However, it is possible and important to evaluate and guide a pilot through those safety-critical items of skills and knowledge or elevated risk that, if deficient, could result in 'damage to aircraft and/or injury to persons'. Some sequences that, if not conducted properly, could lead to damage or injury … are:

…

- steep turns and slow flight;

…

- take-off, approach and landing;

…

- management of emergencies; and
- application of threat and error management and human factors practice.

…

8.4 … assessors should design a flight review that is appropriate for the applicant. … Applicants should accurately detail what flying they have completed over the last two years, and what flying they anticipate they will undertake in the future. It is also important to explain any areas of skills or knowledge where they feel deficient.

…

10.1 A flight review … should take a minimum of about two hours. This would entail an hour of discussion and questions and one hour of flight time. Realistically, a pilot should set aside at least half a day to meet this requirement. …

…

14.1 When a pilot successfully completes a flight review, the person conducting the review must make an entry into the pilot's log-book stating that he … has successfully completed the flight review."

[89] All of the pilots who gave expert evidence were very critical of Mr Johnson's flying prowess. All thought that a flight review should have identified the worst of his bad habits and encouraged him to address them. He would have had to do so to complete the review satisfactorily.

[90] Mr Appleton, called by the defendant, said in his report:

> "… at Charters Towers we have a report of Mr Johnson being agitated and in a hurry to leave. He was probably thinking more about the reason for the trip than the job at hand … of flying the aircraft.
>
> …
>
> A (flight review) is a skills check by an authorised Flight Instructor … . It operates in a similar way to a firewall on a computer or a piece of chain mail on a soldier. If all the other parts are not maintained to the same high standard then even the best conducted (flight review) will not assist in stopping an accident from occurring.
>
> … whilst a … Flight Review can pick up discrepancies in a pilot's abilities and, depending entirely on the discipline of the person conducting the review, Mr Johnson's skills could have been honed, but a number of disturbing events point to poor habits and traits e.g.
>
> - He carried on in thick smoke which could have reduced the visibility below the minimum of 5km required for Visual Flight Rules
> - He appeared so intent on getting home to Weipa that his own safety and that of his passengers took second (or last) place in his thinking
> - He forgot both a bag AND his seatbelt prior to take off
> - He apparently failed to use all of the runway available
> - It is my opinion that he did not have his mind on the job of flying at a most critical time – taking off."

[91] In oral evidence Mr Appleton said that the review was "an opportunity to … see how his pilot technique is", and that the review was "one element in the safety culture" which might have prevented the accident, though if "other elements of self-discipline and concentration … are falling apart" a flight review would not "guarantee anything". He agreed that by not taking a biennial flight review a pilot has "given away one of the defences against an accident." According to Mr Appleton "the point of having a (flight review) … is for the testing officer to try to identify bad habits that pilots accumulate from time to time", and that "a good testing officer will try to find a bad habit and if it … looks like it's persistent, encourage the pilot to get more retraining".

[92] Mr Appleton also expressed the opinion, noted by the trial judge, that the effectiveness of a flight review "depends entirely on the discipline of the person conducting the review as to what is found" and therefore depends also "on the discipline of the person being reviewed", by which he presumably meant that a candidate for the review might conceal the shortcomings from the instructor.

[93] That observation necessarily implies that a pilot knowing that he lacks a skill or aspect of knowledge that will impair his ability to fly safely, and imperil his own

life, will conceal the deficiency from an instructor who might assist him to remedy it. Accepting that the effectiveness of the review of a pilot who endeavoured to conceal faults depends on the astuteness of the instructor it follows that an astute instructor will detect the attempt at concealment and examine what lies behind.

[94] Mr Crocker's opinion was expressed forthrightly. Having noted the pilot's errors he said, in summary:

> "By not undertaking the (flight review), the pilot … removed a major component of the safety strategy, which in my opinion was a direct causative factor in this accident."

He expanded the point:

> "Rushing is a common symptom which results in numerous accidents or incidents. This is the type of phenomena an examiner will look for during a (flight review) and give the pilot advice and or techniques on how to fix it. Rushing leads to errors, mistakes, poor planning or omissions.
>
> …
>
> There are two aspects to a (flight review) and both are important to the goal to keeping aviation risks for the pilot at, or below, an acceptable level. Both elements (refreshing skill and knowledge, and the independent assessment) are equally important and the process should be a collaborative endeavour between the pilot undergoing the review and the assessor conducting it. The aim is for the pilot to show the assessor what he … can do, and the assessor is looking for lapses or changes in process or skills."

[95] Mr Crocker also said:

> "A (flight review) is one … defence (against accidents). The (flight review) is an opportunity for a pilot to have an independent assessment of his … skills and competency checked and corrective action undertaken until the pilot reaches the required level of skill. In Mr Johnson's case, there is plenty of evidence that he had developed a lot of problems that would have required fixing before his (flight review) could have been issued."

[96] The evidence just reviewed, has only one conclusion. A flight review is a defence against pilot error which might cause an aircraft to crash. Its function is to ensure pilots have an appropriate level of skill and apply that skill to the task of flying. It is performed by qualified instructors whose responsibility is to observe practices or habits of a pilot that might affect flight safety, even in those pilots who endeavour to conceal their shortcomings. One area for examination is the technique of taking off. Mr Johnson had a tendency to rush and overlook basic safety requirements as a consequence. These are the sorts of attitudes and practices which a flight review is meant to identify and correct. If not corrected satisfactorily the pilot under review may not fly.

[97] It is not to the point that Mr Johnson might have satisfactorily completed a flight review by concealing his deficiencies in flying technique from the instructor, or by applying himself to the examination more conscientiously than it appears he did in everyday flying. The test is whether the omission, not undergoing the review, could

reasonably be regarded as being capable of contributing to the loss. The failure to undergo the review could be so regarded because:

(i) The loss was caused by pilot error.
(ii) Mr Johnson had many faults as a pilot.
(iii) The purpose of a flight review is to check for pilot faults; and
  (a) correct them; or
  (b) prevent the unskilful pilot from flying.
(iv) An astute instructor will detect faults even where the candidate tries to conceal them.

[98] The respondent did not attempt to prove, as s 54(3) allows, that no part of its loss was caused by Mr Johnson's omission to undergo a flight review.

[99] Section 54 does not assist the respondent. Judgment should have been given for the appellant.

[100] I would allow the appeal and order that the judgment given on 18 March 2010 whereby the appellant was ordered to indemnify the respondent against the plaintiff's claim be set aside. The further orders made on 19 March 2010 by which the appellant was ordered to pay the respondent's costs of and incidental to the third party proceeding and the respondent's costs of and incidental to defending the plaintiff's claim to be assessed on the indemnity basis should be set aside. The respondent should pay the appellant's costs of the trial and of the appeal.

[101] **WHITE JA**: I have read the reasons for judgment of Chesterman JA and agree with the orders proposed by his Honour for the reasons that he gives.