SUPREME COURT OF QUEENSLAND

CITATION:	*Cassa Bedding Pty Ltd v Insurance Australia Ltd* [2022] QSC 1
PARTIES:	**CASSA BEDDING PTY LTD** ACN 168 144 803 (plaintiff) **v** **INSURANCE AUSTRALIA LTD** ABN 11 000 016 722 (defendant)
FILE NO/S:	BS 8778 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 January 2022
DELIVERED AT:	Brisbane
HEARING DATE:	16, 17, 18, 19, 20, 23, 24, 25, 26, 27 November 2020; 9 December 2020; supplementary submissions on behalf of the plaintiff dated 14 December 2020; supplementary written submissions on behalf of the defendant dated 15 December 2020; further submissions by email on behalf of the parties dated 22 March 2021; supplementary submissions on interest calculations dated 17 September 2021
JUDGE:	Burns J
ORDER:	**THE ORDERS OF THE COURT ARE THAT:** **1. The claim is dismissed.** **2. Judgment is entered for the defendant on the whole of the claim.** **3. The parties are directed to file and serve submissions (not exceeding five pages) as to the appropriate order for costs within fourteen days.**
CATCHWORDS:	INSURANCE – property insurance – factory fire – where the plaintiff claimed indemnity for property and other economic loss occasioned by the fire under a policy of insurance with the defendant – where the claim was denied by the defendant – where the denial of indemnity was based on an allegation that the sole director of the plaintiff deliberately started the fire – whether the fire was deliberately started by the sole director of the plaintiff – whether the claim for indemnity was excluded under the terms of the policy of insurance – whether the claim for indemnity was made fraudulently

Insurance Contracts Act 1984 (Cth), s 54(2), s57
Insurance Contracts Regulations 1985 (Cth), reg 32.

Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation [1983] 1 NSWLR 1; 44 ALR 607, cited
AMP Fire & General Insurance Co Ltd v Collie (1991) 6 ANZ Ins Cas 61-082, cited
Beaven v Wagner Industrial Services Pty Ltd [2018] 2 Qd R 542, cited
Belhaven & Stenton Peerage (1875) 1 App Cas 278, cited
Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1, cited
Briginshaw v Briginshaw (1938) 60 CLR 336, followed
Browne v Dunn (1893) 6 R 67, applied
Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588, cited
De Gruchy v The Queen (2002) 211 CLR 85, followed
Forster v Hunter New England Area Health Service (2010) 77 NSWLR 495, cited
Gugliotti v Commercial Union Assurance Co of Australia (1992) 7 ANZ Insurance Cases 61-104, cited
Helton v Allen (1940) 63 CLR 691, cited
Leigh v Bruder Expedition Pty Ltd [2020] 6 Qd R 475, followed
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705, cited
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449, cited
NRMA Insurance Limited v Collier & Anor (1997) 9 ANZ Ins Cas 61-337, cited
Palmer v Dolman [2005] NSWCA 361, cited
R v Morrow (2009) 26 VR 526, cited
Rama Furniture Pty Ltd v QBE Insurance Ltd (New South Wales Court of Appeal, 20 June 1986, unreported), cited
Raso v NRMA Insurance Ltd [1992] NSWCA 202, cited
Rejfek v McElroy (1965) 112 CLR 517, cited
Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 5) [2019] QSC 210, cited
Seltsam v McGuiness (2000) 49 NSWLR 262, cited
Sgro v Australian Associated Motor Insurers Ltd (2015) 91 NSWLR 325, cited
Sachin Sharma v Insurance Australia Ltd trading as NRMA Insurance [2017] NSWCA 307, cited
To v Australian Associated Motor Insurers Ltd (2001) 3 VR 279, cited
Transport Industries Insurance Co Ltd v Longmuir [1997] 1 VR 125, followed
Trimboli & Ors v Royal Insurance Australia Limited (1983) 2 ANZ Ins Cas 60-500, cited
Walton v Colonial Mutual Life Assurance Society Ltd (2004) 13 ANZ Ins Cas 61-620, cited

COUNSEL:	A Duffy QC, with M Stunden, for the plaintiff R Douglas QC, with K Horsley, for the defendant
SOLICITORS:	Piper Alderman for the plaintiff Holman Webb for the defendant

[1] The plaintiff, Cassa Bedding Pty Ltd, operated a bed manufacturing and wholesale business from leased factory premises at Yeerongpilly. On the evening of Saturday, 29 August 2015, the factory burnt to the ground and all contents (including Cassa's equipment, manufacturing supplies and completed stock) were incinerated. In consequence, the business conducted by Cassa was not just interrupted, it was brought to a standstill.

[2] Cassa promptly made a claim on its policy of insurance with the defendant, Insurance Australia Ltd (formerly CGU Insurance Ltd). However, after a lengthy investigation, IAL refused to pay the claim, alleging instead that the fire had been deliberately started by Cassa's sole director, Mr John Cassimatis.

[3] By this proceeding, Cassa claims damages for breach of the policy. IAL denies that it is liable and seeks to call in aid an express exclusion under the policy for loss or damage caused by the wilful act of the insured (or of another party with the knowledge and consent of the insured) whilst otherwise maintaining that the claim on the policy was made fraudulently within the meaning of s 56(1) of the *Insurance Contracts Act* 1984 (Cth).

[4] For the reasons that follow, I am satisfied to the standard required for proof of such a grave allegation that Mr Cassimatis was responsible for the fire and, therefore, the loss.

[5] Cassa's claim must be dismissed, and judgment entered for IAL together with costs.

Background to the fire

[6] At the time of the fire, Mr Cassimatis was 54 years of age and resided with his wife, Mrs Jinhwa Cassimatis, and their children at an address in Mount Ommaney, a 20 to 25 minute drive from the Yeerongpilly factory.

[7] Mr Cassimatis has a long history in bed manufacture and sales, stretching back to 1992. Until late 2013, he worked in a succession of different roles in the bed industry including as account executive, factory manager, operations and logistics manager, manufacturing manager, manufacturing consultant, general manager, group general manager and managing director. Along the way he was employed by several national brands including Sealy, Fantastic Furniture and Sleepeezee.

Mattress Innovations Pty Ltd

[8] From early 2007, Mr Cassimatis was also the sole director and shareholder of his family company, Mattress Innovations Pty Ltd. That company was the owner (as trustee for the Rocklea Property Trust) of a factory situated on Ipswich Road, Rocklea, vacant land situated on nearby Franklin Street (with planning approval for the construction of an automated truck wash) and a two-block residential subdivision on the Brisbane River at Fig Tree Pocket.

[9] On 25 April 2007, the factory at Rocklea was destroyed by fire. The insurer (Suncorp Metway) answered the policy, paying a claim of approximately $1.6 million to Mattress Innovations in or about August 2007, after which the factory was re-built. When the Global Financial Crisis became manifest in 2008, the builder of a house that had been partially constructed on one of the blocks at Fig Tree Pocket went into receivership and, by the time the house was completed by another builder, the property proved difficult to sell in the drastically changed market.

[10] In addition, the subdivision as well as the re-built factory at Rocklea were inundated with water in the January 2011 floods. The insurer of the factory (Allianz) paid for the cost of repairing the flood damage but its market value, like the Fig Tree Pocket property, was adversely affected by the floods. According to Mr Cassimatis, the combined value of the two properties dropped from approximately $4 million to approximately $2.2 million. Both were mortgaged to the National Australia Bank and the mortgage debt was further secured by a personal guarantee from Mr Cassimatis. NAB required Mattress Innovations to either reduce its borrowings or sell the properties. The properties were sold but a significant shortfall was left owing. Ultimately, on 11 June 2015 Mattress Innovations entered into what Mr Cassimatis described as a "confidential deed" with NAB in which the latter "accepted $20,000 in full settlement of a debt of about $1.7 million".

Cassa Bedding Pty Ltd

[11] About 18 months earlier, in December 2013, Mr Cassimatis became aware that a mattress manufacturing business conducted in part of an industrial precinct on the southern side of Station Road, Yeerongpilly was in financial difficulty. The owner of the business was Stromatas Bedding Pty Ltd and it was the lessee of the part of the precinct used by the business. Although Mr Cassimatis was employed at the time as a group general manager at Sleepeezee, he was looking to start up his "own manufacturing operations". He saw Stromatas' plight as an opportunity to do so.

[12] To that end, Cassa Bedding Pty Ltd was registered on 14 February 2014 and, as already mentioned, Mr Cassimatis became its sole director. He was very much the driving force for the company or, as he described his role, the person who was "principally engaged in the management and decision making". Its sole shareholder was Blue Park Pty Ltd as trustee of the Jinhwa Cassimatis Family Trust. Mrs Cassimatis was the sole director and shareholder of Blue Park. Because of his "ongoing issues with NAB", Mr Cassimatis had been advised by his accountant to have "everything of value in [his wife's] name and everything with risk remaining in [his] name".

[13] Mr Cassimatis reached agreement with Stromatas on behalf of Cassa to purchase (or take over leases for) its equipment for "about $190,000". Cassa took an assignment of the lease of the premises occupied by Stromatas and agreed to employ several of the existing staff and accept responsibility for their accrued entitlements (excluding accrued superannuation). The purchase was funded by a loan from Mrs Cassimatis who, in turn, used income from the Rocklea Property Trust and credit in a joint overdraft account to make the advance.

The factory premises

[14] The particular building in the industrial precinct that had been leased by Stromatas

was Unit 281 and, as more space was leased by Cassa in the precinct, it became known as the "main factory". This was the building that was later destroyed by fire. Cassa entered into a lease of Unit 281 on 21 March 2014 for an initial term expiring on 30 April 2015, although it appears to have gone into possession and commenced business a day or so before the lease was executed. When the initial term expired, the lease continued on a month-to-month basis while negotiations for a new lease took place. They had not been finalised by the time of the fire.

[15] Cassa later expanded its Brisbane footprint, acquiring leases of Units 241A and 241D in the Yeerongpilly precinct in March and July 2015 respectively. These Units were situated on the western side of the main factory but separated by an internal road and carparking area. Once acquired, Unit 241A was used for timber manufacturing, spring unit storage and un-bailing and Unit 214D was used for manufacturing headboards and specialty upholstery.

Operations

[16] After commencing business in March 2014, bedding products were manufactured and supplied locally in the main but, before the end of the year, Cassa was looking to expand its business in significant ways and this included pursuing commercial opportunities with a national franchise known as Beds N Dreams as well as with a number of other national bedding retailers such as Beds R Us and the Australian Comfort Group along with several independent retailers.

[17] By December 2014, Cassa was supplying an increasing volume of product to Victoria and, in particular, to a Mr Daniel Tran. Mr Tran operated four Beds N Dreams outlets in the greater Melbourne region. To service this market, Cassa entered into a lease of a warehouse in Sunshine North, Victoria in February 2015. The lease was for three years with an option exercisable by Cassa by February 2016 to purchase the warehouse for a fixed price. Mr Cassimatis saw this move as a way to increase supply to Beds N Dreams in Victoria and also as a stepping-stone to supply Beds N Dreams stores in New South Wales. Indeed, by May 2015, he had already started to look for suitable premises in Sydney. According to Mr Cassimatis, he became interested in setting up a warehouse as well as a factory to enable Cassa to not only store mattresses that had been manufactured in Brisbane prior to delivery to Sydney outlets but also to manufacture mattresses in Sydney. He hoped to do all of this by October 2015.

[18] Around the same time, Mr Cassimatis was also giving consideration to the establishment of a factory in Vietnam. According to him, this could:

> "[S]upplement the ranges of product made by Cassa as part of its business generally, whilst still maintaining local manufacturing of headboards, bases and mattresses in Queensland, Victoria and New South Wales (once the Sydney factory had been set up)."

[19] As it happened, in addition to his Beds N Dreams outlets in Victoria, Mr Tran operated a number of retail mattress stores in Vietnam. Mr Cassimatis discussed his expansion plans with Mr Tran and, on 5 May 2015, the pair travelled to Vietnam to inspect Mr Tran's stores as well as a number of factories in Ho Chi Min City that were thought suitable for the manufacture of mattresses, headboards and bed bases. For Mr Cassimatis, "the real attraction of Vietnam was the low labour costs". As he explained:

> "You could make high volume, low cost product and make a profit, which you cannot do in Australia."

[20] Mr Cassimatis made further trips to Vietnam on 14 June and 27 July 2015 and, by 29 July, he was in negotiations with King Koil, an American mattress brand owned by a Malaysian consortium. He hoped to secure a licence to manufacture and distribute its products in Vietnam. Another trip followed on 9 August 2015 and, after the fire, on 25 September 2015. The September trip was necessary, Mr Cassimatis said, because he was "in the middle of negotiating the [licence] agreement with King Koil".

[21] Mr Cassimatis had it in mind to utilise some surplus equipment to set up a factory in Vietnam but accepted that it would be difficult to do so unless the equipment was not locally available. He also secured agreement in principle from Cassa's factory manager, Mr Bob Franklin, to travel to Vietnam to train local staff in the event that a factory could be established in that country.

[22] In a conceptual sense at least, Mr Cassimatis' plans for expansion into Vietnam were reasonably advanced. He gave this account:

> "I consider that if the [fire] had not occurred, I would have set up Vietnam before mattress manufacturing in Sydney. I still would have set up the Sydney factory by October 2015, but that factory would not have mattress manufacturing capabilities for some time. I already had interest from Beds N Dreams for a product manufactured in Vietnam, being an imported low-end product into Australia. Beds N Dreams had an import program at the time for low end product. I recall having a conversation with … the owner of a Beds N Dreams store in South Australia, who asked when he could order a container if I did set up in Vietnam. I could already see potential in this area of the bedding manufacturing market."

[23] At the time of the fire, the Yeerongpilly factory had a manufacturing capacity of around 80 to 120 mattresses per day with, again according to Mr Cassimatis, an ability to increase production to 175 to 220 mattresses per day if staffing levels were increased. In addition to mattresses, the factory also manufactured bed bases and headboards and that work accounted for about 30% of the factory's output.

Beds N Dreams

[24] Mr Donald McDonald has been a "lifelong friend" of Mr Cassimatis or, as Mr Cassimatis put it when giving evidence at the trial, they are "best mates". After attending school together, for a time they worked together at Crown Posture Bedding where Mr Cassimatis was the managing director and Mr McDonald was the general manager of operations for Queensland. Between November 2006 and October 2013, Mr Cassimatis was the group general manager of Sleepeezee and, from around 2007 to 2012, Mr McDonald also worked for that company as the general manager of its Queensland branch after Mr Cassimatis asked Mr McDonald to move across from his employment at SleepMaker.

[25] In or about 2012, Mr Cassimatis first met Mr Rees Wegenaar, the effective owner of the Beds N Dreams franchise and the master franchisor for Beds N Dreams stores in New South Wales. Subsequently, Mr McDonald told Mr Cassimatis that he was thinking of leaving Sleepeezee to start his own business and that he was considering buying a Bedshed franchise. Mr Cassimatis spoke to Mr McDonald about Mr

Wegenaar and the possibility of a Beds N Dreams franchise, making the point that such a franchise would be "much cheaper" than a Bedshed franchise. Mr Cassimatis then put Mr McDonald in touch with Mr Wegenaar.

[26] In due course, Mr McDonald acquired the Beds N Dreams franchise for Queensland through his company, Tarasco Pty Ltd. Mr Cassimatis decided to invest in the business and, to that end, $134,500 was advanced to Tarasco via the Cassimatis Superannuation Fund on 9 January 2012. The intention was that, through this advance, Mr Cassimatis would acquire "something like an informal 49% share of the business". According to Mr Cassimatis, he had faith in Mr McDonald at this early stage and "had no issue investing in him" but, after a disagreement regarding the site of the first store, Mr Cassimatis decided that he "did not want to be involved in the business". Again according to Mr Cassimatis, their "informal arrangement" was terminated by mutual agreement prior to the commencement of trading later in January 2012 at Tarasco's first store in Aspley.

[27] On 16 January 2012, Tarasco repaid $84,000 of the advance from the Cassimatis Superannuation Fund, leaving a balance owing of around $50,000 which was treated by the parties as a loan to be repaid as and when Tarasco could do so. However, within barely a month, Mr Cassimatis (or the interests he and Mrs Cassimatis controlled) loaned more money to Tarasco ($54,264) and, over time, assisted with the provision of racking and at least one further advance ($60,000) to establish another Beds N Dreams store in Windsor in May 2014. Mrs Cassimatis was also employed by Tarasco in various capacities over time and Mr Cassimatis assisted Mr McDonald in the running of the business until, at least, Cassa commenced operations. From that point on, Cassa became a supplier to Tarasco, although the extent to which Mr Cassimatis also continued to be involved in the business and the precise nature of his interest in it, if any, was not satisfactorily established at the trial. The evidence on that point, voluminous though it was, went to the existence of a possible motive on Cassa's part (through the agency of its director) to burn down the factory but, for reasons later expressed,[1] this alleged motive could not be established to the standard required in a case such as this.

[28] All that remains to be recorded at this juncture is that, in addition to the funds advanced by the Cassimatis interests to Tarasco, Mr Wegenaar also loaned money to Tarasco through his company, Amal Pty Ltd. That occurred in April 2012 and was in a substantial amount (with two subsequent variations) and Tarasco's repayment obligations were guaranteed by Mr and Mrs Cassimatis. Mrs Cassimatis also provided mortgage security for the loan over a property registered in her maiden name (Jin Hwa Kwak) at Oxley.

FactorOne

[29] Mr Andrew Hawes was employed by Cassa as its internal accountant in its early months of operation. At his suggestion, Cassa decided to factor its invoices in order to better manage the company's cashflow.

[30] Scottish Pacific Business Finance Pty Ltd trading as FactorOne was the chosen debt factoring business. To that end, Cassa entered into a Debtor Finance Facility Deed and General Security Deed with Scottish Pacific on 22 September 2014. The way in

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1 At [142] – [148] below.

which these agreements operated was that Cassa would submit invoices to FactorOne for payment. FactorOne would then review the invoices and either approve them or disapprove them based upon an assessment of the creditworthiness of the customers. If approved, Cassa could request payment of up to 80% of the value of the invoice, in exchange for which it would pay a management fee of 1.2% of the value of the invoice together with interest on the amount paid calculated at 1.5% above the then prevailing ANZ Bank Reference Rate. When the customer paid the invoice to FactorOne, the amount received was credited to Cassa's account to pay down the amount drawn and, at this time, the remaining 20% of the value of the invoice would be released.

[31] If an approved invoice was not paid within 90 days from month end, the invoice would automatically be classed as disapproved. This meant that, when an account was not paid for 90 days, Cassa's borrowing capacity would reduce by 80% of the amount of the invoice. In that circumstance, FactorOne could call upon Cassa to repay the amount by which the approval ending limit was reduced because of the disapproved invoice. It was therefore important for clients such as Cassa that their customers pay within 90 days from the month's end. As Mr Michael Byrne, a client manager with FactorOne, swore:

> "In overview, the arrangement was simply an advance from FactorOne to Cassa on the security of the invoices issued by Cassa. Cassa assigned the debts to FactorOne and FactorOne collected the debts directly from customers. However, pursuant to the agreements, Cassa owed FactorOne the amount advanced. If customers did not pay invoices such that there was a shortfall Cassa was liable for that shortfall."

[32] The Facility Deed included a guarantee for the indebtedness of Cassa from Mr Cassimatis and also from Blue Park in its own right and as trustee of the Jinhwa Cassimatis Family Trust. Under those securities, if Cassa failed to pay the amount that had been advanced by FactorOne, FactorOne could have sought recovery from both Mr Cassimatis and Blue Park.

[33] The original limit of the credit facility provided by FactorOne to Cassa was $800,000. Put another way, FactorOne could loan Cassa up to $800,000 provided invoices to the value of $1 million dollars were supplied. In April 2015, Cassa approached FactorOne with a request to increase the facility limit from $800,000 to $1.2 million. On the making of that request, FactorOne engaged Hall Chadwick to conduct an audit of Cassa to enable a decision to be made whether to increase the facility limit. Hall Chadwick subsequently provided an audit report on 19 May 2015 and, based on it, FactorOne agreed to increase the facility limit to $1.2 million. However, as Mr Byrne swore, the report identified that Tarasco was "a potential problem because of the concentration of this one client to Cassa's overall debt and because they often ran close to the 90 day payment period". Mr Byrne continued:

> "One client (Tarasco Pty Ltd) owned several Beds N Dreams stores including Fortitude Valley and they were all grouped from FactorOne's perspective. Before the audit the approved limit for this one customer was $400,000 and 40%, meaning that debt for this customer above that amount and that concentration of the overall debt would not be approved … While the overall limit was increased to $1,200,000, the limits that applied to Beds N Dreams Fortitude Valley did not increase."

[34] The auditor, Mr Nguyen, gave evidence at the trial. He agreed that the concerns he expressed about Beds N Dreams Fortitude Valley could have been addressed, and satisfactorily so, by the registration of a Personal Property Security Register interest over the goods supplied by Cassa.

Events after the fire

[35] The fire was investigated by Queensland Fire and Emergency Services as well as the Queensland Police Service. Although the QFES investigation is discussed in more detail below,[2] only limited evidence was placed before the court regarding the QPS investigation. In any event, for present purposes it is enough to record that Mr Cassimatis has consistently denied having any involvement in the starting of the fire and that no person has been charged with any criminal offence in relation to it.

The Insurer's investigations

[36] IAL appointed loss adjusters (Cunningham Lindsey Australia) to look into the circumstances of the fire, and that occurred at a very early stage. Indeed, one of the fire experts who gave evidence at the trial, Mr Murray Nystrom, was retained by the loss adjusters on 1 September 2015. To that end, he examined the fire scene the very next day and took a series of photographs before producing a preliminary report on 3 September 2015. Then, on 30 September 2015, a senior investigator employed by Verifact Investigations Pty Ltd, Mr Jason Ostrofski, was commissioned to undertake an investigation "into the circumstances surrounding the fire with a view to ascertaining whether or not John Cassimatis, or someone acting on his instructions, lit the fire". Mr Ostrofski did so and, on 23 November 2015, produced a report which was provided to IAL's solicitors on or about that date.

The claim on the policy

[37] In the meantime, on 16 October 2015, Cassa made a claim for indemnity under the policy.[3] IAL formally declined indemnity by letter dated 2 February 2016, alleging that the fire was "caused by arson" and that the perpetrator was Mr Cassimatis.

Cassa ceases business

[38] Because IAL refused indemnity, Cassa lost the ability to replace the contents of the factory, including the equipment, destroyed in the fire and it could not (and did not) resume operations. It formally ceased business in February 2016.

[39] On 14 June 2016, Cassa was placed into voluntary administration.

Bedco Pty Ltd

[40] Three months earlier, in March 2016, Bedco Pty Ltd was registered, and later commenced business as a manufacturer and wholesaler of mattresses and bedding products. Blue Park, in its capacity as trustee of the Jinhwa Cassimatis Family Trust, became the owner of 30% of the units in a unit trust in respect of which Bedco Pty Ltd conducts the business. Mr Cassimatis was, and at least up until the time of trial remained, the day-to-day manager of the business conducted by Bedco.

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2 See [56] – [58] below.

3 An interim claim had earlier been made (15 September 2015).

Litigation

[41] This proceeding commenced by the filing of a claim and statement of claim on 30 August 2016.

[42] In its fourth amended statement of claim filed on 6 May 2020, Cassa purported to accept IAL's failure to discharge its indemnity obligation under the policy of insurance as a repudiation of that contract.

The policy of insurance

[43] A week or so before Cassa was registered in February 2014, Mr Cassimatis contacted an insurance broker, Mr Sebastian Brancati of Alliance Insurance Broking Services, to arrange cover in relation to the factory. In due course, a policy of insurance was secured with IAL[4] for a period of 12 months commencing on 26 March 2014.

[44] Prior to the placing of cover, IAL caused a risk survey to be conducted with respect to the factory, and that exercise was repeated prior to the renewal of the policy in March of the following year. Mr Hawes deposed to having driven the renewal process and swore that he was concerned to avoid underinsurance given the quantity of raw materials being held at the factory. Also, in February 2015, the contents and stock at the Sunshine North factory were added to the policy. Then, when the policy was renewed in March 2015, coverage was increased in a number of respects. For example, stock was increased from $350,000 to $600,000, business interruption insurance (gross income) was increased from $2.5 million to $3.5 million and various motor vehicles were added.

[45] By June 2015, Cassa had commenced operating from Units 241A and 241D and, accordingly, additional cover was needed. Mr Cassimatis contacted Mr Brancati to that end, and the policy was varied to include these additional risks.

The agreed limits under the policy

[46] The operative policy of insurance with IAL provided cover to 26 March 2016. Excluding the Sunshine North factory, the limits of indemnity under the policy were:

(a) Contents (excluding stock) - $2.31 million;

(b) Stock - $695,000;

(c) Business interruption - $3.5 million (gross income);

(d) Payroll - $520,000;

(e) Increased cost of working - $550,000;

(f) Claim preparation - $25,000;

(g) Re-writing of records - $25,000.

[47] The critical parts of the policy terms from the point of view of recovery in this case are those that are concerned with loss or destruction of property and lost income.

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4 As earlier noted, IAL was then named CGU Insurance Ltd.

[48] So far as the former is concerned, IAL agreed to pay the cost of rebuilding, replacing or repairing any damaged property to the same condition as when it was new, or where appropriate, in accordance with what is described as an "output replacement" clause in the policy.[5] By that clause, where property is replaced by an item which has a greater total function, capability or output than the destroyed property and the newly installed cost of replacement is greater than the replacement value of the property destroyed, then the basis of settlement was agreed to be the lesser of the reinstatement value or that proportion of the newly installed cost of the replacement item which the output of the damaged property bore to the output of the replacement item. If the reinstated value of the property was not ascertainable then the basis of settlement was agreed to be the cost of the newly installed replacement item.

[49] Of importance also are the contractual features that IAL was not obliged under the policy to pay any more than the sum insured or the limit of liability for each cover section in the policy schedule and there was otherwise no entitlement to a cash payment for lost or destroyed property. Rather, the promised indemnity was based on the cost of replacement with a deduction if the capacity, for example, of new equipment increased. The importance of that point in this case is that, in order for Cassa to become entitled to recover anything for the plant and equipment lost in the fire, it was obliged to actually replace the equipment. The cost of doing so was estimated to be $2.9 million but, given the limit of indemnity for contents, the most Cassa could recover under the policy was $2.3 million.

[50] As for business interruption, IAL's liability was limited to the loss of gross profit during the indemnity period and a separate amount for increased cost of working, that is to say, the additional expenditure necessarily and reasonably incurred for the purposes of avoiding or diminishing the loss of gross profit. The loss of gross profit was to be calculated under the policy as that sum by which the gross profit earned during the indemnity period falls short of the gross profit earned during that period during the 12 months immediately before the date of loss which corresponded to the indemnity period.[6] However, the calculation of loss was also subject to an adjustments clause and an averaging provision. The adjustments clause provided for adjustments to be made to allow for the trend of the business and for other variations in, or other circumstances affecting, the business either before or after the loss so as to ensure "that the adjusted figures [would] represent as nearly as may be reasonably practicable the results which, but for the damage, would have been obtained during the relevant period after the damage".[7] Again, IAL was not obliged to pay any more than the limit of liability, here, $3.5 million for business interruption and $550,000 for increased cost of working.

The relevant policy exclusion

[51] The General Exclusions section of the policy included the following provision:

> "**Wilful Acts**
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> Subject to the provisions of the *Insurance Contracts Act* 1984, we will not pay for any loss or damage caused by either Your wilful act or by the wilful act of

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5 Clause 44.9.
6 Clauses 44.15 and 44.17.
7 Clause 44.18.

> another party committed with Your knowledge and consent and which You were capable of preventing."

[52] Plainly, loss caused by the deliberate lighting of a fire by the sole director of the insured will constitute a "wilful act" within the meaning of this exclusion and, where proved, will provide a basis for the insurer to refuse to pay under the policy.

Fraudulent claims

[53] Section 54 of the *Insurance Contracts Act* relevantly provides that, where the effect of a contract of insurance would be that the insurer may refuse to pay a claim by reason of some act of the insured or some other person, the insurer may not refuse to pay the claim by reason only of that act. Instead, the insurer's liability in respect of the claim will be reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act. However, this provision has no application to fraudulent claims because any such claim (if properly characterised as such) would fall squarely within the terms of s 56(1) of the Act.[8]

[54] Section 56(1) of the *Insurance Contracts Act* is in the following terms:

> "**56 Fraudulent claims**
>
> (1) Where a claim under a contract of insurance, or a claim made under this Act against an insurer by a person who is not the insured under a contract of insurance, is made fraudulently, the insurer may not avoid the contract but may refuse payment of the claim."

[55] The term, "fraudulently", is not defined by the *Insurance Contracts Act* and, as such, the common law meaning is to be applied.[9] A claim will be made fraudulently if, for example, a false statement is knowingly made in connection with the claim for the purpose of inducing the insurer to pay the claim.[10] Accordingly, a finding of fraud in this context will necessarily involve a finding that the insured was untruthful, and deliberately so, with the intention of obtaining a financial gain. Such a finding will therefore be one of "seriously wrong conduct"[11] but, even so, the deliberate destruction of property followed by a claim for indemnity with respect to the loss of that property would easily meet this description. The whole premise for any such claim must necessarily be that the insured is entitled to make it. There can be no such entitlement where the insured property is deliberately destroyed by the insured for the purpose of wrongful financial or other gain under the policy. By making a claim in those circumstances, an insured sets out to deceive the insurer regarding the insured's entitlement to do so. That is the dishonest intention on which a finding of fraud will sit, that is to say, an intention to induce a false belief on the part of the insurer for the

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8 *Gugliotti v Commercial Union Assurance Co of Australia* (1992) 7 ANZ Insurance Cases 61-104, 77,451; *To v Australian Associated Motor Insurers Ltd* (2001) 3 VR 279, [28]. And see s 54(2) of the *Insurance Contracts Act* which provides that "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". The deliberate destruction of insured property would plainly be an act that causes loss under the policy.

9 *Sgro v Australian Associated Motor Insurers Ltd* (2015) 91 NSWLR 325, 335-337.

10 *To v Australian Associated Motor Insurers Ltd* (2001) 3 VR 279, [19], [23]; *Walton v Colonial Mutual Life Assurance Society Ltd (*2004) 13 ANZ Ins Cas 61-620, [144].

11 *Sgro v Australian Associated Motor Insurers Ltd* (2015) 91 NSWLR 325, [57].

purpose of obtaining a payment or other benefit under the policy of insurance to which the insured is not entitled.

The claim in this proceeding

[56] Cassa contends that the loss of the factory and its contents caused the immediate cessation of production and an inability to take orders, and so much may be accepted. So, too, may it be accepted that the earlier indemnity under the policy of insurance could be confirmed, the better would be Cassa's chances of surviving as a business. As it was, after indemnity was refused, Cassa ceased to operate.

[57] The central issue for determination in this case however was whether IAL has proved to the required standard that the fire was deliberately lit by Mr Cassimatis in order to set up a fraudulent claim on the policy of insurance, an allegation that he not only steadfastly denied but also claimed would have been an act bereft of motive.

[58] IAL's case in that regard was wholly circumstantial, that is to say, various circumstances were alleged from which, IAL submitted, arson should be inferred. Although these alleged circumstances will be discussed in greater detail below,[12] they included: Mr Cassimatis being alone in the factory before the fire started; the starting of separate fires, one outside the factory in an area adjacent to the south-eastern corner and at least one inside the building; Mr Cassimatis driving away from the factory in darkness without his headlights illuminated to avoid detection; switching the lights for his vehicle off again as he approached and then passed the Yeerongpilly Railway station to again avoid detection; and misleading investigators about the time of his departure from the factory. IAL of course also alleged that Mr Cassimatis had a financial motive to burn down the factory. So, too, was IAL's case to the effect that a fraudulent claim was subsequently made on the policy of insurance wholly circumstantial. The same circumstances were relied together with the further circumstance that, having deliberately burnt the factory down, Mr Cassimatis made the claim on Cassa's behalf.

Onus and standard of proof

[59] IAL has the onus of proving that the fire was deliberately lit and, consistently with the way in which the case was conducted, that the person responsible was Mr Cassimatis. IAL also has the onus of proving that the claim on the policy of insurance was made fraudulently. Expressed in the language of the policy of insurance and the statute, IAL has the onus of proving that the wilful act exclusion under the policy is engaged and/or that the claim was made fraudulently within the meaning of s 56(1) of the *Insurance Contracts Act*.[13]

[60] Given the gravity of the allegations in this case, involving as they do a series of contentions amounting to serious criminal conduct, and the consequences for Cassa and its director if such a claim is upheld, a high degree of persuasion will be required before those allegations can be made out. As Dixon J stated in *Briginshaw v Briginshaw*:

> "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences

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12 See [149] – [156] below.

13 *Sachin Sharma v Insurance Australia Ltd trading as NRMA Insurance* [2017] NSWCA 307, [17].

> flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency."[14]

[61] What is required is clear and cogent proof so as to induce, on the balance of probabilities an actual persuasion of the mind as to the fire having been started by Mr Cassimatis and, not only that, that he (through Cassa) knowingly advanced a fraudulent claim on the policy of insurance.[15] Of course, the same high degree of certainty is not required as that in a criminal case, but reasonable satisfaction according to the nature of the case is demanded.[16] In *Leigh v Bruder Expedition Pty Ltd*, Sofronoff P (Davis and Wilson JJ agreeing) recently summarised the principles in this way:

> "Dixon J said that the application of the civil standard to proof of facts was not a mere mechanical comparison of probabilities. Rather, the fact finder must feel an actual persuasion of the occurrence of the relevant fact before its existence can be found. An opinion that a state of facts exists may be held according to indefinite gradations of certainty. However, except in criminal cases, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. Reasonable satisfaction on the balance of probabilities is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. In particular, the seriousness of the allegation made, the inherent unlikelihood of an occurrence, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."[17]

[62] Furthermore, and consistently with the existence of the presumption of innocence enjoyed by all citizens, it may be accepted that members of the public do not ordinarily engage in criminal conduct and, for that reason, the court should be slow to make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.[18] Indeed, it is important to keep in mind that even if the court rejects Mr Cassimatis' account, that is not the end of the matter because it remains for IAL to satisfy the court affirmatively, on the balance of probabilities, that Mr Cassimatis deliberately lit the fire and, further, advanced a fraudulent claim on the strength of his handiwork.[19] What is required is an assessment of the whole of the evidence in the case which the court does accept to determine whether IAL has discharged its onus of proof.

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14 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362.
15 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361; *Helton v Allen* (1940) 63 CLR 691, 712.
16 *Rejfek v McElroy* (1965) 112 CLR 517, 521.
17 *Leigh v Bruder Expedition Pty Ltd* [2020] 6 Qd R 475, [16].
18 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 450.
19 *Raso v NRMA Insurance Ltd* [1992] NSWCA 202, p 7; *Sachin Sharma v Insurance Australia Ltd trading as NRMA Insurance* [2017] NSWCA 307, [41].

[63] As already mentioned,[20] IAL's case is wholly circumstantial. As such, it was for IAL to prove the existence of facts from which it is reasonable to draw the alleged inferences.[21] Whatever is pleaded as to the circumstances alleged to give rise to a reasonable and definite inference of, in this case, arson and fraud, the focus must be on what has actually been proved as opposed to what has merely been pleaded. Again, the significance and consequences of such serious findings cannot be overlooked, so the facts proved must give rise to a reasonable and definite inference that the fire was deliberately lit and the claim fraudulently made. If the facts proved merely give rise to conflicting inferences of equal degrees of probabilities, the choice between them will be mere conjecture and could never sustain a finding of wrongdoing in a case like this.

[64] That said, the criminal standard of proof is not engaged and the essential difference between that standard and the civil standard of proof is that, in the former, the facts must be such as to exclude reasonable hypotheses consistent with innocence while, in the latter, the proponent need only prove circumstances raising a more probable inference in favour of what is alleged, but bearing in mind the high degree of persuasion already discussed. Mere suspicion will never be enough to meet the standard of proof required.[22]

[65] In these respects, a useful summary appears in the judgment of Tadgell JA in *Transport Industries Insurance Co Ltd v Longmuir*.[23] It was as follows:

> "In a civil case like this, where there is no direct evidence of a fact that a party bearing the onus of proof seeks to prove, 'it is not possible to attain entire satisfaction as to the true state of affairs': *Girlock (Sales) Pty Ltd v Hurrell* (1982) 149 CLR 155, at 169, per Mason J. In such a case, however, the law does not require proof to the 'entire satisfaction' of the tribunal of fact. A definition of the sufficiency of circumstantial evidence in a civil case to support proof by inference from the directly proved facts was given by the High Court in the unreported case of *Bradshaw v McEwans Pty Ltd* (27 April 1951) in a passage since repeatedly adopted: eg *Luxton v Vines* (1952) 85 CLR 352, at 358; *Holloway v McFeeters* (1956) 94 CLR 470, at 480-1; *Jones v Dunkel*, at 304; *Girlock's* Case, at 161 and 168. The relevant passage in *Bradshaw's* Case is this:
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> > 'Of course as far as logical consistency goes many hypotheses may be put which the evidence does not exclude positively. But this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture: see per Lord Robson,

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20 Above at [57].

21 *Seltsam v McGuiness* (2000) 49 NSWLR 262, 275.

22 *AMP Fire & General Insurance Co Ltd v Collie* (1991) 6 ANZ Ins Cas 61-082, 77,284.

23 *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125, 141

> *Richard Evans and Co Ltd v Astley* [(1911) AC 674, at p. 687]. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise ...'"[24]

[66] In the passage immediately preceding this summary, Tadgell JA also had this to say:

> "… [T]o assess the evidence in a case like this by reference to various individually-pleaded particulars, as though running through items on a check list, is apt to mislead. The evidence is to be evaluated as a whole in order fairly to consider whether the party bearing the onus of proof has established what is ultimately sought to be proved. The object of the exercise of evaluation is to discover whether the evidence paints a picture reflecting real life, rather than to place a tick or a cross against paragraph after paragraph of torpid pleading. A true picture is to be derived from an accumulation of detail. The overall effect of the detailed picture can sometimes be best appreciated by standing back and viewing it from a distance, making an informed, considered, qualitative appreciation of the whole. The overall effect of the detail is not necessarily the same as the sum total of the individual details: cf *Hall (Inspector of Taxes) v Lorrimer* [1992] 1 WLR 939, at 944; *Shepherd v The Queen* (1990) 170 CLR 573, at 579-80."[25]

[67] Thus, when determining in a civil case such as this whether circumstantial evidence leads to an inference of arson and fraud, the court is obliged to consider "the weight which is to be given to the united force of all the circumstances put together"[26] and must then apply the onus of proof only at the final stage of the reasoning process because it would be "erroneous to divide the process into stages and, at each stage, apply some particular standard of proof".[27] When doing so, the inference to be drawn from the proved facts must be weighed against realistic possibilities as distinct from possibilities that might be regarded as fanciful and where the competing possibilities are of equal likelihood, or the choice between them can only be resolved by conjecture, the allegation will not have been proved.[28]

Motive

[68] As already noted,[29] in this case IAL alleged that Cassa (and Mr Cassimatis) had a financial motive to burn down the factory and claim on the policy of insurance. On the other hand, Cassa (and, again, Mr Cassimatis) maintained that there was "nothing to gain and everything to lose" by such an act.[30]

[69] The evidence on that point, voluminous though it was, went to the existence of a possible motive on Cassa's part (through the agency of its director) to burn down the

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24 *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125, 141. NB: *Bradshaw v McEwans Pty Ltd* is reported. The citation is (1951) 217 ALR 1 and this passage appears at page 5 of that report.

25 *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125, 141.

26 *Belhaven & Stenton Peerage* (1875) 1 App Cas 278, 279.

27 *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125, 129.

28 *Palmer v Dolman* [2005] NSWCA 361, [41]; *Sachin Sharma v Insurance Australia Ltd trading as NRMA Insurance* [2017] NSWCA 307, [66].

29 Above at [27].

30 Trial submissions on behalf of the plaintiff, paragraph 180.

factory but, for the reasons later expressed,[31] this alleged motive could not be satisfactorily proved.

[70] While the existence of opportunity and motive may bolster an insurer's case, proof of either or both can never be determinative, especially where the evidence connecting the insured with the fire is weak.[32] On the other hand, the absence of any motive may be a powerful consideration against a finding of wrongdoing. Of course, it must steadfastly be kept in mind that the insured has no onus to prove an absence of motive but where the evidence adduced in the case is such that the tribunal of fact can conclude that an insured had no motive to, for example, destroy insured property in order to make a fraudulent claim on a policy of insurance, that will be a strong factor weighing against an inference to the contrary effect.

[71] In this regard, there is of course a difference between a case where there is an absence of proven motive and a case where there is a proven absence of motive. As to this, and although a criminal case, the following observations made by Gaudron, McHugh and Hayne JJ in *De Gruchy v The Queen*[33] are apposite:

> "Motive, if proven, is a matter from which a jury might properly infer intention, if that is in issue, and, in every case is relevant to the question whether the accused committed the offence charged. As was observed by Lord Atkinson in *R v Ball*:
>
> > 'Evidence of motive necessarily goes to prove the fact of the homicide by the accused … inasmuch as it is more probable that men are killed by those who have some motive for killing them than by those who have not.'
>
> So, too, absence of motive is equally relevant to the question whether the accused committed the offence charged and, as observed by Menzies J in *Plomp v The Queen*, 'is commonly relied upon as a circumstance tending in favour of … a person accused of a crime'.
>
> Although absence of motive is relevant, the appellant's argument overlooks a critical distinction between absence of proven or apparent motive, on the one hand, and proven absence of motive, on the other. In the present case, there was no evidence of motive, which is not the same thing as proven absence of motive. And although the character evidence called on behalf of the appellant tended to negate possible motive, it by no means established the absence of motive.
>
> The absence of evidence of possible motive is clearly a matter to be taken into account by a jury, particularly in a case based on circumstantial evidence. However, if, as in the present case, the prosecution does not have to establish motive, it is difficult to say that the absence of evidence in that regard is a matter of 'positive significance', either in the sense that it is a weakness in the prosecution case or a strength in the defence case. It might be otherwise if there were positive evidence that the accused lacked motive. However, that would be a most unusual case. The present is not a case of

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31 At [142]-[148] below.

32 *Trimboli & Ors v Royal Insurance Australia Limited* (1983) 2 ANZ Ins Cas 60-500, 77, 848; *NRMA Insurance Limited v Collier & Anor* (1997) 9 ANZ Ins Cas 61-337, 76, 718-9.

33 *De Gruchy v The Queen* (2002) 211 CLR 85.

> that kind. It is simply a case where there was no evidence of motive."[34] [References omitted]

The fire

[72] It was uncontentious that, at approximately 9:25 pm on 29 August 2015, a "fire was ignited in the vicinity of" the main factory (Unit 281). Nor was it in dispute that the fire destroyed the factory and its contents, including all equipment and stock.

[73] Unsurprisingly given the circumstantial nature of IAL's case, the resolution of the central issue at the trial – whether Mr Cassimatis caused the fire and then advanced a fraudulent insurance claim for the loss he (and, through him, Cassa) had caused – turned on a close examination of the proven circumstances. Of the proof advanced by IAL to that end, the most telling was what might broadly be described as the fire development evidence. It consisted of a mix of objectively ascertainable timings from a range of sources which enabled a reliable comparison to be made regarding Mr Cassimatis' movements and the growth of the fire, QFES and lay observations regarding the latter and expert evidence to assist in the interpretation of that evidence.

[74] It is useful though to commence with some features of the evidence that were not in dispute.

The factory

[75] The main factory (Unit 281) was a predominantly steel structure consisting of a portal frame clad with steel clip-lock and steel roofing on a concrete slab with a floor area of around 1,830 m^2. The factory had a roof height of approximately eight metres and a total approximate volume of 16,000 m^3. The clip-lock cladding sat over the edges of the concrete slab for the most part but, in parts including the south-eastern corner of the building, there was a small gap between the slab and the cladding.

[76] The industrial precinct on which the factory was situated is bordered by Station Road to the north and Moolabin Creek to the south. The closest major arterial road to the east of the precinct is Ipswich Road. If travelling in the vicinity inbound along that road, the entry to several streets on the left-hand side of the road would be passed including Michlin Street (running perpendicular to Ipswich Road, before curving to the right and terminating at a carpark on the south side of Moolabin Creek with a good view from the south of the main factory), Dexter Street and Ellen Street before reaching Lucy Street. Lucy Street also runs perpendicular to Ipswich Road before crossing Moolabin Creek and becoming Station Road just prior to reaching the eastern boundary of the industrial precinct. From that point, Station Road runs in a generally westerly direction until a sweeping right-hand bend in the road where it becomes Wilkie Street. Continuing on that path of travel, Wilkie Street proceeds in a generally northerly direction past the Yeerongpilly Railway Station (on the eastern side) and onto the junction of that street with Cardross Road where access can be had to Fairfield Road, Yeronga which is only a short distance to the left.

[77] The land on which the main factory was situated falls away from the northern side of the building (Station Road) in a gentle decline to the south-eastern side of the building

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[34] *De Gruchy v The Queen* (2002) 211 CLR 85, [28]-[30]. And see *Rama Furniture Pty Ltd v QBE Insurance Ltd* (New South Wales Court of Appeal, 20 June 1986, unreported), [18].

(Moolabin Creek). Because of this decline, the slab was built up by brickwork in places so that the ground floor of the factory was level across the declining slope. Of relevance were two driveways; one to the north leading directly onto Station Road and another to the south leading past the south-eastern corner of the factory and out onto Lucy Street.

[78] Although an alarm system was fitted for the main factory and, according to Mr Cassimatis was activated by him on leaving the factory that evening, it was not "back to base".

[79] At the time of the fire, the main factory contained a large quantity of highly combustible manufacturing materials and stock. This was said to include around 415 "completed pieces" which were due to be dispatched on 31 August 2015 to Tarasco. According to Mr Cassimatis, there were also approximately 130 mattresses scheduled for delivery on the same day to other customers as well as miscellaneous stock comprised of over 100 mattresses and 30 headboards and bases.

The skip bin

[80] On the south-eastern corner of the main factory, there was a large industrial skip bin that was obtained and utilised by Cassa for the disposal of manufacturing waste. It was reportedly full of rubbish following a clean-up of the site earlier on the day of the fire, and two bales of manufacturing waste had been placed near the skip by Mr Lima, an employee.

[81] There was evidence before the court that the skip was used from time to time by members of the public because it was largely ended unattended on weekends. There had also been a number of incidents in the past where rubbish bins had been set alight within the complex.

[82] The skip was accessible from inside the factory through a lockable exit door. It was open to the elements.

[83] The distance from the skip to the end of Station Road (and the beginning therefore of Wilkie Street) was approximately 420 metres and the distance from the skip to the Yeerongpilly Railway Station on Wilkie Street was approximately 710 metres, that is to say, an additional 290 metres or so.

CCTV cameras

[84] A number of CCTV security cameras were installed at the main factory and, according to Mr Cassimatis, they were working at the time of the fire but the footage was stored on a hard drive on the premises and it was destroyed in the fire. However, Mr Michael Cassimatis,[35] the person responsible for the maintenance of that system, said that it was not operating at the time of the fire and had not been operating for around six weeks. Either way, there was no security footage from the factory in evidence.

[85] Black Moth Technologies Pty Ltd occupied Unit 247 in the industrial precinct. That Unit was situated about 50 metres from Unit 281. At the time of the fire, two CCTV

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35 An employee of Cassa and Mr Cassimatis' brother-in-law.

cameras were installed on the exterior of Unit 247, one facing east towards Station Road and the other facing south. Both were operating at the time of the fire. A good proportion of the southern side of Unit 281 was within the field of view of the east-facing Black Moth CCTV camera, although the skip could not be viewed from that angle.

[86] The Yeerongpilly Railway Station on Wilkie Street also had security cameras installed, and operating, at the time of the fire. Relevantly, one faced down Wilkie Street towards the point where it becomes Station Road (at the bend in the roadway) and another faced up Wilkie Street in the direction of the junction with Cardross Road.

[87] The times recorded on footage from the east-facing Black Moth CCTV were 30 minutes faster than real time and the time signatures on the footage from the CCTV cameras at the Railway Station were one minute slower than real time.

The weather

[88] It was raining on the evening of 29 August 2015. The rain commenced at around 5:30 pm and, when Mr Cassimatis returned to the factory, it was raining heavily. The rain continued for several hours.[36] According to Mr Cassimatis, it had "started to ease off" by the time he left the factory.

The fire development evidence

[89] What follows is a summary of the key features of the fire development evidence that I accept. It is expressed in chronological order using times that have been synchronised by adjusting for the differences between the times recorded on the Black Moth CCTV and the Railway Station CCTV on the one hand and the real time in each case on the other. The times when 000 calls and the like were made are the times logged by the QFES. In the case of mobile telephone photographs and video-recordings taken of the fire by one of the witnesses, Ms Chelsea Leone, the times recorded on them were limited to hours and minutes (and did not record seconds). As such, a conservative approach favouring Cassa (and, therefore, Mr Cassimatis) is required. That being the case, I have treated those images and recordings as having been taken at the last second of the minute recorded on Ms Leone's phone.

[90] As such, and erring in Cassa's favour, the times have been adjusted so that each photograph or video is assumed to commence at the fifty-ninth second of the minute recorded on the image or recording. Otherwise, it was not suggested to Ms Leone when she was cross-examined that the time function on her mobile telephone was not accurate and, in any event, the times recorded on the images and recordings taken by her were consistent with the other evidence in the case regarding the times when various persons made observations regarding the progress of the fire.

[91] The relevant synchronised times are emboldened in the summary below for ease of reference and, where applicable, are accompanied by parenthetical notes recording the time elapsed from when Mr Cassimatis departed the precinct and from when the reflected glow of a fire is first seen on the east-facing Black Moth CCTV.

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[36] The Bureau of Meteorology recorded 9.4 mm of rain falling at Archerfield Airport (the closest weather station to the factory) between 4:00 pm and 9:30 pm that evening.

[92] It should also be mentioned that there was no agreement between the parties about the accuracy of the times recorded on the CCTV footage, images or other recordings in evidence in this case. All that Cassa was prepared to accept in that regard was that the times were "approximate". Although I have treated the times as such, I have to say that there was nothing in the evidence to suggest that the synchronised times were other than entirely accurate. Nonetheless, as I have just stated, I have proceeded on the assumption that all synchronised times are only approximations, albeit close approximations.

[93] That made clear, Mr Cassimatis was the only person in the factory from around **18:30:00** on the evening of the fire. That was Mr Cassimatis' belief when cross-examined on this point and it fits with the account given by Mrs Cassimatis to the effect that, after a horse-riding lesson at Moggill, she arrived home with her husband and children at around **17:00:00** and that Mr Cassimatis drove back to the factory "an hour or so later".[37] It is also to be noted that this was a Saturday evening and that the Black Moth CCTV footage did not reveal the presence of any other person in its field of view after that time. It was also, by then, raining heavily.

[94] Mr Cassimatis left the precinct at approximately **21:25:00**. Before doing so, he looked over the main factory floor and did not see anyone else in the building. He then set the alarm and locked up. He made his way to where his Mercedes sedan was parked in the adjacent carpark and drove off, accelerating as he did so.[38]

[95] Footage from the east-facing Black Moth CCTV shows the Mercedes sedan in motion from approximately **21:25:32**. The footage depicts the vehicle proceeding from the direction of the carpark and past the skip adjacent to the south-eastern corner of the factory premises. When giving evidence, Mr Cassimatis said that he did not see anyone as he drove past the skip and nor did he notice any "source of light" in or around the skip. Notably, the lights on the Mercedes sedan were switched off. Only the vehicle's brake lights appeared to be illuminated.

[96] The Black Moth CCTV footage then shows Mr Cassimatis' vehicle moving away from the field of view of the camera but, just before the vehicle disappears from view, its lights are switched on. This happened at approximately **21:25:40** (departure + 0.8).

[97] A number of things may then be inferred from the timings and vision recorded on the Black Moth CCTV footage and the Railway Station CCTV footage. Mr Cassimatis drove along the driveway in the precinct to the south of the main factory and out onto Lucy Street. He then turned left and proceeded in a westerly direction along Station Road before negotiating the right hand bend into Wilkie Street and travelling in a northerly direction along that roadway. Then, on reaching the junction with Cardross Street, he turned left and continued his journey home to Mount Ommaney.

[98] At approximately **21:25:56** (departure + 0.24) the first sign of the fire can be seen on the Black Moth footage – a glow in the line of trees and shrubs adjacent on one side to the driveway to the south of the main factory and on the other side to the northern

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37 Mr Cassimatis also told QFES Officer Boreham that he returned to the factory at approximately 5:30 pm.

38 At the trial, senior counsel for IAL did not rely on Mr Cassimatis having accelerated when driving out of the precinct as part of IAL's overall circumstantial case but, regardless, Mr Cassimatis stated that he did: Mr Cassimatis' first statement dated 20 April 2020, paragraph 253.

bank of Moolabin Creek. This moment in time is referred to hereafter as "first glow". At trial, it seemed to be common ground that the glow was at first constituted by reflected light from a fire in the skip but, in a relatively short space of time, that glow dramatically increased in size and illumination and, as such, it must have been the case that the glow was by then constituted by reflected light from the fire in the main factory.

[99] The Mercedes sedan is first seen on the Railway Station CCTV footage as it turns from Station Road into Wilkie Street. The vehicle's headlights are illuminated. The time when the vehicle first appears is approximately **21:25:58** (departure + 0.26; first glow + 0.02).

[100] At approximately **21:26:08** (departure + 0.36; first glow + 0.12) the Railway Station CCTV footage shows the headlights to the vehicle switching off and that remains the case for at least the next 13 seconds as the vehicle travels up Wilkie Street, past the Railway Station as well as an oncoming vehicle and then disappears from view. The time was **21:26:21** (departure + 0.49; first glow + 0.25).

[101] Ms Genene Deakin called 000 to report the fire at approximately **21:27:52** (departure + 2.20; first glow + 1.56). She had been travelling in a motor vehicle with her son on Ipswich Road, and heading towards the City, when her attention was drawn to a fire "out the passenger window of the car". She thought that the fire was located on Lucy Street and so she drove a short distance down that roadway and parked on the left hand side of the road. By that time, the fire was well alight and "the inside of the building was glowing". She therefore called 000. She reported that there was a "building on fire, fully on fire". She added that "everything is fully ablaze" and that there were "flames coming out of the windows".[39]

[102] A Fire Investigation Field Report completed by a QFES Officer Mark Boreham following the fire noted an "alarm time"[40] of **21:27** and an arrival time of **21:34**. An Incident Report prepared by the first QFES officer to the scene, Officer Martin, on 31 August 2015 noted the time of the 000 call to be **21:28**.

[103] Just prior to approximately **21:28**, Ms Leone was a passenger in a motor vehicle being driven by her husband in a northerly direction along Ipswich Road when she saw "smoke and the glow of a fire". Her husband turned left into Michlin Street to "see where the smoke was coming from". As he did so, at approximately **21:28:07** (departure + 2.35; first glow + 2.11), Ms Leone called 000 to report a "fairly substantial building fire". She told the operator that it was a "big fire" and could be seen from Ipswich Road.

[104] Ms Leone's husband then drove along Michlin Street until reaching what Ms Leone described as a "dead end car park looking at the fire on the other side of … Moolabin Creek". Although she was not sure of the distance, Ms Leone estimated that they were "perhaps one hundred metres away". It was in any event clear to her that the fire was "very large" and "burning in all parts of the building". Her view was to the north and across the creek.

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39 To similar effect were the observations made by other onlookers such as Mr Trent Goodman and Ms Tanya Harding.

40 Because there was no "back to base" alarm fitted to the factory at the time of the fire, this "alarm time" would appear to be the time when QFES was first alerted to the fire via 000 (FireCom).

[105] Ms Leone alighted from their car to watch the progress of the fire and, after doing so, used her mobile telephone to take several still images and two short video recordings, as follows:

(a) At approximately **21:28:59**, a still image (Photograph 7467);

(b) At approximately **21:28:59**, a video recording;

(c) At approximately **21:29:59**, another two still images (Photographs 7468 and 7470);

(d) At approximately **21:30:59**, another three still images (Photographs 7471, 7472 and 7474); and

(e) At approximately **21:36:59**, another video recording.

[106] The still images and recordings taken by Ms Leone assumed particular importance to the final conclusions reached by the fire experts who gave evidence at the trial and, ultimately, to the inferences I have drawn. For that reason, the first and last image in the series taken by Ms Leone are reproduced in the Appendix to these reasons. To be clear, the first image was taken at **21:28:59** (departure + 3.27; first glow + 3.03) and the last image was taken at **21:30:59** (departure + 5.27; first glow + 5.03). The last image, it will be seen, appears to be substantially more zoomed in on the factory than the first image.

[107] Mr Trent Goodman called 000 at approximately **21:30:04** (departure + 4.32; first glow + 4.08). He had just emerged from the nearby World Gym. Amongst other things, he said that a factory was on fire and that he was "trying to get away from it". He described the fire as "massive".

[108] By approximately **21:33:27** (departure + 7.55; first glow + 7.31), QFES Station Officer Graeme Martin of the Rocklea Station was travelling in one of the first fire tenders on route to the fire when, as they entered Ipswich Road from the Station, he saw the fire and observed it to be "well involved". He then radioed the fire communications team to upgrade the fire to a "second alarm", meaning that additional resources were required to suppress the fire due to its size.

[109] Officer Martin arrived at the fire at approximately **21:34:33** (departure + 9.01; first glow + 8.37). His fire tender was the first QFES vehicle to arrive at the scene and, so, Officer Martin became the officer in charge of the fire suppression activities. On arrival, he saw that all three faces of the building visible from the roadway were well involved in the fire with "flame heights of above six metres". The "flame height" above the skip was approximately four to six metres. Parts of the northern face of the building were starting to collapse. The steel structure on the south-eastern corner had started to weaken and fold and the fire was "freely burning with a high fire intensity". His immediate action was to apply water to the fire using the deck cannon on top of his tender and to look "first to rescue people". That was ruled out because, as he said when giving evidence, "the building was completely consumed".

[110] Officer Martin also conducted what he described as a "size up". This involved walking around the perimeter of the building to look for "potential openings, potential fire spread and [to] develop a tactic", but the building was secured and he could not gain access. It would in any event have been unsafe to send QFES personnel inside the building given the extent of the fire. He did not detect anything unusual in terms

of odour such as a petrochemical odour and did not find any evidence of the presence of jerrycans or similar fuel receptacles. He decided to adopt a defensive tactic which involved keeping a substantial distance from the fire while undertaking fire suppression activities with the aim of, among other things, preventing the fire spreading to other buildings. Ultimately, pedestrian doors on the western face of the factory were forced open by QFES personnel after the fire intensity reduced.

[111] In the Incident Report completed by Officer Martin on 31 August 2015, he made the following remarks:

> "The building was almost entirely involved on our arrival. Flame was visible near the roofline on all faces. Flame and smoke were visible as we entered Ipswich Rd from Rocklea Station. There were a large number of spectators both on Ipswich Rd and then when we turned into Lucy Street. The fire had obviously had significant time to develop prior to discovery by onlookers and QFES notification. I heard several explosives/percussive noises on the western face adjacent to the awning area as I started size up. Due to intensity and structural integrity I ordered a defensive external action."

[112] To like effect was this account provided by Officer Martin to Officer Boreham by email dated 8 September 2015:

> "All three faces visible from the roadway were well involved on arrival (flame height 6m +). The bin on the eastern face had flame height (4-6m visible above the bin). Parts of the northern face were collapsing and the SE corner had started to weaken and fold."

[113] The fire was brought under control at about **23:27** with all firefighting operations ceasing at about **01:39** the following morning.

The QFES Investigation

[114] The fire was investigated by a team of fire investigators attached to the QFES and led by Officer Boreham. A Fire Investigation Field Report was completed by Officer Boreham by 31 August 2015 although a more detailed Fire Investigation Report was subsequently produced.[41] Following his initial field investigation, Officer Boreham had a telephone conversation with Mr Cassimatis. He told Officer Boreham that he had left the factory on the evening of the fire at 8:00 pm.

[115] When giving evidence, Mr Cassimatis said that he could not recall any such conversation, but I have no doubt the conversation took place and that he told Officer Boreham that he left the factory at 8:00 pm. A "phone log" is incorporated in the Fire Investigation Field Report prepared by Officer Boreham, and it includes an entry for a half hour telephone conversation with Mr Cassimatis commencing at 12:30 pm on 7 September 2015. Elsewhere in that report are notes Officer Boreham made of the conversation, described in the report as an "interview". Against a topic entitled, "J.C. occupancy", this appears:

> "Morning until 1300. Returned approx. 1730. Left again 2000. No machinery operating … Switched light off. Admin & cleaning."

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41 On 1 April 2016.

[116] Officer Boreham was called to give evidence at the trial. He agreed that he had a discussion with Mr Cassimatis regarding several matters including the "presence of personnel at the building". He said that Mr Cassimatis "identified that he was the last person there", that he returned to the building at about 5:30 pm and that he left at 8:00 pm. However, in the Fire Investigation Report it is recorded that Mr Cassimatis was the "owner and last occupant" and that he had "confirmed the premises had been left secured after the cessation of work approximately 1 hour before the first call to Firecom". The first 000 call was made at approximately 9:27 pm and, as such, this account would have Mr Cassimatis leaving the factory at approximately 8:30 pm. When questioned about this possible discrepancy at the trial, Officer Boreham said that he may have had more than one conversation with Mr Cassimatis but, beyond that, nothing was resolved. I proceed on the basis that Mr Cassimatis gave an account to the fire investigators to the effect that he left the premises at least an hour before the commencement of the fire.

The QPS investigation

[117] Mr Cassimatis was interviewed by members of the Queensland Police Service who were investigating the fire on the following day (30 August 2015). Relevantly, he told them that he left the factory "between 8:30 pm and 9:00 pm approximately".

The expert evidence

[118] Three witnesses with expertise in fire investigation gave evidence at the trial – Ms Belinda Jones, Mr Morgan Cook and Mr Nystrom (to whom reference has of course already been made).[42] Of those, Ms Jones and Mr Cook were retained by Cassa's solicitors and Mr Nystrom was engaged by IAL, however, only Ms Jones was called on behalf of Cassa at the trial. Mr Cook and Mr Nystrom were called by IAL.

[119] Ms Jones is a consultant forensic scientist specialising in the investigation of fires, explosions and related phenomena. She attended on what remained of the factory on 15 September to "examine, document and interpret the scene" and then produced what might be described as a preliminary report containing her views on 7 November 2015. She then produced a further report on 9 January 2020 after further evidence had been gathered and various opinions had been expressed by Mr Cook and Mr Nystrom.

[120] Mr Cook also has considerable expertise in fire investigation. He was not engaged until 2017 and, so, did not have the advantage of inspecting the fire scene for himself. However, he conducted a desktop review of a range of material including the Fire Investigation Report produced by QFES Officer Boreham, reports prepared by Ms Jones and Mr Nystrom and some of the Black Moth CCTV footage. He then authored two reports containing his opinions, on 15 August 2017 and 4 July 2018.

[121] Mr Nystrom is a vastly experienced fire investigator and well known to the courts. He has provided expert evidence on numerous occasions over a career now spanning some four decades. As already mentioned, Mr Nystrom was first retained by Cunningham Lindsey Australia on 1 September 2015 and attended the fire scene the following day. He produced an initial report on 3 September 2015 and this was followed up with supplementary reports on 21 December 2017 and 1 June 2019.

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42 At [36] above.

[122] The body of expert evidence in this case, comprised in the main by the opinions expressed by these three experts, has evolved over time as more evidence emerged. For a long time, it was thought that the fire might have initially started in the skip and then radiated inside the factory to ignite, at first, a large quantity of combustible material (mattresses and the like) positioned near the south-eastern wall. In fact, this conclusion was first reached by QFES Officer Boreham who recorded as much in his Fire Investigation Field Report and then offered a more detailed opinion to the same effect in his subsequent Fire Investigation Report.

[123] However, each of the fire experts was later provided with a copy of the Incident Report completed by QFES Officer Martin on 31 August 2015[43] along with a copy of his email to Officer Boreham dated 8 September 2015.[44] After reviewing these accounts, each of the experts expressed the opinion, which I accept, that there would have been insufficient time for the fire to propagate from the skip to inside the factory to produce a fire of the magnitude observed by Officer Martin so quickly, that is to say, approximately eight minutes after first glow. If that was so, there must have been a second seat of fire inside the building.

[124] On 16 October 2019, Applegarth J ordered the fire experts to form a conclave and produce a joint report. Amongst other material, the experts were tasked to consider a range of further evidence that had been gathered including the Black Moth CCTV footage, and Railway Station CCTV footage and the Fire Investigation Field Report prepared by QFES Officer Boreham (and accompanying photographs) along with, of course the Incident Report completed by Officer Martin on 31 August 2015 and his email to Officer Boreham on 8 September 2015.[45] That duly occurred and, on 13 April 2020, a joint expert report regarding a list of issues was produced.[46]

[125] After discussing the "observations and timeline" evidenced by the further material, the experts agreed to refer to the time when the glow was captured on the Black Moth CCTV camera as "Glow" and the time when QFES Officer Martin made his observations on arrival at the fire scene as "Glow +8 mins". That explained, their opinions may be summarised as follows:

(a) Mr Cook was of the opinion that the glow reflected in the Moolabin Creek area seen on the Black Moth CCTV footage (commencing at **21:25:56** (departure + 0.24)) is more likely to have been from a fire outside the factory in the area of the skip. Ms Jones also believed that the glow was a result of a fire external to the building. Mr Nystrom, too, agreed, but considered it likely that there was also a fire inside the factory at the same time;

(b) The experts were agreed that "the height above ground of the initial flame" could not be inferred from the glow seen on the footage. Mr Nystrom added his opinion that could be said was that the glow was "sudden and bright";

(c) After consideration of the time that elapsed between the "sudden glow" and the observations made by QFES Officer Martin, Mr Nystrom considered it likely

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43 Extracted at [111] above.

44 The relevant part of Officer Martin's email is extracted at [112] above.

45 Letter from Holman Webb Lawyers dated 11 March 2020.

46 It should be recorded that Professor Lovell, a person with expertise in videography, also attended the conclave but, after some initial discussions concerning that topic, he took no further part. Nonetheless, he was a signatory to the joint expert report.

that there was a fire inside the factory at the same time as a fire in the area of the skip that "caused the glow seen [on] CCTV", and Mr Cook agreed. Ms Jones accepted that there was "one definite seat" of fire in the area of the skip and surroundings and could not exclude "a possible second area of origin within the building prior to the glow on the CCTV";

(d) As to the origin of the fire, the experts agreed that the likely point or points of origin of the fire inside the factory were not able to be "narrowed down" and also agreed that a specific point of origin could not be concluded for the area outside the factory other than to say that this area of origin was in the area of the skip at the south-eastern corner outside the building;

(e) On the question whether the fire in the area of the skip was deliberately lit, Mr Nystrom was of the opinion that the "sudden glow is indicative of the fire being accelerated and so, deliberately set". Ms Jones expressed the opinion that the observations made by QFES Officer Martin indicated that "the skip and the fully involved internal fire were concurrent at Glow + 8 mins" and this suggested that "the fire in the skip is more likely to be deliberate". She also considered that "accidental ignition" such as from a smouldering cigarette was "far less likely". Whilst that mechanism of ignition could not be completely eliminated, Ms Jones considered that the "speed of fire and observations made make this a far less likely scenario". Mr Cook was in agreement with most of Ms Jones' comments but could not "rule anything out". He did agree that "smouldering ignition is far less likely", but added that such a mechanism could not be excluded;

(f) So far as the fire inside the factory was concerned, the experts agreed that there was no physical evidence available to show how that fire was ignited. Mr Nystrom expressed the opinion that the fire did not "naturally spread from the bin to the building to create the fire observed by the attending" QFES personnel. Mr Cook and Ms Jones expressed the opinion that "due to the severity of the fire damage and the warehouse no ignition mechanism can be excluded";

(g) Mr Nystrom was of the opinion that the fire in the area of the skip had been started by an ignition source being applied to an accelerant.[47] Ms Jones could not "confirm or exclude that the fire was ignited by the application of an accelerant". Mr Cook thought that the application of an ignition source to an accelerant, "possibly an ignitable liquid", was more likely given "the speed of the fire growth and the sudden appearance of the glow". As to the fire inside the factory, the experts agreed that an ignition source being applied to an accelerant could neither be excluded nor concluded from the available evidence;

(h) Mr Cook and Ms Jones could not rule out smouldering combustion as a cause of the fire in the area of the skip but considered it "less likely as an ignition mechanism" whereas Mr Nystrom discounted smouldering combustion completely;

(i) Spontaneous ignition (for example, by way of exposure of rags to linseed oil

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47 The experts agreed that the definition of "accelerant" be adopted from National Fire Protection Association *Guide for Fire and Explosion Investigations* (2017), s 3.3.2 – "a fuel or oxidiser, often an ignitable liquid, intentionally used to initiate a fire or increase the rate of growth or spread of fire".

or paint or otherwise) was discounted by all experts with respect to the fire in the area of the skip. So far as the fire inside the factory was concerned, Mr Nystrom discounted spontaneous ignition whereas Mr Cook and Ms Jones could not rule that out but said that this was "a far less likely scenario";

(j) As to whether electrical ignition was a possibility, Mr Nystrom said there were no electrical ignition sources in the area of the skip and so he discounted this as a cause. He also expressed the opinion that an electrical ignition mechanism was not consistent with the sudden glow seen on the CCTV. Ms Jones considered electrical ignition unlikely for much the same reasoning but Mr Cook could not rule out electrical ignition because he was "not at the scene". So far as the fire inside the factory is concerned, electrical ignition could not be confirmed or ruled out by Mr Cook and Ms Jones but Mr Nystrom considered that an "electrical cause within the building is discounted based on there being two contemporaneous fires";

(k) The experts were asked to express an opinion about which of the potential causes "is most likely". Mr Nystrom expressed the opinion with respect to the fire in the area of the skip that an ignition source was applied to an accelerant and this, he said, was "evident by way of the sudden glow on the CCTV, lack of an electrical ignition source, and the rainfall". The observations made by QFES Officer Martin and the "timeframe (Glow + 8 mins)" indicated to him that there was a "separate deliberate ignition within the building", although the means of ignition could not be established. Mr Nystrom stated that the "concurrent nature of the two areas of fire as observed, indicates that the two fires were deliberately set". Ms Jones considered that the "lack of physical evidence for an ignition source and the presence of an accelerant" made identification of a specific mechanism for the fire in the area of the skip difficult to isolate. Likewise, she considered that no specific ignition mechanism could be identified or excluded for the fire inside the factory but said that "the Fire Brigade observations" are "strong evidence of multiple seats of fire" in the area near the skip and inside the factory. She said that this is "highly suggestive of an overall deliberate fire event". Mr Cook expressed the opinion that the sudden glow appearing in the vicinity of the skip suggested the "presence of a volatile fuel source, quite possibly an accelerant by way of ignitable liquid having an ignition source applied". He went on to state that the "protracted rainfall on the day would have made a smouldering ignition far less likely in this area". So far as the fire inside the factory is concerned, Mr Cook considered that there "may have been a second fire burning within the [factory] due to the fact that smoke and flame were visible by responding fire brigades whilst enroute to this incident";

(l) As to whether an accelerant was used, Mr Nystrom expressed the opinion that the sudden glow on the CCTV indicated that ignition of the fire in the area of the skip occurred in the "vapour phase". Because of this, he thought that a "volatile ignitable liquid would have been likely", such as petrol. He was unable to say whether an accelerant was involved in relation to the fire inside the factory. Mr Cook and Ms Jones were unable to say whether a specific accelerant was used in the case of either fire. All experts agreed that, if an ignitable liquid was used, it may not have been detected in analyses carried out during the course of the investigation of the fire;

(m) The experts agreed that the fire in the area of the skip was "fuelled by refuse in and around the area of the skip" and that the fire inside the factory was "fuelled by the contents and stock" within the factory.

[126] Subsequently, each of the experts were provided with a copy of Ms Leone's photographs and video recordings, along with some other photographic and video evidence gathered from passers-by shortly after the fire started. That occurred on 22 October and, thereafter, the legal representatives for IAL conferred with each of the fire experts. A note of what was said at each conference was generated in the form of a memorandum.

[127] In the conferences to which I have just referred, each of the experts expressed the opinion that there were two fires, one inside the factory and one in the area of the skip. They were also each of the view that there was insufficient time for a fire to have migrated from the skip to the inside of the factory and to have progressed to a fire of the magnitude witnessed by QFES Officer Martin upon his arrival, although Ms Jones could not rule out entirely that the fire could have developed from a single seat, that is to say, in the area of the skip. Both Mr Cook and Mr Nystrom believed that it was more likely than not that an accelerant was used because of the extent to which the fire was observed to have developed by the time QFES Officer Martin made his observations. Each agreed that the photographs and video recordings taken by Ms Leone indicated that the factory was, by that time, well alight and that was, of course, some minutes before Officer Martin made any observations. In that regard, both Ms Jones and Mr Nystrom expressed the opinion that much, if not all, of the factory was "fully involved in fire" indicating that the fire had progressed past the transition point of "flashover", that is to say, the point in time when a fire inside a building reaches such a temperature that all of the surfaces within the compartment are simultaneously ignited through radiation and the whole compartment is engulfed in fire.

[128] When Ms Jones gave evidence at the trial, she was asked about the photographs and video recordings taken by Ms Leone. She said that what could be observed on those photographs and video recordings was consistent with all the other evidence that had been presented to her to the effect that the "timeframe was short" and that a second seat of fire inside the factory was likely at that point in time. After the first video recording taken by Ms Leone at approximately **21:28:59** (departure + 3.27; first glow + 3.03) was played to Ms Jones, she was asked whether she could draw any conclusions about the intensity of the fire at that point of time. Ms Jones replied that the fire was "very intense and burning very hotly". She said that it was "fully involved in [the] area that you can see" and she agreed that flashover must have occurred at some time prior to approximately **21:28:59**. Further, Ms Jones agreed that, if one assumed the video was taken approximately three to three and a half minutes after the first glow was seen on the Black Moth CCTV, that was a substantially lesser period of time than would have been needed for a fire in the area of the skip to radiate to the interior of the factory, and even if there was combustible material leaning against or close to the inside of the wall of the building adjacent to the skip.

[129] Mr Cook agreed in evidence at the trial that he did not have a precise knowledge of the nature of the contents of the factory other than that it included mattresses and raw materials used to make mattresses. Likewise, in the case of the skip, he formed a general view that the refuse in it was "quite flammable" but beyond that, he was

unable to determine how flammable that material may have been. He was of the opinion that it would take longer than eight to 10 minutes for a fire in the skip to spread to materials inside the factory, although he accepted that he had not "conducted any scientific analysis". Rather, he based his opinion on the evidence that was to hand including, importantly, the Black Moth CCTV footage to establish the time when a first glow could be seen in the vicinity of the skip, the observations made by QFES Officer Martin and the photographs and video recordings taken by Ms Leone. A scenario whereby the fire started in the skip and then, through radiant heat or some other transference, spread to the interior of the factory was far less likely in Mr Cook's opinion than the scenario where there was a separate seat of fire inside the factory. He suggested that an accelerant in the form of an ignitable liquid was likely to have been present inside the skip because of the sudden appearance of the glow and "how bright it got in such a short period of time". He agreed that a significant amount of accelerant must have been used and some form of ignition applied to it. He also agreed that, when the ignition was applied to that accelerant, it would have flared up "very rapidly".

[130] When Mr Nystrom gave evidence at the trial, he was also referred to the photographs taken by Ms Leone and confirmed that, by the time those photographs were taken, flashover had "occurred within the compartment of the factory to have created the fire that was observed … which was escaping through the roof". The video recordings taken by Ms Leone depicted the same thing in Mr Nystrom's opinion, a "well advanced fire within the compartment … well beyond flashover". When cross-examined, Mr Nystrom confirmed that he had taken some samples from the debris to test for the presence of accelerant and could find no such evidence. The inside of what had been the factory was not generally accessible although he was able to enter parts of the building. He found no evidence to suggest that the fire had an electrical cause but there was insufficient physical evidence to conclusively rule that out as a cause. Mr Nystrom agreed that he did not undertake any chemical or laboratory tests to determine the flammability of materials found after the fire. He could plainly see that they were combustible and he did not need to test them to identify what they were. Testing he had conducted in the past showed that a finished mattress would burn at a "pretty similar" rate to the raw materials used to make the mattress. Mr Nystrom had in the past performed tests to determine such things in other matters, many times. He did not agree that "some level of experimentation" would be required to determine the rate at which materials assumed to be in the factory would burn when he already had experience from many other cases with respect to that. Asked how much accelerant may have been used in the vicinity of the skip to ignite, for example, the bales of refuse, Mr Nystrom expressed the opinion that it would have been a significant amount, "perhaps several litres". The accelerant could have been ignited by applying a flame to the liquid or, alternatively, the flame may have ignited vapour from the liquid. In Mr Nystrom's experience, petrol was the most commonly used accelerant and its vapour will ignite at all ambient temperatures save for polar extremes. He did not agree that a cigarette thrown into the skip could have ignited the fire if the contents of the skip were wet. That would be "exceptionally remote" as a possibility. Mr Nystrom confirmed that, as a result of the further evidence he received in October 2020, he was of the opinion that there was a separate point of origin for the fire inside the factory. His opinion was that a fire had been deliberately lit in the skip and another fire inside the factory. He said that the glow seen on the Black Moth CCTV was "not a glow that gradually built up over time". The glow captured by that footage meant that "a volatile ignitable liquid [was] present and in quantity". He was

unable to say where the fire started and added that it could have been achieved by "multiple fire seats" or by "spreading an ignitable liquid" or a combination of those things. Mr Nystrom was again referred to the photographs taken by Ms Leone and again confirmed that they depicted a fire that was "well beyond flashover", a point, he said, when there was "sufficient energy radiating downward from [the] fire in the upper volume to cause literally every combustible surface to catch fire". So far as the Black Moth CCTV footage was concerned, Mr Nystrom agreed that the glow that was first seen on that footage was from the fire in the area of the skip and not the fire that was inside the factory. Mr Nystrom again confirmed that he drew on his experience as a fire investigator. That experience included numerous experiments he conducted in the course of other investigations as well as when educating other fire investigators. In re-examination, Mr Nystrom confirmed that he carried out tests to determine whether there was any evidence of the presence of accelerant. He agreed that he did not find any evidence of a "time delay mechanism" and agreed that, if such a mechanism was not used, the ignition of the fire would have been "near instantaneous".

[131] Despite the relative concurrence of the opinions ultimately expressed by the expert called by Cassa at the trial (Ms Jones) with those expressed by the other two experts, the expert evidence as a whole was criticised by Cassa on several grounds.

[132] First, it was submitted that the fire experts had "largely engaged in a process of expressing views on whether one cause is more or less likely than another". This, it was argued, was "really no more or less than ranking possibilities". It was therefore submitted that there was "no properly reasoned expert opinion from which the court might make a finding". This was a topic considered by Ms Jones in her report of 9 January 2020 where she discussed what she described as "an emerging problem in fire investigation called *negative corpus* where the lack of evidence is used to provide evidence for a theory of which there is no other evidence". Drawing on extracts from the National Fire Protection Association *Guide for Fire and Explosion Investigations* (2017), Ms Jones warned against that process of reasoning.[48] But, although there may have been room for such a criticism at earlier stages of the fire investigation when there was very little evidence to go on, that was not the overall evidentiary position which ultimately obtained. In particular, important further evidence was gathered in advance of the conclave such as the observations made by QFES Officer Martin along with the Black Moth CCTV footage and the Railway Station CCTV footage and, even after that point in time, the recorded observations and timings from Ms Leone (and others) were furnished to the experts for their consideration. This further evidence became pivotal in the formation of their opinions regarding the origin, growth and rate of development of the fire. In their final analyses, the experts did not engage in guesswork; they relied on this independently sourced, and reliable, evidence to add to what was already established during their investigations in order to form their opinions. There was, in the end, a powerful body of evidence to support their conclusions and no doubt this was why Ms Jones did not persist with the warning she expressed before it all emerged.

[133] Second, Cassa submitted that the experts failed to adequately express the reasoning for their opinions and, in particular, that they failed to "furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions".[49] That failure,

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48 See paragraphs 67 to 71 of Ms Jones' report.

49 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [59].

it was submitted, affected the weight that could be attached to their opinions and that was even further diminished because the experts failed to satisfactorily demonstrate how their expertise applied to the facts so as to produce the opinions expressed.[50] In these respects, it is well-established that an expert must ordinarily explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded.[51] However, as French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ observed in *Dasreef Pty Ltd v Hawchar*,[52] that an expert (in that case, a specialist medical practitioner) expressing an opinion in his or her relevant field of specialisation is applying "specialised knowledge" based on his or her "training, study or experience", and being an opinion "wholly or substantially based" on that "special knowledge", will require "little explicit articulation or amplification once the witness has described his or her qualifications and experience, and has identified the subject matter about which the opinion is proffered".[53] That was the case here. There was never any serious issue about the expertise of any of the experts to express the opinions which they did, and it was plainly apparent that those opinions were wholly or substantially based on their respective training, study or experience.

[134] Furthermore, in its written submissions, Cassa attempted to single out Mr Nystrom's reports for allegedly failing to identify how his opinions were the product of his specialised knowledge. However, Mr Nystrom's evidence was not confined to that which he had written; it included, relevantly, the evidence he gave under cross-examination at the trial. There, he made plain that his opinions were based on his experience over 44 years of fire investigation including the many tests and experiments he had conducted over that time. For this reason, the argument advanced by Cassa goes nowhere because any doubt about the adequacy of his expression was entirely removed by the cross-examination conducted by senior counsel for Cassa.

[135] Third, Cassa complained that Mr Nystrom's evidence was "not truly based on expertise" because, while Mr Nystrom accepted that he could have set up experiments to determine the time that it would have taken for the fire to radiate from the skip to the inside of the factory, he did not conduct any such tests. The problem with this criticism is that it overlooks, again, Mr Nystrom's vast experience in the investigation of fires, the tests he previously conducted in the context of other investigations and those he carried out for the purpose of educating other fire investigators. Mr Nystrom was perfectly entitled to draw on his experience in that regard to support the conclusions he reached in relation to this fire. It is also a criticism which overlooks why the fire theory originally formulated by QFES Officer Boreham was eventually abandoned by all three experts. Shortly stated, there was insufficient time for a fire in the area of the skip to radiate to the inside of the factory and then cause a fire of the magnitude observed by QFES Officer Martin and, even earlier than that, by Ms Leone (and several other onlookers).[54] Once that was appreciated, any further pursuit of this

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50 Citing *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [85]. And see *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 5)* [2019] QSC 210, [46]; *Beaven v Wagner Industrial Services Pty Ltd* [2018] 2 Qd R 542, [44].

51 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [85]. And see *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, [35]-[37].

52 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588.

53 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, [37].

54 Such as Mr Trent Goodman and Ms Tanya Harding.

theory became pointless. Likewise, senior counsel for Cassa criticised Mr Cook for failing to undertake any calculations regarding the speed with which flames might spread through certain types of material but, for the reason just expressed, that was also pointless.

[136] In the result, there was no substance in any of the criticisms made by Cassa about the expert opinion evidence in this case. To the contrary, once the full implications of the Black Moth CCTV footage, the Railway Station CCTV footage, the observations made by QFES Officers Martin and Boreham and the photographed and recorded observations made by Ms Leone were understood, the fire experts could not, in my view, have reached any different conclusion. Indeed, most of what they ultimately concluded just accorded with common sense. The proposition that the fire seen by Ms Deakin within two to three minutes of Mr Cassimatis' departure (a "building on fire, fully on fire"; "everything is fully ablaze"; "flames [were] coming out of the windows") and, barely a minute or so later, by Ms Leone (a fire "burning in all parts of the building" interpreted by all three fire experts as post-flashover) emanated from a fire in the area of the skip that was not alight when Mr Cassimatis drove past it is simply preposterous. Not only were these observations supported by the contemporaneous recordings made by Ms Leone, they were perfectly consistent with the observations made by QFES Officer Martin not long after he left the Rocklea Station and, a short time later, when he arrived at the scene, not to mention the legion of onlookers who gave strikingly similar accounts regarding the magnitude of the fire. In a real sense, one has to only look at the images forming Appendix A to these reasons with an appreciation of the time they were taken referable to Mr Cassimatis' departure from the precinct and the appearance of the first glow to make good this very point.

[137] Furthermore, not only does this body of evidence establish that there would have been insufficient time for a fire in the area of the skip to cause a fire inside the factory, it supplies the irresistible inference that at least one other fire must have been started inside the factory at about the same time as the fire that was started in the area of the skip and the further inference, just as irresistible, that these acts must have been deliberate. It also puts to rest a whole range of other theories floated by Cassa in an attempt to explain the origin of the fire such as "spontaneous ignition", "smouldering ignition", a wayward cigarette butt thrown into the skip or on one of the bales of refuse sitting alongside the skip, a stranger wandering into the precinct and starting a fire in the area of the skip, the driver of an unidentified Subaru vehicle seen "speeding away" from the area around the time of the fire, an electrical cause, and so on. Moreover, the suddenness (and brightness) of the fire in the area of the skip, particularly given the feature that it had been raining for some time before Mr Cassimatis' departure, means that an accelerant, most probably several litres of petrol, was applied and then ignited and if, as I accept, that was the method adopted outside the factory, there would be no reason to adopt a different method to start the fire or fires inside the building. As to whether a delay mechanism was employed in either place, some sort of device must have been used for at least the fire in the area of the skip to allow Mr Cassimatis time to light the fire inside the factory and leave the precinct but, as it turned out, the mechanism adopted cannot have been very successful because the whole factory was in flames within a short matter of minutes after Mr Cassimatis looked over the main factory floor and then secured the building before leaving.

Mr Cassimatis' denial

[138] I have already touched on various aspects of Mr Cassimatis' account, but there is no need to rehearse much more of it here because on the issues that mattered to the outcome of this trial it was from almost start to finish a shameless concoction. Mr Cassimatis repeatedly lied under oath and, while there can be no doubting his intelligence or ability to parry under cross-examination, he left me with the firm impression that he had given a great deal of thought to how he might explain away any aspect of the evidence that he believed might implicate him in the starting of the fire, and for the most part he had ample time to do so.[55] Mr Cassimatis was well-versed in the evidence, but there was much of it which appeared to implicate him as the person who had started the fire. He advanced a version, at first in writing and then on oath at the trial, in an attempt to supply those explanations. Many of them were convoluted, but they probably had to be so given the damning nature of some of the circumstances he tried to paper over. However, in the end, some of those circumstances, indisputably proven as they were on the evidence assembled against Cassa, simply could not be satisfactorily explained. For example:

(a) Mr Cassimatis invented a story to explain three particular circumstances that arose on the evidence, only two of which were relied on by IAL at the trial but all of which he must have apprehended well in advance of the trial might be held up against him. These were that: (1) he accelerated as he drove away from the factory; (2) at the same time he did so he had his headlights switched off; and (3) he switched his headlights back on as he reached the exit on to Lucy Street. At the trial, IAL did not allege that (1) was part of its circumstantial case but relied on (2) and (3) as evidence from which it could be inferred that Mr Cassimatis was attempting to avoid detection. In an effort to explain all three circumstances, Mr Cassimatis said that he was engaging in some motor vehicle diagnostics said to have been necessary because a traction control warning light inexplicably illuminated on the dashboard of his vehicle on his trip to the factory earlier that evening. Mr Cassimatis swore that he was switching his headlights and tail lights on and off as part of this attempted diagnosis and that he accelerated in an attempt to "get the wheels to spin" for the same purpose. This explanation was fanciful and, as it was picked apart in cross-examination, demonstrated to be arrant nonsense. Mr Cassimatis kept his headlights off as he drove through the precinct to avoid detection either from the Black Moth CCTV cameras[56] or people making their way to or from other establishments in the precinct such as the World Gym or otherwise;

(b) Mr Cassimatis persisted with the same invention to explain why, after he rounded the bend from Station Road, into Wilkie Street, he switched his headlights off and then kept them switched off for at least 13 seconds (and hundreds of metres of travel) but, in all events, until he was well past the Railway Station. He did so in the face of an oncoming vehicle that passed Mr Cassimatis' vehicle in the vicinity of the Railway Station. Asked why he would engage in such a dangerous undertaking at night, Mr Cassimatis asserted that he was following advice given to him many years before to the effect that, if he was ever in that situation on the road (driving without headlights towards an oncoming vehicle), he should wait until the vehicle passed before switching his

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55 For example, Mr Cassimatis first watched the Black Moth CCTV footage on 5 February 2016.

56 Mr Cassimatis had been aware of their existence since March 2015.

headlights on. That assertion, made as it was for the first time under cross-examination at the trial, just beggared belief. Mr Cassimatis kept his headlights off to avoid detection knowing, as he admitted, that the Railway Station had CCTV cameras in place.

(c) As earlier stated,[57] a considerable body of evidence was placed before the court by IAL to prove motive and, of that, much evidence was assembled to prove that Mr Cassimatis had an ongoing involvement, if not a direct financial interest, in the running of Tarasco. I have no doubt that was the case but Mr Cassimatis falsely maintained that he had no interest whatsoever in Tarasco. In this regard, his close involvement with the affairs of Tarasco was amply demonstrated through the content of the contemporaneous email correspondence and attachments as well as the evidence of Mr Wegenaar, an impressive witness in every respect, as well as witnesses such as Ms Lisa Rogers and Mr Johann Konstatzky whose evidence I also had no difficulty accepting. On the other hand, I found Mr McDonald to be a singularly unimpressive witness and I could not rely on anything he was prepared to say in support of his friend;

(d) Mr Cassimatis gave an elaborate explanation for how he lost track of time[58] and, in the result, made such misleading statements to QFES Officer Boreham and the police about the time he left the factory. I did not believe it. Mr Cassimatis lied to investigators about the time he left the factory to distance himself from the commencement of the fire and, therefore, any opportunity to start it; and

(e) Lastly, Mr Cassimatis' flat denial of any wrongdoing was not only starkly exposed by the evidence just discussed,[59] it was revealed for what it was by the staggered manner in which that evidence emerged. Mr Cassimatis' principal statement was signed on 20 April 2020, seven days after the conclave report was produced by the fire experts. However, the experts were not called on to offer opinions regarding Ms Leone's photographs until October of that year. This evidence was telling, for the reasons I have explained,[60] but Mr Cassimatis was effectively locked into the version he first advanced and that depended in large part on the theory that the fire in the factory emanated from a fire in the area of the skip bin. If there was any doubt about the effect of the Black Moth CCTV footage, and Railway Station CCTV footage, the Fire Investigation Field Report prepared by QFES Officer Boreham (and accompanying photographs), the Incident Report completed by QFES Officer Martin on 31 August 2015 and his email to Officer Boreham on 8 September 2015, Ms Leone's observations and recordings shattered that theory and so, by the time of trial, Mr Cassimatis was lost for answers. That is not to say that there was an onus on Mr Cassimatis or Cassa to answer anything, but the alternative explanation for the fire advanced through Cassa's lawyers no longer had any substance. It therefore came as no surprise when Mr Cassimatis was cross-

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57 At [27] and [68]-[69] above.

58 That he left his mobile telephone at the factory, that his watch was in for repairs, that the "pixels dropped out" on the digital clock on the dashboard of his Mercedes sedan and that there was no clock in the kitchen or anywhere else at his home.

59 At [123]-[137] above.

60 At [137] above.

examined that he could not explain how a fire within the factory could have been set by anyone other than him.[61]

[139] It should be mentioned for completeness that Mrs Cassimatis supported her husband's account in some of its peripheral detail but, although I do not think she had any knowledge of, or involvement in, the starting of the fire, I found her overall to be an unreliable witness. My impression was that the evidence she gave owed more to what she believed her husband wanted her to say than it did to any accurate recollection on her part.

[140] The essential thrust of Mr Cassimatis' version was that, after being alone in the factory for about three hours from approximately 6:30 pm, he made his way home to Mount Ommaney where he ate dinner and watched television with his wife before later learning about the fire when the manager of the Sunshine North factory contacted his wife. Mr Cassimatis claimed to have had nothing at all to do with the starting of the fire. I did not believe him. To the point, save where what Mr Cassimatis swore was confirmed by other evidence or constituted an admission against interest, I could not rely on anything he had to say.

[141] But it does not follow from my rejection of Mr Cassimatis' story that IAL has hefted the heavy burden on it that is necessary to prove its case. Rather, the correct approach is to put Mr Cassimatis' version to one side because it proves nothing and to focus instead on the circumstances that I do accept are proved by the evidence in order to decide whether those circumstances are sufficient to support the drawing of inferences of wrongdoing to the standard earlier discussed.[62] However, before doing so, it is necessary to say something about the evidence regarding motive or the absence thereof.

Motive

[142] Caution is required in the assessment, and possible use, of the evidence at trial going to the possible existence of a motive on the part of Cassa (through Mr Cassimatis) to burn down the factory. If, as I find below,[63] Mr Cassimatis set fire to the factory, then the claim he subsequently made on the policy may be thought to reveal what may broadly be described as a motive for his act i.e., to obtain for Cassa the benefits payable under that policy for the loss. However, although that circumstance may be used to infer that the claim was made fraudulently (assuming it is otherwise proved that Mr Cassimatis was the perpetrator), the mere fact that he made such a claim cannot without more assist in the proof of the allegation that Mr Cassimatis set fire to the building.

[143] That made clear, in support of the existence of a motive on Cassa's part, IAL submitted that at the time of the fire:

(a) Cassa's business, while growing, was undercapitalised. There was an inability to pay liabilities such as employees' superannuation and Mr and Mrs Cassimatis were unable to inject any further capital because of their "high levels of personal debt";

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61 See, for example, the exchange at T.3-10, l.30 to T.3-11, l.17.

62 At [64] – [67] above.

63 At [156] below.

(b) Mr Cassimatis knew that Tarasco was "in serious financial difficulty and likely to fail" and, if that occurred, the plaintiff would lose "its best customer, to the extent of 25% of its sales";

(c) If Tarasco failed, that would have serious repercussions for Mr and Mrs Cassimatis and their shareholder company, Blue Park, under the guarantees given in favour of FactorOne and Amal;

(d) A successful claim on the policy of insurance could accrue to the plaintiff approximately $7.6 million dollars in policy benefits, including new plant when much of Cassa's existing plant was quite old, with just under half of that sum payable for business interruption (gross profits).

[144] In these respects, IAL did not contend that Cassa was insolvent at the time of the fire and, further, accepted that the business operated by it had growth prospects and might have gone on to achieve commercial success. Indeed, IAL conceded that, if the claim had been paid, Cassa would have continued to trade. Nonetheless, IAL pointed to what it argued were several significant problems for Mr and Mrs Cassimatis and Cassa had Tarasco folded.

[145] There can be no doubting that Tarasco was a significant customer, accounting for approximately one quarter of Cassa's sales revenue, or that, by the date of the fire, that company was in serious financial difficulty. According to the liquidator, Mr Dullaway, Tarasco had probably been trading whilst insolvent for over a year before his appointment, that is to say, from before 20 April 2015. Mr Cassimatis was well aware of this, he being intimately familiar with the financial affairs of Tarasco, a contention that I accept. If Tarasco folded, not only would Cassa lose a substantial slice of its sales revenue, it might be faced with the prospect of recovery action from FactorOne. Also, if Tarasco failed, it would likely mean that Cassa could not recover money owed to it by Tarasco and, of even more concern, Mrs Cassimatis would be exposed to liability under the personal guarantee she provided Amal, a sum of at least $315,000 with accrued interest. Mr Cassimatis certainly went out of his way to attempt to hide his ongoing involvement in, and real concern for the fate of, that company. His interest in it was far more deeply entrenched than he was prepared to acknowledge.

[146] Also, there could be no doubt that, at the time of the fire, Cassa was undercapitalised, a proposition agreed to by the forensic accountant called by Cassa at the trial, Mr Paul Vincent. During its first 18 months of operation, Cassa had the benefit of capital injections from Mattress Innovations as well as Mrs Cassimatis but, by the time of the fire, those sources of support had been exhausted. The family home was significantly encumbered, Cassa owed over $166,000 in overdue and unpaid superannuation and credit card debts totalled over $100,000. According to Mr Cassimatis, he could rely on profits to pay down these debts but, if he did that, it would make it all the harder to rely on profits for future capital expenditure or to weather the storm if Tarasco collapsed.

[147] As against these arguments, Cassa contended that the proposition that Mr Cassimatis sought to benefit by destroying a profit-generating business was inherently improbable and should be rejected, and various arguments were advanced to support this contention. For example, the substantial order due for delivery to Tarasco on 31 August 2015 was sitting completed in the factory and would have resulted in a

payment of $159,854 (or, at least, 80% of that sum in the short term) and sums totalling in excess of $160,000 were paid to creditors including the Australian Tax Office in the week prior to the fire. These features alone, it was submitted, made IAL's proposition far-fetched. Otherwise it was contended that the loss of Tarasco as a customer would not impact greatly on Cassa or Mr and Mrs Cassimatis and that, even if Tarasco collapsed, they would not have anything like the consequences submitted by IAL.

[148] It is possible to speculate that Mr Cassimatis saw the burning down of the factory and accompanying claim on the policy as a way to rid himself (as well as his wife and Blue Park) of the millstone Tarasco had become or, alternatively, as a way he could quickly expand into Vietnam to take advantage of the market opportunities he had identified. But it would be wrong to speculate and, in the end, I was not satisfied that IAL had clearly identified and then proved to the standard required the existence of a motive to burn down the factory. That, however, is not to say that the evidence on this topic was such as would allow the court to conclude that Mr Cassimatis had no motive to burn down the factory, only that the evidence could not be sufficiently disentangled to draw a conclusion one way or the other.

Conclusion on liability

[149] Of course, as earlier discussed,[64] the absence of any proved motive is not determinative. What the court must do is focus on the circumstances that have been proved and consider the weight to be given to the united force of all of those circumstances in order to then determine whether IAL has proved its case. In doing so, the inference I am asked by IAL to draw from the facts I do accept must be weighed against realistic alternatives as distinct from alternatives that might be regarded as fanciful. Where competing alternatives are of equal likelihood, or the choice between them can only be resolved by conjecture, the inference cannot be drawn. Importantly, in this civil context, the court is concerned with probabilities, and not with possibilities. It is not necessary for IAL to prove that the facts are such as to exclude all reasonable hypotheses consistent with innocence; IAL will have proved its case if the facts give rise to a more probable inference in favour of what is alleged, that is to say, a reasonable and definite inference to that effect.

[150] That said, the seriousness of the allegations made in this case, the inherent unlikelihood that someone like Mr Cassimatis would engage in the conduct alleged and the gravity of the consequences to Cassa and Mr Cassimatis if I accept that he did all affect the question whether the allegations have been satisfactorily proved. Clear and cogent proof so as to induce, on the balance of probabilities, an actual persuasion of the mind that the fire was started by Mr Cassimatis and, not only that, that he (through Cassa) then knowingly advanced a fraudulent claim on the policy of insurance is required.

[151] Proceeding with those principles firmly in mind, the evidence I do accept overwhelmingly establishes that there would have been insufficient time for a fire in the area of the skip to cause a fire inside the factory. At least one other fire must have been started inside the factory at about the same time as the fire that was started in the area of the skip. That being so, I cannot reach any conclusion other than that the fire was deliberately started and that the brace of alternative theories advanced by

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64 At [68]-[71] above.

Cassa to support the contention that the fire could have started in the area of the skip and then radiated to the inside of the factory has no substance. At best for Cassa, those theories are fanciful possibilities, and each is trumped by the only inference that I think can be drawn on the known facts.

[152] The evidence also proves as a matter of inference, and to the same high degree of satisfaction, that an accelerant, most likely several litres of petrol, was applied and then ignited to start the fire in the area of the skip and the probabilities are that the same method was adopted inside the factory. A delay mechanism must have been attempted for at least the fire in the area of the skip to allow the perpetrator time to light the fire inside the factory and escape the premises.

[153] Mr Cassimatis was alone in the factory at the time when the fires were set. I am satisfied that he was the only person with the opportunity to access the skip through the adjacent door, return inside, light the fire or fires inside, set the alarm, secure the building and then make good that escape. After doing so, Mr Cassimatis endeavoured to avoid detection by switching off the headlights to his vehicle at different times and lying to investigators about the time he left the factory. The argument advanced by Cassa to the effect that someone other than Mr Cassimatis could have lit the fires, secured the building and then vanished without trace is so unlikely as to barely rise to the level of possibility but, even if such a possibility could be entertained, it must be dismissed as unrealistic. On the whole of the evidence I am satisfied that IAL has proved to the standard required that Mr Cassimatis was the perpetrator. That is the only reasonable and definite inference available on the proven facts.

[154] To be clear, when drawing this inference, I was mindful of the gravity of such a conclusion and the consequences to Cassa and Mr Cassimatis in reaching it. I was also cognizant of the evidence to the effect that Mr Cassimatis was widely respected within the bedding industry and, accordingly, I took account of the inherent unlikelihood that someone like him would commit arson and attempted fraud. Likewise, I took into account the many arguments advanced by Cassa to submit that such an act made no logical sense, several of which have already been touched on,[65] but others which have not.[66] However, as a measure of human behaviour, logic is an imprecise ruler, and that is especially so where criminal conduct is concerned. Such conduct is not infrequently illogical, if not irrational, and often times inexplicable. Although it may be accepted that people like Mr Cassimatis do not ordinarily engage in such serious criminal behaviour, behaviour like that does occur and sometimes for no logical reason (or motive), at least on the known facts. That is why it was so important to carefully scrutinise the evidence connecting Mr Cassimatis with the starting of the fires, as I have done. Where a weak case to that effect is advanced, then the absence of any proven motive will make the drawing of an inference of wrongdoing difficult. But where, as here, the evidence connecting Mr Cassimatis to the act of destruction is so potent, the absence of any proven motive will assume less importance.

[155] Before concluding, I should deal with a particular submission made on behalf of Cassa. It was that IAL was obliged to put to Mr Cassimatis the case it had pleaded as to the origin and manner of ignition of the fire (or fires). Although it was put to Mr

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65 At [147] above.

66 Such as the evidence from Mrs Cassimatis to the effect that a number of personal, sentimental items were destroyed in the fire.

Cassimatis in cross-examination that he gained access to the skip through the adjacent exit door from the factory and lit a fire in the skip before lighting a fire inside the factory and leaving the premises, Cassa's complaint was that it was not put to Mr Cassimatis that he lit those fires in a particular way or that he used an accelerant or that he attempted to employ a delay mechanism. But none of those details could have been known by IAL and, for that reason, there was no obligation to put them to Mr Cassimatis.[67] No doubt what was pleaded in these respects arose on IAL's contention as inferences from facts that were known, but the rule in *Browne v Dunn*[68] rests on notions of fairness and there was no unfairness to Cassa or Mr Cassimatis in the circumstances of this case. The evidence-in-chief of all witnesses was reduced to writing, the experts furnished written reports (or conference memoranda) and the details about which this complaint is made were listed in an agreed list of issues to be tried in advance of the trial.

[156] That said, I am satisfied to the high standard discussed that:

(a) Mr Cassimatis was the only person in the factory from about 6:30 pm until about 9:25 pm;

(b) Prior to about 9:25 pm, Mr Cassimatis lit at least two fires; one outside the factory in the area of the skip and the other or others inside the building;

(c) Both fires were probably fuelled by an accelerant such as petrol and that was almost certainly the case for the fire in the area of the skip where the fuel load must have been dampened by the rain;

(d) A delay mechanism was likely employed, at least for the fire in the area of the skip;

(e) The fire or fires Mr Cassimatis lit inside the factory quickly took hold and reached flashover within a short matter of minutes from ignition;

(f) In consequence of the fire or fires inside the factory, the factory and all contents were destroyed;

(g) After lighting the fires, Mr Cassimatis set the alarm, secured the factory and drove from the precinct to his home at Mount Ommaney. When driving through the precinct, he kept the headlights for his vehicle switched off to avoid detection and, as he approached the Yeerongpilly Railway Station, he did the same thing and for the same purpose;

(h) Mr Cassimatis later lied to investigators about the time he left the factory;

(i) Mr Cassimatis subsequently caused a claim to be advanced on the policy of insurance on behalf of Cassa for the loss caused by the fire. At the time when he did so Mr Cassimatis knew that, he having deliberately burned down the factory, Cassa had no entitlement to advance such a claim. His intention was to induce a false belief on the part of IAL as to Cassa's entitlement to make a claim for the purpose of obtaining the benefits payable under the policy for such a loss.

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67 *R v Morrow* (2009) 26 VR 526, [50].

68 *Browne v Dunn* (1893) 6 R 67. And see *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* [1983] 1 NSWLR 1; 44 ALR 607.

[157] It follows that, the fire (and resultant loss) was caused by the wilful conduct of Mr Cassimatis with the knowledge and consent of Cassa and, as such, its claim is expressly excluded from cover under the policy.

[158] It is also a claim that was made fraudulently within the meaning of s 56 of the *Insurance Contract Act*.

[159] IAL was therefore entitled to refuse payment of the claim on the policy of insurance and is now entitled to judgment on the whole of the claim made by Cassa in this proceeding.

Damages

[160] Despite concluding against Cassa on the question of liability, it is still necessary as a matter of convention to go on to assess damages, although I will do so briefly. To allow for that, what follows should be read in conjunction with the written submissions of the parties on the question of quantum.

[161] When this case came to court, the battlelines on the question of damages had largely been drawn through the competing opinions of two forensic accountants: Mr Vincent of Vincents Chartered Accountants on behalf of Cassa and Mr Stephen Hanna of Corporate Advantage Group in Sydney on behalf of IAL. Reports were individually generated and conclave reports produced on 28 February 2020 and 12 November 2020 pursuant to an order of this court. Each was called to give evidence at the trial; Mr Vincent in person and Mr Hanna via video link. However, it emerged during Mr Hanna's cross-examination that, far from being the independent expert he held himself out to be, he had been employed by IAL in the past, a fact he had failed to disclose. Mr Hanna was stood down as a witness overnight so the parties could consider their respective positions and, the following morning, senior counsel for IAL rightly disavowed reliance on any of Mr Hanna's opinions. The result was that Mr Vincent's opinions were unchallenged by any expert opinion to the contrary although he was cross-examined about the foundation for a number of his views and submissions have been made challenging various aspects. As a general observation, I was impressed by Mr Vincent and consider that he gave the topic at hand careful consideration and adopted a sensible approach to the calculations he made, and the views he formed in arriving at his opinions.

[162] As earlier stated,[69] it was not disputed that the fire destroyed the main factory and its contents, including equipment and stock. Nor was it disputed that Cassa's business was interrupted and that the contents destroyed in the fire could not be re-established or replaced from the Cassa's own resources (or the resources of Mattress Innovations).

[163] Further, it was accepted that had the main factory and the equipment and stock in it been available from 29 August 2015, Cassa would have continued to operate the business using its factories in Queensland and Victoria. However, because IAL refused indemnity, Cassa lost the ability to replace the contents, including the equipment, destroyed in the fire and it could not (and did not) resume operations. There was accordingly a loss of commercial opportunity, the nature and extent of which were in issue at the trial.

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69 At [72] above.

[164] That said, the fiction which underlies what follows is of course that IAL has not proved its case on liability and damages fall to be assessed on that basis. In this regard, and unlike the liability case, Cassa has the onus of proving the quantum of its claim.

[165] Cassa is entitled to the full benefit of its bargain with IAL under the policy as well as damages flowing from the refusal of IAL to indemnify.

[166] So far as recovery under the policy is concerned, IAL admitted that the contents destroyed in the fire had a replacement value of not less than the limit of the policy ($2,310,000) and that the stock destroyed in the fire had a value of not less than $539,815. Both amounts should be allowed together with interest at the rate of 5%. Likewise, IAL accepted that the value of the payroll was not less than the limit of the cover ($520,000) and this amount, too, should be allowed together with interest.

[167] The claim for business interruption under the policy was contentious. IAL criticised Mr Vincent's assumptions in this regard but it should not be overlooked that the calculations set out in Mr Vincent's report of 21 April 2020 were supported by actual customer sales data. However, the business conducted by Cassa at the time of the fire was very much in a start-up phase. I accept the submission made on behalf of IAL that an increase in sales of 75% over the indemnity period is a reasonable allowance. As such, but for the fire, sales during the indemnity period (September 2015 to August 2016) would have been $10,709,004. Adopting a gross profit margin of 52.01%, the gross profit would have been $5,568,682. From this needs to be deducted the actual gross profit in the indemnity year ($507,566), and this produces a loss of gross profit of $5,061,116. The savings flowing from the fire also need to be deducted from this amount. Again, I accept the approach submitted on behalf of IAL regarding the calculation of these savings and the amount arrived at in consequence ($4,428,020). The end result is a loss of profit during the indemnity period of $633,096, and this sum should be allowed together with interest at the rate of 5% from March 2016.

[168] Turning then to the damages claim, this was also contentious. As a starting point, it may be accepted that Cassa is entitled to claim damages for breach of contract without repudiating the contract. However, Cassa not only made a claim on the policy of insurance, it claimed indemnity under the contract of insurance and damages for breach of the contract in this proceeding and then persisted with that claim until 6 May 2020 when it alleged that IAL had rescinded the contract of insurance and purported to accept the alleged repudiation. In my view, by its conduct in the litigation and otherwise over more than four years, Cassa elected to affirm the contract. It follows that damages must be assessed as if the contract remained on foot. This, in turn, requires a determination, so far as possible, of what would have happened but for the fire.

[169] That understood, Cassa is entitled to damages for consequential loss in accordance with orthodox principle, but excluding the 12 month indemnity period to avoid double recovery. It is necessary therefore to assess what sales would have been achieved and what net profit margin would have applied to those sales. In these respects, in his report of 21 April 2020, Mr Vincent expressed the opinion that the loss of sales from the date of the fire to May 2020 was $42,206,128. I accept that figure as a reasonable estimate of the loss of sales to that date although it obviously needs to be extrapolated to bring it up to the current day. From this figure, sales during the indemnity period need to be deducted. As to the applicable net profit percentage, for the reasons

expressed by Mr Vincent during cross-examination, the appropriate rate is 8.1%. The calculation of future loss should proceed on the same basis, although discounted for present receipt. For the purpose of calculating the period of past loss, it was in my view reasonable for IAL to wait until 2 February 2016 before denying indemnity given the size of the claim and the complexity of the investigation of the fire. It only became unreasonable for IAL to refuse payment after that date.

[170] Lastly, interest on damages for the past is payable pursuant to s 57 of the *Insurance Contracts Act*. In that regard, the *Insurance Contracts Regulations* 1985 (Cth) stipulates the rate: reg 32.

Disposition

[171] For these reasons, the orders of the court will be:

(a) The claim is dismissed.

(b) Judgment is entered for the defendant on the whole of the claim.

(c) The parties are directed to file and serve submissions (not exceeding five pages) as to the appropriate order for costs within fourteen days.

Cassa Bedding Pty Ltd v Insurance Australia Ltd

Appendix

First image taken by Ms Leone at 9:28:59 pm
(Photograph 7467)

Last image taken by Ms Leone at 9:30:59 pm
(Photograph 7474)